



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL APPEAL NO. E016 OF 2021**

**WYCLIFFE OGETO ONKOBA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. In his petition of appeal filed on 5<sup>th</sup> March, 2021, the appellant, *Wycliffe Ogeto Onkoba*, challenged the sentence passed by *Hon Kitagwa* on 19<sup>th</sup> February 2021 in Kibera Chief Magistrate's Court Misc. Cr. Appln. No. 302 of 2020 claiming that it was harsh and excessive in the circumstances of his case.

He prayed that the sentence be set aside and that a more appropriate sentence be meted out by this court.

2. On the date the appeal was scheduled for mention for directions on its disposal, learned prosecuting counsel *Ms Adhiambo* raised a preliminary objection contesting the jurisdiction of the court to hear the appeal. *Ms Adhiambo* contended that the appellant and his co-accused had proffered another appeal to this court challenging their conviction and sentence by the lower court and that though his co-accused's appeal was successful, the appellant's appeal was dismissed. The appeals were filed separately and were registered as Criminal Appeals No. 132 and 133 of 2015 which were subsequently consolidated and heard together.

3. *Ms Adhiambo* urged me to find that the consolidated appeals were heard and determined by a court of concurrent jurisdiction and this court therefore lacked jurisdiction to determine the appellant's current appeal; that the only remedy available to the appellant was to appeal to the Court of Appeal. She submitted that the appeal ought to be struck out.

4. In response, learned counsel for the appellant, *Mr. Michuki* admitted that this court had determined the consolidated appeals referred to by *Ms Adhiambo* but claimed that the appeals were not relevant to the instant appeal which only challenged the sentence imposed by *Hon. Kitagwa* after a resentencing hearing in Misc. Cr. Appln. No. 320 of 2020. In addition, *Mr. Michuki* argued that the preliminary objection was an afterthought and should be dismissed.

5. I have considered the rival oral submissions made by *Ms Adhiambo* and *Mr. Michuki* in support and in opposition to the preliminary objection. I have also read the lower court's original record in Kibera Misc. Cr. Appln. No. 302 of 2020 and noted the sentence passed therein which is the subject of this appeal. I have also read the court record in Criminal Case No. 2183 of 2009 in which the appellant and his co-accused were tried and convicted of the offence of defilement contrary to *Section 8 (1)* as read with *Section 8 (2)* of the *Sexual Offences Act*. They were sentenced to serve 25 years imprisonment. This is the conviction and sentence that was challenged in their consolidated appeals.

6. I have read the court's judgment in the consolidated appeals and I have ascertained that the appellant's appeal was dismissed by *Hon. Ngenye J* on 29<sup>th</sup> May 2017.

7. The court record in Kibera Misc. Cr. Appln. No. 302 of 2020 shows that the application for resentencing was filed on 29<sup>th</sup> July 2020 slightly over 3 years after the appeal was dismissed by the High Court. It is noteworthy that the learned trial magistrate after hearing the application confirmed the sentence that had initially been passed by the trial court which was confirmed by the High Court.

8. A reading of the resentencing application shows that in the grounds supporting the application, the applicant admitted that his appeal to the High Court had been dismissed and went further to add that even his appeal to the Court of Appeal was dismissed.

9. The lower court original record in Kibera Cr Case No. 2183 of 2009 contains a copy of the judgment delivered by the Court of Appeal on 10<sup>th</sup> July 2020 which I have had an opportunity to read. The judgment confirms that the applicant's appeal was dismissed.

10. It is important to note that the appellant filed his resentencing application on 5<sup>th</sup> March 2021 about 7 months after the Court of Appeal

had rendered its decision on his appeal. The Court of Appeal decision was made about 2<sup>1/2</sup> years after the Supreme Court's decision in ***Francis Karioko Muruatetu & Another V Republic, [2017] eKLR*** which declared as unconstitutional the mandatory death sentence prescribed by the law for the offence of murder. The Supreme Court opened a window for resentencing of murder convicts to allow courts to exercise discretion in sentencing. The Court of Appeal must have been aware of the Supreme Court's decision when deciding the appeal and would have resented the applicant or remitted the case back to the trial court for resentencing if it was so minded. Instead, the court confirmed his sentence.

11. Given the foregoing, it is my finding that having dismissed the applicant's appeal, the Court of Appeal sealed his fate as far as his grievances on his conviction and sentence were concerned unless he was able to file an appeal against the court's decision to the Supreme Court, that is, if he was lucky to get certification by the Court of Appeal to enable him lodge an appeal to the Supreme Court.

12. It is not lost on me that the learned trial magistrate conducted the resentencing hearing at a time when courts were applying the jurisprudence developed by the Supreme Court in the ***Muruatetu case [supra]*** to all offences for which the law prescribed mandatory sentences including sexual offences.

13. Even though the Supreme Court has now clarified its decision vide the second *Muruatetu* decision delivered on 6<sup>th</sup> July, 2021 that its earlier decision applied to the mandatory death sentence prescribed for the offence of murder only, it is my considered opinion that even at the time the resentencing application was heard under the authority of the first *Muruatetu* decision, the trial court did not have jurisdiction to entertain the said application considering that the sentence sought to be reviewed had been confirmed by the Court of Appeal post the *Muruatetu* decision.

14. Similarly, it is my finding that this court does not have jurisdiction to hear an appeal challenging a sentence which had been affirmed by a court of concurrent jurisdiction or by the Court of Appeal.

15. In my view, hearing the instant appeal would be tantamount to reviewing or sitting on appeal against a decision by the Court of Appeal which is not permissible in law. *Article 163 of the Constitution of Kenya, 2010* which provides for the system and hierarchy of courts leaves no doubt that the Court of Appeal is superior to the High Court and appeals against its decisions can only be heard by the Supreme Court.

16. For the foregoing reasons, I find merit in the preliminary objection raised by the respondent and it is hereby upheld. Consequently, I am satisfied that the appellant's appeal is incompetent and it is hereby struck out. This file is now marked as closed.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF MARCH 2022.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Mr. Michuki for the appellant

Mr. Kiragu for the respondent

Ms Karwitha: Court Assistant