



**Ngatia v Republic (Criminal Miscellaneous Application
E006 of 2021) [2022] KEHC 10807 (KLR) (25 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 10807 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL MISCELLANEOUS APPLICATION E006 OF 2021**

JN NJAGI, J

MAY 25, 2022

BETWEEN

DUNCAN MWANGI NGATIA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant brought the present application wherein he seeks revision and resentencing under section 362, 364 and 333 (2) of the [Criminal Procedure Code](#). It is his case that he was charged and convicted of the offence of robbery with violence contrary to section 296(2) of the [Penal Code](#) in Karatina Criminal Case No. 343 of 2007 and sentenced to death. That he appealed to this court vide Nyeri High Court Criminal Appeal No. 66 of 2010 and which appeal was dismissed. He subsequently appealed to the Court of Appeal vide Criminal Appeal No. 166 of 2017 where he subsequently withdrew his appeal. The applicant seeks a myriad of declarations. However, from a clear scrutiny of the said petition, the petitioner seeks revision and resentencing pursuant to the Supreme Court's decision in [Francis Karioko Muruatetu v Republic](#) Petition No 15 of 2015.
2. At the hearing of the application, the applicant relied on the submissions in advancing his case. The application was however opposed by the respondent herein. The respondent contends that the applicant sentence is not subject to revision by this honourable court because the applicant is serving a mandatory legal sentence which was upheld by this court. The respondent further contends that the applicant was charged and convicted with the offence of robbery with violence contrary to section 296(2) of the [Penal Code](#) and he is not entitled to benefit on resentencing under the Muruatetu case.
3. Having considered the application and the court record, as the applicant correctly put, he was convicted by the trial court of the offence of robbery with violence and sentenced to death. He appealed to this court vide Nyeri High Court Criminal Appeal No. 66 of 2010 and which appeal was dismissed. The Court upheld the conviction and the sentence by the trial court. As such, the judgment and the



sentence which is in force and the one the applicant herein is serving is the one imposed by this court but differently constituted. It therefore my considered view that the main issue for determination is whether the petition is merited.

4. The jurisdiction of the High Court is provided for under article 165 of the Constitution of Kenya 2010 and it includes unlimited original jurisdiction in criminal and civil matters; jurisdiction to enforce bill of rights; appellate jurisdiction; interpretative jurisdiction; any other jurisdiction, original or appellate conferred on it by legislation and supervisory jurisdiction. The supervisory jurisdiction in criminal matters is expounded under section 362-364 of the Criminal Procedure Code. Under the said sections, this court has jurisdiction to call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court. It is therefore clear that this court cannot and does not have jurisdiction to review the decision of a court of concurrent jurisdiction. Once this court delivered its judgment on appeal (though differently constituted), it became factus officio over the matter herein.
5. As a general rule therefore, High Court can only review the judgment of a subordinate court under the jurisdiction provided by sections 362 to 366 of the Criminal Procedure Code. This court does not have jurisdiction to review its own decision.
6. In Daniel Otieno Oracha v Republic [2019] eKLR, a case where the petitioner had applied for review of a sentence imposed by a court of concurrent jurisdiction and while holding that the court did not have jurisdiction to review the said judgment Aburili J held that; -

“ 14. The law abhors that practice of a judge sitting to review a judgment or decision of another judge of concurrent jurisdiction. Reduction of sentence could only be considered by the Court of Appeal or if this court was sitting on appeal of a judgment of the subordinate court or if the petitioner was seeking for resentence after exhausting appeal mechanisms and not otherwise.....”

7. The judgment of Abida Ali-Aroni J made in accordance with the law has not been challenged. This court cannot sit on appeal of its own judgment or of court of concurrent competent jurisdiction when the petitioner had an opportunity to ventilate his grievance before the Court of Appeal even if it was to challenge sentence alone.

Good governance demands that cases be handled procedurally in the right forum. This is because the rule of the thumb that superior courts cannot sit in review/appeal over decisions of their peers of equal and competent jurisdiction much less those courts higher than themselves and that matters falling under the exclusive jurisdiction of Supreme Court under article 163(3) cannot be dealt with by the High Court.....”

8. It is my considered view that this court cannot review its earlier decision and in doing so resentence the petitioner herein. The court which ought to deal with an issue arising out of the decision of this court is the Court of Appeal as it is the one with jurisdiction under article 164(3) of the Constitution and section 379(1) of the Criminal Procedure Code. This is in appreciating the provisions of article 50(2) (q) of the Constitution of Kenya 2010 which guarantees the right of a person if convicted, to appeal to, or apply for review by, a higher court as prescribed by the law



9. In *John Kagunda Kariuki v Republic* [2019] eKLR Justice Joel Ngugi (Prof) in appreciating the application of *Muruatetu's case* in sexual offences and its implications on the court's powers to exercise discretion in sentencing, proceeded to hold that;-

...“8. However, unlike the decision in *Muruatetu* and other cases where the death penalty was imposed, the decision *Dismas Wafula Kilwake* does not operate retroactively. This was a decision given the ordinary common law mode which does not entitle all other people who could have benefitted from the new development in decisional law to approach the High Court afresh for review of the sentences imposed. Instead, the principles announced in the case will apply to future cases. In other words, persons whose appeals have already been heard by the High Court are not entitled to file fresh applications for re-sentencing in accordance with the new decisional law. To reach a different conclusion would lead to an ungovernable situation where all previously sentenced prisoners would seek review of their sentences.....

In the present case, the Applicant's appeal has already been heard by the High Court. He cannot return to the High Court for a review of the sentence imposed. He is at liberty to make an argument for reduced sentence at the Court of Appeal...”

10. Considering all the above, this court is bereft of jurisdiction to issue the orders sought by the applicants and ought to down its tools. As such, the petition herein is wrongly before this court and is therefore dismissed for want of jurisdiction.

DELIVERED, DATED AND SIGNED AT NYERI THIS 25TH MAY, 2022.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Mururu for Respondent

Applicant present in person

Court Assistant: Kinyua

