



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

REVIEW APPLICATION NO. 126 OF 2020

PHARIS MUNYI MUNGAI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant herein was convicted for the offence of robbery with violence contrary to Section 296(2) of the Penal Code at Runyenjes Law Courts in Criminal Case No. 197 of 2008 and sentenced to suffer death. He avers that he has exhausted all the avenues of appeal as he has appealed to the High Court Embu, vide HCCR 230 of 2009 and to the Court of Appeal vide Nyeri Criminal Appeal No. 114 of 2012. Further that, he filed a petition seeking resentencing pursuant to the Supreme Court's judgment in **Muruatetu's case** and the said death sentence was substituted with a twenty (20) years' term of sentence.

2. He now approaches this court vide the instant application filed in court on 21/09/2020 wherein he basically seeks review of the twenty (20) years' sentence he is currently serving and prays that this court be pleased to consider handing him a non-custodial sentence.

3. The application was canvassed orally and the petitioner submitted that he relied on the petition and the facts in support of the same. Ms. Mati for the respondent opposed the application wherein she submitted that this court had already heard the petitioner in a similar application in petition number 25 as consolidated with petition 32 of 2019. She further submitted that the prayers being sought herein are unknown in law. In a rejoinder, the applicant sought leniency and assistance from the court.

4. I have considered the application herein and the oral submissions by the parties before the court. It is my considered view that the issue which I need to decide on is whether the same is merited.

5. As I have earlier observed, the application seeks review of the sentence currently being served by the applicant. However, the applicant in the instant application deposed that he has already exhausted all the avenues of appeal as his appeal to this court and that to the Court of Appeal were dismissed and the conviction and sentence upheld by both courts. He further deposed that he petitioned this court for resentencing under **Muruatetu's decision** and the sentence was reduced to twenty (20) years' imprisonment.

6. In deed I have called and perused the court records in **Embu High Court Constitutional Petition Number 25 as consolidated with Petition Number 32 of 2019** (reported as **Phares Munyi Mungai & another v Republic [2020] eKLR**) and confirmed that Muchemi J vide the ruling delivered on 1/07/2020 did resentence the applicant herein to twenty (20) years imprisonment. As such, it is clear that the applicant herein is currently serving a sentence meted out by this court. It is this sentence that the applicant wants revised and be substituted with a non-custodial sentence.

7. The court which resented the applicant herein under **Muruatetu's decision** (Hon. Muchemi, J.) is a court of concurrent jurisdiction with this court. Under article 165 of the Constitution of Kenya 2010, the jurisdiction of the High Court (this court) include; unlimited original jurisdiction in criminal and civil matters; jurisdiction to enforce bill of rights; appellate jurisdiction; interpretative jurisdiction; any other jurisdiction, original or appellate jurisdiction conferred on it by legislation and supervisory jurisdiction. Under section 362-364 of the Criminal Procedure Code, this court (revisionary jurisdiction), has powers 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.

8. In the instant application, the applicant seeks review of the sentence of a concurrent court (Muchemi J) and which was imposed upon a petition for resentencing under the said **Francis Karioko Muruatetu & Another -vs- Republic (supra)** and in doing so substitute the 20 years imprisonment with a non-custodial sentence. It is my view that this court is bereft of such jurisdiction. Doing so would be tantamount to sitting as an Appellate court on the judgment of Hon. F. Muchemi, J.

9. The law abhors that practice of a judge sitting to review a judgment or decision of another judge of concurrent jurisdiction. 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. The only time that this court can review a sentence imposed upon by a court is where such sentence was imposed by a subordinate court (as per section 362 of the Criminal Procedure Code) or where this court is approached vide an application for resentencing pursuant to the decision in **Francis Karioko Muruatetu & Another –vs- Republic [2017] eKLR (Muruatetu’s case)** where the trial court did not exercise discretion in sentencing due to the mandatory nature of the sentence as provided by law.

10. In **Samuel Kamau Macharia & Another –vs- KCB & 2 Others App. No. 2/2011**, the Supreme Court of Kenya made it clear that a Court of law can only exercise jurisdiction as conferred by the constitution or other written law and cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law, and that a court cannot expand its jurisdiction through judicial craft. And as it is trite, a court of law ought to down its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. (See **the owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR.**)

11. In the premises aforesaid, the application herein has no merits and it is hereby dismissed.

12. It is so ordered.

Delivered, dated and signed at Embu this 21st day of January, 2021.

L. NJUGUNA

JUDGE

.....**for the Respondent**