



**REPUBLIC OF KENYA**

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

**CRIMINAL REVISION NO. 134 OF 2020**

**BENSON NDONYE MUTUA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. Before this court is a notice of motion dated 21/10/2020 and filed in court on the same date where in the applicant seeks resentence hearing and the order that the court be pleased to issue a habeas corpus, if so required, for the applicant to address the judge/court.
2. The application is supported by the affidavit of the applicant herein wherein it is deposed that he was convicted in Embu high Court Criminal Case No. 20 of 2014 and sentenced to serve 10 years imprisonment. That he did not appeal but he was seeking intervention in sentence only in conformity with Misc. Application No. 29 of 2019 and thus the court do issue habeas corpus so that he can address the court.
3. When the application came up for hearing, it was argued orally wherein the applicant urged the court to reduce the sentence and impose a non-custodial sentence. Ms. Mati for the respondent submitted that the application was not clear as to the orders sought. Further that, the appellant faced murder charges before this court and thus it cannot review its own orders. In a rejoinder, the applicant reiterated that he sought substitution of custodial sentence with a non-custodial one.
4. I have considered the application herein and the oral submissions by the parties and I note that the applicant substantively seeks review of his sentence from ten (10) years imprisonment to a non-custodial sentence.
5. It is trite that a Court of law can only exercise jurisdiction as conferred by the constitution or other written law and it cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. (See **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**).
6. The jurisdiction of the High court is provided for under Article 165(3) of the Constitution and includes; unlimited original jurisdiction in criminal and civil matters; jurisdiction to enforce bill of rights; appellate jurisdiction; interpretative jurisdiction; and **any other jurisdiction, original or appellate, conferred on it by legislation**. The High court further has supervisory jurisdiction.
7. Just as the learned counsel for the respondent rightly submitted, the applicant was sentenced by this court but differently constituted. The learned Judge after convicting the applicant herein presented an opportunity to the applicant to mitigate before sentencing. Ms. Muriuki mitigated on behalf of the three accused persons therein (including the applicant) wherein she prayed for leniency and adoption of the principles in Muruatetu case. The learned judge after taking into consideration the said mitigation, the period spent in custody and the seriousness of the offence sentenced the applicant to ten years imprisonment. It is this sentence that the applicant seeks review of.
8. Resentence hearing as was prayed by the applicant is only applicable where the trial court's hands were tied by the mandatory minimum provisions of the law. This jurisprudence was introduced by the Supreme Court in the case of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR**. In that case, the court found that section 204 of the Penal Code was unconstitutional as it provided for the mandatory minimum sentence. The reasoning of the court was that the mandatory sentence denied the trial court discretion while sentencing.
9. In the case herein, the trial court considered the applicant's mitigation and further considered the principles in **Muruatetu case** and proceeded to impose a sentence which was not the mandatory minimum. In my view, there is no basis in law upon which this court can consider the application herein.
10. At the hearing of the application, the applicant prayed that he be awarded a non-custodial sentence and which in my view means that the applicant was inviting this court to review the judgment of the trial court. Justice Muchemi (trial court) and this court are courts of concurrent jurisdiction. In my view, this court cannot review a judgment of a court of concurrent jurisdiction as doing so would be tantamount to sitting as an Appellate court on the judgment of Hon. F. Muchemi J. 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 is 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.

11. The court having determined the case and considered the mitigation by the appellant herein, the right forum where the applicant ought to move is the court of appeal. The trial court in my view rightfully applied its mind and meted a sentence which it considered appropriate in the circumstances. If the applicant herein feels that the same was harsh or that the trial court erred in its decision, the right recourse ought to be an appeal to the court of appeal and not a review. This is because the Court of Appeal is bestowed with jurisdiction over appeals from the decisions of the High Court. (See article 164(3) of the Constitution and section 379(1) of the Criminal Procedure Code).

12. In the premises, the application herein is dismissed.

13. Orders accordingly.

**Delivered, dated and signed at Embu this 20<sup>th</sup> day of January, 2021.**

**L. NJUGUNA**

**JUDGE**

.....for the Applicant

.....for the Respondent