



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL REVISION NO. 135 OF 2020

JOSEPH NJENGA NG'ETHE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant's case is that he was convicted in Siakago SPM Criminal Case No. 10339 of 2017 with the offence of robbery with violence and sentenced to death on 19/09/2008. He appealed to the High Court at Embu vide Embu High Court Criminal Appeal No. 172 of 2008 but which appeal was dismissed and the sentence upheld after which he appealed to the Court of Appeal at Nyeri vide Criminal Appeal No. 20 of 2010 but the appeal was dismissed and the conviction and sentence were upheld in the judgment of the court delivered on 18/09/2013. That the death sentence was later commuted to life sentence.

2. It was his case further that he petitioned this court for resentencing following the Supreme Court's decision in Petition No. 15 of 2015 and the original death sentence was substituted with twenty-five (25) years imprisonment. That he further petitioned this court vide petition No. 18 of 2019 seeking consideration of the period spent in custody and which petition was allowed vide a ruling delivered on 18/12/2019.

3. He now approaches this court vide the instant application filed on 01/11/2020 wherein he seeks review of the sentence and urged this court to order that the remaining part of the said sentence be served under non-custodial sentence and that this court to order that the applicant do serve the rest of his sentence under Community Service Order.

4. The grounds in support of the application are that he has already served a third (1/3) of his 25 years' sentence and that he has reformed and rehabilitated hence qualifies to have his sentence reviewed. Further that he has acquired some life skills that can enable him easily restart his life after release and thus this court ought to allow him to serve the remaining part of his sentence under Community Service Order.

5. At the hearing of the application, the applicant made oral submissions that he was arrested while still young and urged the court to reduce the sentence. Ms. Mati the Learned Counsel for the State (respondent) submitted that the application is without merit as the matter herein went to the Court of Appeal in Criminal Appeal No 20 of 2010 and further that the applicant moved this court vide Petition No. 18 of 2019 and the sentence was reduced to 25 years imprisonment and as such this court cannot review its own orders. Further that there is no law that allows this court to grant the applicant's prayers to serve the remainder of the term while out of prison.

6. I have considered the application herein and the oral submissions by the parties. Further, I have considered the applicant's written submissions. I note that the applicant substantively seeks review of his sentence from 25 years imprisonment to a non-custodial sentence and for the court to order that he serves the remainder of the said sentence under Community Service Order. The question which needs to be answered is whether the application herein ought to be allowed.

7. As I have indicated above, the applicant's appeal to this court and the Court of Appeal against the sentence by the trial court were dismissed and the conviction and sentence upheld by both courts. The applicant thereafter petitioned this court pursuant to the Supreme Court's judgment in Petition 15 of 2015 (**Francis Karioko Muruatetu & Another v Republic [2017] eKLR**) and the sentence was reviewed and substituted with a 25 years' imprisonment. It is this sentence that he seeks review of.

8. However, it is trite law that jurisdictions of courts in Kenya is always conferred by the Constitution or other written laws and that a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. A court of law 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**).

9. The jurisdiction of the High Court 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. Under Section 362-364 of the Criminal Procedure Code, this court 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.

10. The applicant herein invites this court to review the sentence of the High Court in Petition No. 18 of 2019 and substitute the 25 years imprisonment with a non-custodial sentence or a Community Service Order. However, it is my opinion that 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 (supra)** where the trial court did not exercise discretion in sentencing due to the mandatory nature of the sentence as provided by law.

11. In the instant application, the applicant seeks review of the sentence of a court of concurrent jurisdiction (Muchemi J) and which was imposed upon a petition for resentencing pursuant to the decision in **Francis Karioko Muruatetu & Another –vs- Republic (supra)**.

12. As such, 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. This court can only review the orders of the subordinate court (under Section 362 of the Criminal Procedure Code) or its own orders when resentencing under **Muruatetu**. Otherwise this court is bereft of jurisdiction to grant the orders as sought herein.

13. As it is settled law, 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**).

14. In the premises the application is hereby struck out.

15. It is so ordered.

Delivered, dated and signed at Embu this 20th day of January, 2021.

L. NJUGUNA

JUDGE

.....**for the Applicant**

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