



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NUMBER 533 OF 2019

AHMED ABOLFATHI MOHAMMED.....1ST APPLICANT

MANSOUR MOUSAVI.....2ND DAPPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. **Ahmed Abolfathi Mohamed** and **Mansour Mousavi**, the 1st and 2nd Applicants, respectively, approached the Constitutional and Human Rights Division seeking re-sentencing in line with the provisions of section 333(2) of the Criminal Procedure Code (CPC), a matter that was transferred to this court due to the nature of the application.

2. The Applicants, Iranian Nationals, were arraigned before the trial court for offences as follows:-

a) Being in possession of explosives contrary to section 29 of the Explosives Act;

(b) Committing an act intended to cause grievous bodily harm contrary to section 231 of the Penal Code;

(c) Preparation to commit a felony contrary to section 308 of the Penal Code.

3. Having been taken through full trial, they were found guilty, convicted and sentenced to serve life imprisonment, 15 years and 10 years' imprisonment, respectively. Aggrieved, they appealed to the High Court. Upon re-evaluation, Kimaru J. upheld the findings of the trial court on conviction but allowed the appeal against the sentence. Holding that the life imprisonment sentence was excessive, he set it aside and substituted it with 15 years imprisonment which were to run concurrently.

4. Being dissatisfied by the decision of the High court the Applicants appealed. They cited circumstantial evidence that did not unerringly point to them, that RDX was not an explosive within the meaning of the Explosive Act, by failing to hold that the Applicants were denied a fair trial, and by imposing an illegal, harsh and excessive sentence on the Applicants herein. The appeal was allowed by the Court of Appeal, consequently the appeal was quashed and sentence set aside.

5. Aggrieved, the State sought leave to have the matter certified as being of general public importance. Pursuant to leave granted, it appealed on grounds that the Court of Appeal erred by failing to properly interpret the provisions of section 25A,111(1) and 119 of the Evidence Act; that they erred in law by equating the evidence from a suspect leading to discovery with a confession under section 25A; failing to analyze and interrogate the evidence that clearly indicated that it was the provisions of sections 111 (1) and 119 of the Evidence Act that were relevant and not section 25A; that by failing to interrogate and find that the circumstantial evidence adduced during trial was water tight and inconsistent with the innocence of the Applicants amongst others.

6. The supreme court found that the court of appeal was correct in finding that the chain of circumstantial evidence was broken which would have led to an acquittal, however, there were dissenting opinions and therefore the supreme court went ahead to set aside the decision of the Court of Appeal and upheld the decision of the High Court and that of the trial court and ordered that the accused serve the remainder of their sentence then be repatriated back to their country.

7. In their submissions, the Applicants acknowledged the fact of this matter having been adjudicated up to the apex court in the land which upheld the conviction and sentence. However, they urged this court to consider re-sentencing them. Their main contention is that it must have been an oversight on the part of the learned Judge of the High Court to have stated that he had considered the period that the Applicants

were in remand custody from 16th June, 2012, before they were convicted but went ahead to order that the sentence would take effect from the date that the applicants were convicted by the trial court on the 6th May, 2013, a fact that was observed by the Court of Appeal and not faulted by the Supreme Court.

8. On Its part the Respondent herein submitted that this court lacks jurisdiction to determine this matter. It urged that the issue of section 333(2) has been exhausted in all the appellate courts as it was dealt with in the High court and the same issue arose in the Supreme Court as well and in that breath this court cannot purport to reopen or examine the decision by the last court at the apex.

9. The Respondent further submitted that the decision of the court of appeal cannot be relied upon in this instant as it had already been set aside by the Supreme Court and in addition Kimaru J. in his decision duly considered the period the Applicants were in custody.

Issues to be determined by this court are as follows;

a) Whether this court has the Jurisdiction to determine this matter.

b) Whether section 333(2) was considered by the appellate courts.

11. The jurisdiction of this court is donated by the Constitution. Article 165(3) provides as follows; -

“... Subject to clause (5), the High Court shall have—

(a) Unlimited original jurisdiction in criminal and civil matters;

(b) Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) Jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider

the removal of a person from office, other than a tribunal appointed under Article 144;

(d) Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) The question whether any law is inconsistent with or in contravention of this Constitution;

(ii) The question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) Any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) A question relating to conflict of laws under Article 191;

and

(e) Any other jurisdiction, original or appellate, conferred on it by legislation....”

12. Jurisdiction is the authority of the court of law to hear and determine cases. Jurisdiction may be general or specific, limited or unlimited. It may be conferred by the Constitution or Statute. In the case of **Republic v Karisa Chengo & 2 Others (2017)eklr** the Supreme Court had this to state :-

“... [35] In the above regard, we note that in almost all the legal systems of the world, the term “jurisdiction” has emerged as a critical concept in litigation. Halsbury’s Laws of England (4th Ed.) Vol. 9 at page 350 thus defines “jurisdiction” as “...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.” John Beecroft Saunders in his treatise Words and Phrases Legally Defined Vol. 3, at page 113 reiterates the latter definition of the term ‘jurisdiction’ as follows:

“By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the

particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing”.

From these definitions, it is clear that the term “jurisdiction”, as further defined by The Black’s Law Dictionary, 9th Edition, is the Court’s power to entertain, hear and determine a dispute before it..”

13. In the case of *Samuel Kamau Macharia Vs KCB & 2 Others*, Civil Application No. 2 of 2011 stated thus:

“A Court’s jurisdiction flows from either the Constitution or Legislation or both. Thus a Court of Law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by Law”

14. It is urged that the Applicants sought to have the issue determined by the Constitutional and Human Rights Division, which should have been the right forum to address it. It is important to note that the stated Division of the High Court was set up for administrative purposes, and the matter having emanated from a trial at the Criminal Division, this is the right court to deal with the application. Therefore, the impugned transfer of the matter is inconsequential.

15. It is evident that this matter has gone through the appellate process until the highest court. Section 333(2) of the CPC provides thus: -

“(2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

16. The question of sentence was raised on appeal before a court of equal jurisdiction with this court. Kimaru J. presiding over the court stated with clarity that he had taken into consideration the time that the Applicants had spent in custody. Subsequently, the matter was considered on a second appeal and ultimately by the Supreme Court which upheld the decision of the High Court. Therefore, this court cannot purport to interrogate the decision reached as the court was functus officio.

17. The Supreme Court expounding on the doctrine of functus officio in ***Election Petitions Nos. 3, 4 & 5 Raila Odinga & Others vs. IEBC & Others [2013] eKLR*** citing with approval an excerpt from an article by Daniel Malan Pretorius, in “The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law,” (2005) 122 SALJ 832 stated thus: -

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”

18. The upshot of the above is that this court being functus officio is not seized of the jurisdiction to determine the matter. In the result, the application fails and is dismissed.

19. It is so ordered.

Dated, Signed and Delivered Virtually this 25th Day of February, 2021.

L. N. MUTENDE

JUDGE.