REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

MISC CRIMINAL PETITION NO. 83 OF 2018

(CORAM: F.M. GIKONYO J.)

Revision from Original Conviction/Sentence in Criminal Case No. 696 of 2010

of the Chief Magistrate's Court at Narok and HCCRA 66 of 2011 at Nakuru

MUSA LESHORE LEMUNKE.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING ON RESENTENCING

Resentencing

[1] Through an undated application filed on 31/08/2018, the applicant is seeking for re-sentencing by way of review of sentence imposed upon him.

[2] The applicant was convicted for the offence of robbery with violence contrary to section 296 (2) of the penal code and was sentenced to death. He filed **an appeal; Nakuru HCCRA 66 of 2011; the appeal was dismissed. Of significance is that, the appellate court upheld the death sentence because it is the sentence provided for by section 296(2) of the Penal code.**

[3] Now, the applicant has approached the Court for resentencing on the basis of the decisional law in the Supreme Court decision in the matter of ***Francis Karioko Muruatetu & Another –vs- Republic [2017] eKLR*.**

[4] The applicant's case is that his mitigation was not considered and he was not accorded a fair hearing in sentencing; thus, a contravention of article ***25(c) ,48, and 50(2)(f) of*** the Constitution of Kenya. The applicant relies on the following authorities; ***Francis Karioko Muruatetu & Another –vs- Republic, Guyo Jarso Guyo Vs Republic Petition No. 6 Of 2018 At Maralal High Court.***

[5] The applicant in his submission reiterated his position in the application that he has not exhausted all the avenues of appeal, and that he had withdrawn his appeal to the Court of Appeal on 17/09/2020 in order to benefit from the Supreme Court ***Muruatetu decision***.

Prosecution: court functus officio

[6] Ms. Koina, the prosecution counsel for the respondent, in her oral submission opposed the application and submitted that the High Court had already pronounced itself and the applicant cannot come back. She therefore insisted that the applicant should go to the Court of Appeal for lesser sentences. She urged the court to dismiss the application.

ANALYSIS AND DETERMINATION

Issues

[7] From the arguments presented by the applicant and the respondent, I see two issues in controversy, namely: -

(i) The question of jurisdiction of the court; and

(ii) Review of sentence.

Jurisdiction

[8] The sweetest canticle ever on jurisdiction, was composed by Nyarangi JA in the famous case of ***''LILLIAN ''S'' VESSEL''*** that***;***

> ***''*Jurisdiction is everything''.**

[9] The Supreme Court ***in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR*** buttressed at paragraph 68 that;

> **"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. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission* (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."**

[9] Therefore, where court's jurisdiction has been questioned, it becomes a matter of preliminary significance and should be determined as such.

[10] The applicant filed appeal number HCCRA NO. 66 of 2011 which was heard and dismissed. He filed a second appeal to the Court of Appeal being CA Appeal No. 4 of 2016 which was withdrawn on 17th September 2020. The prosecution counsel argued that this court pronounced itself on the sentence and so it is *functus officio*. This is a challenge to the court's jurisdiction to entertain the application. What does the law say about this challenge?

[11] Much help is found in the decision by the Court of Appeal in the case of ***William Okungu Kittiny -v- R (2018) eKLR*** **when it stated:**

> ***"The decision of the Supreme Court only discouraged persons from filing petitions to the Supreme Court but the decision does not prohibit court below it from ordering sentence re-hearing in a matter pending before the courts. By Article 163 (7) of the Constitution, the decision of the Supreme Court has immediate and binding effect on all the other courts. The decision of the Supreme Court opened the door for review of death sentences even in finalized cases".***

[12] Accordingly, this court has jurisdiction to determine this application. But, I will not stop there.

[13] Another angle of tackling the question; the High Court, in ***Stephene Kimathi Mutunga -v- Republic (2019) eKLR*** stated that the High Court has unlimited jurisdiction in both Civil and Criminal matters and the mandate of enforcing fundamental rights and freedoms as enshrined in the Constitution clothes the High Court with jurisdiction to deal with the petition for sentencing rehearing.

[14[More jurisprudence: in ***Michael Kathewa Laichena & Another -v- Republic (2018) eKLR Majanja J.*** *stated:*

> ***"…by re-sentencing the petitioner, the High Court is merely enforcing and granting relief for what is in effect a violation caused by the imposition of the mandatory death sentence".***

[15] I should also add that, under article 50(2)(p) of the Constitution: -

> **50(2) Every accused person has the right to a fair trial, which includes the right—**
>
> **(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing**

[16] I see a subtle judicial hint emerging when Muruatetu decisional law is interposed to article 50(2)(p) of the Constitution. Arguably, the decisional law in Muruatetu changed the law on mandatory punishments; now appropriate sentence should be imposed by courts in all instances which may be less severe than the mandatory sentence. Therefore, imposition of mandatory sentences was a deprivation of the right to appropriate sentence. With this thought, I take the considered view that, persons who suffered mandatory sentences may invoke the benefit of article 50(2)(p) of the Constitution to remedy the injustice and the violation of the right to fair trial arising therefrom. Needless to state that the right to fair trial cannot be limited in any manner and should be viewed with such seriousness. See article 25 of the Constitution. Accordingly, such violation of right is to be remedied under article 23 of the Constitution. The article confers upon the High Court the authority to redress the violation of a right, uphold and enforce a right. See the article below: -

> **23. Authority of courts to uphold and enforce the Bill of Rights**

(1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights

[18] I am now properly grounded; I should think that a violation of right does not require an appeal for redress. This court has jurisdiction under article 165 of the Constitution to hear and determine applications for redress of denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Re-sentencing hearing on the basis of denial or violation of a right or freedom in the Bill of Rights is in the nature of application for redress of denial or violation of right and fundamental freedom in the Bill of Rights envisioned in article 23 of the Constitution. This is one such application. Therefore, I will address the violation of right and resentence the applicant in accordance with the circumstances of his case.

Re-sentencing: Nature and Scope

[19] It is, however, important to state the nature and scope of re-sentencing hearing; it is neither a hearing *de novo* nor an appeal. It is a proceeding undertaken within the court's power to review sentence only. The court will ordinarily check the legality or propriety or appropriateness of the sentence. The relevant considerations in the proceeding *inter alia*, are the penalty law, mitigating or aggravating factors, and the objects of punishments. In re-sentencing proceedings, conviction is not in issue.

Sentence

[20] The starting point is application of the decisional law in the Supreme Court's decision in Muruatetu **(supra)** on mandatory nature of death sentence in other category of cases other than murder cases. In the case of ***Willian Okungu, Kittiny -vs- Republic [2018] eKLR***, the Court of Appeal sitting in Kisumu held as follows: -

> ***" ..... we hold that the findings of the Supreme Court particularly in paragraph 69 applies "Mutatis Mutandis" to Section 296 (2) and 297(2) of the Penal Code. Thus the sentence of death under Section 292(2) and 297(2) of the Penal Code is a discretionary punishment. To the extent that Section 292(2) and 297(2) of the Penal Code provides for mandatory death sentence, the Sections are inconsistent with the Constitution."***

[21] I have perused the decision by this court and it is apparent that the death penalty was imposed because it was the only sentence prescribed in law at the time. Such law is inconsistent with the Constitution and I declare it a violation of the right to fair trial. On that basis, I set aside the death sentence imposed upon the applicant.

[22] What is the appropriate sentence? Sentencing is a discretion of the court. But, the court should look at the facts and the circumstances of the case in its entirely so as to arrive at appropriate sentence. The Court of Appeal **Thomas Mwambu Wenyi Vs Republic (2017**) **eKLR** cited the decision of the Supreme Court of India in **Alister Anthony Pereira Vs State of Mahareshtra** at paragraph 70-71 where the court held the following on sentencing: -

> ***"Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.***

[22] See also **Francis Karioko Muruatetu & Another –Vs- Republic (Supra)** where the Supreme Court stated the guidelines and mitigating factors in a re-hearing sentence. These factors are also applicable in a re-sentencing for the offence of robbery with violence.

[23] The Judiciary Sentencing Policy Guidelines lists the objectives of sentencing at page 15 paragraph 4.1. Among others; the gravity of the offence, the threat of violence against the victim, the nature and type of weapon used by the Applicant to inflict harm. What are the relevant circumstances of this case?

[24] Some past cases: In **Benjamin Kemboi Kipkone –Vs- Republic (2018) eKLR** where 3 robbers armed with an AK 47 rifle robbed the complainant of Ksh. 250,000/= and a mobile phone, Chemitei J. substituted the death sentence with 20 years' imprisonment.

[25] In **Benson Ochieng & France Kibe –Vs- Republic (2018) eKLR,** Joel Ngugi J. re-sentenced the petitioners to 20 years' imprisonment upon considering that the offence was aggravated by the use of multiple guns by an organized gang to commit armed robbery.

[26] In the case before me, the evidence show that the applicant with others in police uniforms armed with rifles and rungus stopped the complainant's lorry. He stopped for he thought they were police officers only to be pulled down forcefully, assaulted and forced to drink some unknown liquid which made them unconscious. His turn boy was also given similar treatment. They gained consciousness much later to find the lorry and cargo they were carrying stolen. The manner the offence is committed is relevant consideration. In this case it was cruel. Security of the society from criminals especially those who have the audacity to dress like police officers to hoodwink the public is also quite relevant consideration in this case.

[27] The offence is also serious; robbery with violence. And, the weapons used were also dangerous weapons; rifles and rungus.

[28] In the circumstances of this case, deterrent sentence is most appropriate. I therefore sentence the applicant to 30 years' imprisonment.

Taking account of time spent in custody

[29] At the time the offence was committed, robbery with violence was not bailable. The applicant remained in custody from the date of arrest. Section 333 (2) of the Criminal Procedure Code requires the sentencing court to take account of the period spent in custody. In re-sentencing, the court should be aware that, in some instances, time spent in custody may mean; (1) the period spent in remand during trial; and (2) the time actually served upon initial sentence. If a court does not clearly state the commencement date of the sentence upon re-sentencing, or states that the sentence commences on introduce an illegality. Care should, therefore, be taken by sentencing courts about the implication of section 333(2) of the CPC. I am aware that section 333(2) of the CPC does the date of judgment, a possibility of great absurdity and injustice looms. For instance, if a person was sentenced to serve 10 years and he has already served 5 years, if you reduce the sentence to 5 years with effect from the date of judgment, the person will actually serve more than he would have served under the original sentence given the right to remission. Such sentence will not only violate the right to fair trial but will not state how a court should take account of time spent in custody. But, it is my humble view that, the court should state categorically when the sentence commences in a manner that readily shows that it has given full effect to the requirements of section 333(2) of the CPC. It has been stated time without number, and I will state it again; merely stating that the court has taken account of time spent in custody is not sufficient. In that connection, the sentence herein will commence from 12th day of September, 2010 when the applicant was first charged in court because he remained in custody from thence to date. It is so ordered.

Dated, signed and delivered at Narok through Microsoft Teams Online Application this 25th day of February 2021

F. GIKONYO

JUDGE

In the Presence of:

1. Ms. Koina for DPP

2. Mr. Kasaso – Court Assistant

3. Applicant- present

F. GIKONYO

JUDGE