



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

PETITION NO. 96 OF 2020

DAVID MUGO KIMUNGE.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The petitioner's case is that he was convicted of the offence of robbery with violence contrary to Section 296(2) of the Penal Code in Embu CM Criminal Case 1890 of 2010 and sentenced to suffer death. That, he subsequently appealed to the High Court at Embu but the appeal was dismissed. Subsequently, he appealed to the Court of Appeal at Nyeri in Nyeri Court of Appeal Criminal Appeal No. 4 of 2014 and the same was dismissed. It was his case that pursuant to the decision in **Muruatetu**, he filed **Petition No. 10 of 2018 – Embu** seeking resentencing and which was allowed and the death penalty substituted with a sentence of 20 years. Further that he filed another petition being **No. 31 of 2019** seeking review of the sentence to take into consideration the time spent in custody and which was allowed and the sentence ordered to commence from the date of arrest.

2. He has now filed the instant petition and wherein he seeks for orders that this court do review the said sentence. The grounds of the petition appear to be that the sentence court failed to apply Sections 216 and 329 of the Criminal Procedure Code and thus contravening Article 27(1)(2) (4) and Article 50(2)(p) of the Constitution of Kenya. He thus prayed that this court do review his case for the purposes of applying the said provisions of the law.

3. At the hearing the petitioner erected to rely on his written submissions earlier filed. Ms. Mati for the respondent opposed the application on the grounds that a similar application had been heard by Muchemi, J. in **Revision 31 of 2019** and wherein the court ordered that sentence do run from the date of arrest. In a rejoinder, the applicant sought for leniency stating that he had suffered enough in prison.

4. I have considered the petition before me, the written submissions by the petitioners and further the response by the respondent and it is my view that the main issue for determination is whether the petition is merited.

5. As the petitioner did rightfully state in the petition and the submissions, it is clear that he appealed against the trial court's decision to this Court and further to the Court of Appeal and the two courts affirmed the sentence by the trial court. The petitioner has also benefitted from the Supreme court's decision in **Francis Karioko Muruatetu & another v Republic [2017] eKLR** and also had his sentence further reviewed under section 333(2) of the Criminal Procedure Code and both petitions having been heard by Muchemi J. It is my considered view this court cannot now turn back and review the decision of the Learned Judge. Doing so would be tantamount to this court sitting as an appellate court over a decision of a peer court/a court of concurrent jurisdiction and which jurisdiction this court does not have. The appellant having appealed to the Court of Appeal means that the trial court's judgment was affirmed as the final judgment. This court only came to the rescue of the situation pursuant to the decision in **Muruatetu** and under the resentencing jurisdiction which was bestowed upon this court by the Supreme Court. The said jurisdiction having been exercised, this court is bereft of any jurisdiction to grant the orders sought.

6. It is trite 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. (See **Samuel Kamau Macharia & Another V. KCB & 2 Others App. No. 2/2011**). Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs 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**).

7. This court being bereft of jurisdiction it ought to lay down its tools. As such the petition herein is hereby dismissed for want of jurisdiction.

8. However, even assuming that this court has jurisdiction to determine the issue herein, I have noted, the applicant invites this court to review the sentence meted upon him and in doing so, this court to apply the provisions of Sections 216 and 329 of the Criminal Procedure Code. Section 216 provides that; -

“The court may, before passing sentence or making an order against an accused person under section 215, receive such evidence as it thinks fit in order to inform itself as to the sentence or order properly to be passed or made”

Section 329 on the other hand provides that; -

“The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.”

9. What is clear from the above sections is that they provide for mitigation- where an accused person is presented with an opportunity to present facts which might move the trial court when sentencing. From the Criminal Procedure Code, it is clear that section 216 applies to proceedings in the subordinate courts while section 329 applies to proceedings before the High Court. However, it is clear that the two sections only apply where a court is sentencing after hearing a matter (trial court). I have perused the court record and I note that after the judgment was read by the trial court (on 20.09.2012), the court offered the two accused persons (who included the petitioner herein) a chance to mitigate. The record indicates “nil” on the part of the petitioner. It is therefore illogical and an afterthought and dishonest for the petitioner to state that the trial court did not comply with the requirement of the law as to mitigation.

10. Therefore, the application herein lacks merit and the same is hereby dismissed.

11. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 17TH DAY OF MARCH, 2021.

L. NJUGUNA

JUDGE

..... **FOR THE PETITIONER**

..... **FOR THE RESPONDENT**