



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION OF THE HIGH COURT

CRIMINAL REVISION NO. 122 OF 2019

CHRISPINE ODHIAMBO MAGOHA.....APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

1. The Applicant herein was charged in the Chief Magistrates Court, vide criminal case number; 1932 of 2012, with the offence(s) of; robbery with violence contrary to section 269(2) of the Penal Code, in two counts, and alternative charge of; handling stolen property contrary to section 322(2) of the Penal Code. The particulars of each charge are as per the charge sheet.

2. He pleaded not guilty to all the charges and the case proceeded to a full hearing. The prosecution called a total of eight (8) witnesses. The accused did not call any witness, but defended himself vide an unsworn statement.

3. At the conclusion of the trial, the court found that, the applicant guilty on the offences of; robbery with violence contrary to section 296 (1) of the Penal Code and convicted him on both accordingly.

The prosecution indicated to the court that, the Applicant had no previous records of conviction and treated him as a first offender.

4. Having considered the records and the Applicant's mitigation, the trial court sentenced him to "suffer death" as provided for under the law. However, the court observed that, as the applicant could not suffer death "twice" and suspended the sentence on the second count.

5. However, the Applicant, being dissatisfied with the conviction and sentence, filed a Criminal Appeal No. 194 of 2013, at the High Court; He avers that, the same was dismissed in its entirety by Hon Justice L. Kimaru on 29th June 2016.

6. However, being dissatisfied the Applicant moved the court vide; Miscellaneous Application No. 325 of 2017, filed in the High Court, seeking for "appropriate remedy pursuant to; the provisions of; articles 23(1) and (3) of the constitution of Kenya 2010" and an order that, the matter be sent back to the lower court for retrial and/or the proceedings in the lower court be declared null and void. Upon considering the application, Hon. Lady Justice G. Ngenye Macharia ordered that, the matter be mentioned on 1st November 2018, before the Chief Magistrates Court at Kibera, for directions or hearing.

7. On 24th November 2019, Hon. Barbra Ojoo; Senior Principal Magistrate, heard the Applicant's application on re-sentencing, and subsequently rendered a ruling thereon, on 15th February 2019. The applicant was, re-sentenced to serve eighteen (18) years imprisonment on each count and the sentence to run concurrently and granted him 14 days right of appeal.

8. The Appellant being dissatisfied with that sentence, has filed the subject undated chamber summons, vide Miscellaneous Criminal Appeal No. 122 of 2019, seeking for orders as here below reproduced:

a. That, the Hon. court be pleased to issue orders for the sentencing imposed on the accused to be given rights as enshrined to; section 333(2) of the Civil Procedure Code for a consideration of the period spent in custody;

b. That, the Honourable court be pleased to issue orders for remission of the term served in custody,

c. That, the application is supported by annexed affidavit of Chrisphine Odhiambo Magoha amongst other grounds to be addressed

during the hearing of this application.

9. The application is supported by an affidavit sworn by the Applicant in which he basically prays that, the court invokes the provisions of section 333(2) of the Criminal Procedure Code and considers the period he was held in custody during the trial, and order for remission of a third of his sentence. The Respondent did not file any formal response to the application.

10. However, the application was disposed of vide written submissions filed by both parties. I have considered the said submissions in total. In a nutshell, the Applicant reiterates that, he is remorseful, and regrets causing pain to the complainants. That, he is a devoted Christian who believes in the power of forgiveness. He further submitted that, he has acquired skills, for personal development as well as community when released. He attached various certificates in support thereof.

11. Finally, he stated that, he has three (3) children aged 11 and 13 years, who were abandoned by their mother, and are under the care of an aged mother-in-law who is not able to feed for them. He prayed to be released to go and take care of them.

12. However, the Respondent in response, submitted in a nutshell that, as the High Court has pronounced itself on this matter, it has no jurisdiction to entertain the application herein, as it is *functus officio*. That the Applicant should seek redress at “the Supreme Court”. The Respondent urged the court to dismiss the “appeal”.

13. I have considered the application in the light of the averments and/or submissions aforesaid. However, I note that, the Respondent’s submissions are in reference to an appeal but the Applicant filed a certificate of urgency on 7th March, 2019 but not an appeal.

14. Be that as it were, I find that the issue to determine is whether the application has merit and/or whether the order sought for should be granted. To answer these issues, I shall first establish whether the court has jurisdiction to hear this matter or is; *functus officio*.

15. In that regard, the court record reveals that, the applicant was initially charged in the Chief Magistrates Court, vide criminal case number; 1932 of 2012, and sentenced to death. He appealed against both conviction and sentence to the High Court vide High Court Criminal Appeal No. 194 of 2013 and Criminal Appeal No. 137 of 2014. The record thereof reveals that, the judgment on the appeal was delivered on 29th June, 2016, whereby the court dismissed the appeals in entirety.

16. Further perusal of the court files shows that, on 23rd October, 2017 the Applicant filed a Miscellaneous Criminal Revision 325 of 2017, in the High court, described as a “Petition” and upon consideration thereof; the court on 19th October, 2018, ordered that the matter be mentioned before the Chief Magistrate’s Court for re-sentencing.

17. The resultant decision is the ruling of the Chief Magistrate’s court re-sentencing the Applicant to eighteen (18) years as stated herein. However, the Applicant argues that when the sentence was considered, the provision of section 333(2) of Criminal Procedure Code, were not taken into account.

18. The subject provisions state as follows:

“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 (emphasis mine).”

19. However, I note from the resentencing proceedings the Hon. Magistrate stated as follows;

“The matter now comes up before me for re-sentencing pursuant to an order from the High Court. I have considered the mitigation of the Accused person. He states that he is a father of 3 children aged between 11 and 6 years. He has been in custody for 6 years and has had various trainings in ICT skills. He was also a mechanic and had been self-employed prior to arrest. I have also noted that he has a commendation for good character from prison and is said to be disciplined.

I have taken into account all the above as well as the prosecution’s remarks on behalf of the victims and the aggravating circumstances of the 2 robberies. I hereby re-sentence Accused person to serve eighteen (18) years imprisonment on each count commencing 24/6/2013 on each count. Right of appeal 14 days. Sentences run concurrently.”

20. From the aforesaid, it is clear that the court considered fully all the relevant factors, including the six (6) years he was in custody and therefore this application has no merit.

21. However, it is not worthy that, this court has no power and jurisdiction to entertain this matter for several reasons that; the court having heard and dismissed the Applicant’s appeal in its entirety, it is *functus officio*. At that point the Applicant’s recourse lay to the Court of Appeal. He avers that, he filed an appeal in that court but it is still pending. Obviously by abandoning that appeal “by conduct” he endorsed the decision of the High Court.

22. Further, there is no legal authority for re-sentencing the Applicant once he has been re-sentenced. He can only appeal against that sentence without losing sight of the fact that, this Court has already pronounced itself on the matter. Finally, the High court can only, exercise its supervisory jurisdiction under Article 165 of the Constitution of Kenya, 2010, in the light of the provisions of; section 362 to 364

of Criminal Procedure Code.

23. The provisions of section 362 states as follows:

“The High Court may 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.”

24. In the same vein, the provisions of; section 364 of the Criminal Procedure Code states that: -

“(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.

(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”

25. In view of the aforesaid, I find, first and foremost, this court is *functus officio*. Indeed, matters in court must have finality at a given time. The principle of finality in law, is the concept that, certain disputes must achieve a resolution from which no further appeal may be taken, and from which no collateral proceedings may be permitted to disturb that resolution.

26. Secondly, even if the matter is considered on merit, it has none. The upshot is that the application struck out for want of jurisdiction and/or dismissed for lack of merit.

27. It is so ordered.

DATED, DELIVERED VIRTUALLY AND SIGNED ON THIS 19TH DAY OF APRIL 2021

GRACE L. NZIOKA

JUDGE

In the presence:

Applicant present in person

Ms Ndombi for Respondent

Edwin Court Assistant