



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

MISC. CRIMINAL APPLICATION NO. E011 OF 2021

JOHN GICHOVI MUTURIPETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant brought the instant application wherein he seeks resentence hearing. It is his case that he was charged and convicted of the offence of robbery with violence contrary to section 296(2) of the Penal Code in Embu CM Criminal Case No. 365 of 2008 and sentenced to death. That he appealed to this court vide Embu High Court Criminal Appeal No. 181 of 2009 and which appeal was dismissed. He subsequently appealed to the Court of Appeal but the appeal is yet to be heard and determined. The applicant invoked the Supreme Court's decision in **Francis Karioko Muruatetu –vs- Republic Petition No. 15 of 2015** and as was applied by the Court of Appeal in **William Okungu Kittiny -vs- Republic [2018] eKLR**.
2. At the hearing of the application, the applicant relied on the submissions in advancing his case. Ms. Mati did not oppose the application for reduction of the sentence but invited this court to take into account all the circumstances of the case. Ms. Mati further submitted that the applicant has been heard by the High Court and the Court of Appeal before the Muruatetu jurisprudence.
3. I have considered the application herein and the oral response by the respondent. I have perused the court record and as the applicant correctly put, he was convicted by the trial court of the offence of robbery with violence and sentenced to death. He appealed to this court vide Embu High Court Criminal Appeal No. 181 of 2009 and which appeal was dismissed in the judgment of Hon. Lessit J (as she then was) and Hon. H.I Ong'udi J delivered on 21.09.2012. The Learned Judges upheld the conviction and the sentence by the trial court. As such, the judgment and the sentence which is in force and the one the applicant herein is serving is the one imposed by this court but differently constituted. It therefore means that the applicant wants this court to review the decision of a court of concurrent jurisdiction and in so doing apply the dictum in **Muruatetu's case** as was applied in **William Okungu Kittiny's case (supra)**. The question in my view which ought to be answered is whether this court can resentence the applicant and in doing so review a decision of court of concurrent jurisdiction.
4. The jurisdiction of the High Court is provided for under article 165 of the Constitution of Kenya 2010 and it 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. The supervisory jurisdiction in criminal matters is expounded under Section 362-364 of the Criminal Procedure Code. Under the said sections, this court has jurisdiction 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. It is therefore clear that this court cannot and does not have jurisdiction to review the decision of a court of concurrent jurisdiction. Once this court delivered its judgment on appeal (though differently constituted), it became *factus officio* over the matter herein.
5. The law abhors that practice of a judge sitting to review a judgment or decision of another judge of concurrent jurisdiction. This is because the rule of the thumb is that superior courts cannot sit in review/appeal over decisions of their peers of equal and competent jurisdiction much less those courts higher than themselves. The court which ought to deal with an issue arising out of the decision of this court is the Court of Appeal as it is the one with jurisdiction under Article 164(3) of the Constitution and Section 379(1) of the Criminal Procedure Code. This is in appreciating the provisions of Article 50(2)(q) of the Constitution of Kenya 2010 which guarantees the right of a person if convicted, to appeal to, or apply for review by, *a higher court* as prescribed by the law. (See **Daniel Otieno Oracha –vs- Republic [2019] eKLR**).
6. As such, this court does not have jurisdiction over the revision application herein. The right forum would be the Court of Appeal.
7. However, there is a new jurisprudence which was developed by the Supreme Court in **Muruatetu's case (supra)**, and wherein the Supreme Court found that the mandatory death sentence under section 204 of the Penal Code is unconstitutional as it takes away the discretion of the court while sentencing. The Supreme Court gave this court (being the trial court in murder charges) a special jurisdiction to

hear a party on resentencing where an accused person was sentenced under the mandatory section 204 of the Penal Code. (See paragraphs 110 and 111 of the said decision).

8. Unlike in **Muruatetu's case** where the court directed that the pending cases be taken for resentencing, the Court of Appeal in **William Okungu Kittiny's case (supra)** did not make an order or even give directions as to how the convicts already serving their sentence ought to be treated or how their resentencing ought to proceed. It is my view that the Court of Appeal was only applying the **Muruatetu's decision** as it is since it was the new law at the time. The court was proper in applying the said dictum as it was exercising appellate jurisdiction and applied the law as it had developed.

9. Further, the court in the said case was handling an appeal from a decision of Chemitei J in **Constitutional Petition No. 2 of 2011** where the Learned Judge disallowed the petition seeking resentencing hearing. It was thus an appeal from a constitutional petition seeking resentencing and which was after they had exhausted all the chances of appeal having appealed up to the Court of Appeal. As such the Court of Appeal was exercising its appellate jurisdiction and in rendering the said decision, it appreciated that the decision by the Supreme Court had already been rendered.

10. The Court of Appeal did not direct as to how prisoners serving sentences and having been sentenced prior to its decision ought to be treated.

11. It is trite that laws do not act retrospectively. The Supreme Court in **Mary Wambui Munene –v- Peter Gichuki King'ara & 2 others [2014] eKLR** in setting out exemption to this general rule cited with approval the case of **A –vs- The Governor of Arbour Hill Prison [2006] IESC 45, [2006] 4 IR 88** where it was held that:-

“Judicial decisions which set a precedent in law do have retrospective effect. First of all the case which decides the point applies it retrospectively in the case being decided because obviously the wrong being remedied occurred before the case was brought. A decision in principle applies retrospectively to all persons who, prior to the decision, suffered the same or similar wrong, whether as a result of the application of an invalid statute or otherwise, provided of course they are entitled to bring proceedings seeking the remedy in accordance with the ordinary rules of law such as a statute of limitations. It will also apply to cases pending before the courts. That is to say that a judicial decision may be relied upon in matters or cases not yet finally determined. But the retrospective effect of a judicial decision is excluded from cases already finally determined. This is the common law position”.

(See also **Republic –vs- Karisa Chengo & 2 others [2017] eKLR** paragraph 102 -104).

12. The Court of Appeal's decision was not ordered to apply retrospectively as opposed to the Supreme Court's decision in **Muruatetu**. In my view, there is no legal basis of resentencing in robbery with violence so as to apply the principles in **Muruatetu decision**. The decision by the Court of Appeal where the Learned Judges applied the reasoning in **Muruatetu** in robbery with violence were decisions made by the Court in rendering a decision on appeal and since at that time (of rendering the appeal) the law had changed, they had no alternative but to apply the said reasoning as it was binding on them. The same cannot apply retrospectively and thus enabling those who had been sentenced before the same was rendered to apply for revision of their sentence basing their argument on the pronouncements made in the said decision.

13. In **John Kagunda Kariuki –vs- Republic [2019] eKLR** Justice Joel Ngugi (Prof) in appreciating the application of **Muruatetu's case** in sexual offences and its implications on the court's powers to exercise discretion in sentencing, proceeded to hold that:-

“8. However, unlike the decision in Muruatetu and other cases where the death penalty was imposed, the decision Dismas Wafula Kilwake does not operate retroactively. This was a decision given the ordinary common law mode which does not entitle all other people who could have benefitted from the new development in decisional law to approach the High Court afresh for review of the sentences imposed. Instead, the principles announced in the case will apply to future cases. In other words, persons whose appeals have already been heard by the High Court are not entitled to file fresh applications for re-sentencing in accordance with the new decisional law. To reach a different conclusion would lead to an ungovernable situation where all previously sentenced prisoners would seek review of their sentences.....”

10. *In the present case, the Applicant's appeal has already been heard by the High Court. He cannot return to the High Court for a review of the sentence imposed. He is at liberty to make an argument for reduced sentence at the Court of Appeal....”.*

14. In the same breath, the decision of the Court of Appeal in in **William Okungu Kittiny's case (supra)** cannot be applied retrospectively but in future cases. Otherwise, it would bring out an ungovernable situation where all previously sentenced prisoners would seek review of their sentences.

15. I note that the applicant indicated that he has a pending appeal in the Court of Appeal. It would be wise of him to pursue the said appeal and if none is pending, let to appeal to the Court of Appeal.

16. I think I have said enough to prove that the application herein is wrongly before this court. This court does not have jurisdiction over the matter. It is trite that where a court is bereft of jurisdiction, it should down its tools 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**).

17. Considering all the above, this court is bereft of jurisdiction to issue the orders sought by the applicants and ought to down its tools. As such, the petition herein is dismissed for want of jurisdiction.

18. It is so ordered.

Delivered, dated and signed at Embu this 30th day of June, 2021.

L. NJUGUNA

JUDGE

.....for the Petitioner

.....for the Respondent