REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

PETITION NO. E032 OF 2021

(Originating from Criminal Case No.1865 of 2006 at Malindi and High Court App No. 22 of 2009 at Malindi)

IN THE MATTER OF RESENTENCING PURSUANT TO ARTICLE 50 (2) Q OF THE CONSTITUTION

THE CONSTITUTION OF KENYA 2010(SUPERVISORY JURISDICTION AND PROTECTION FUNDAMENTAL

RIGHTS AND FREEDOMS OF AN INDIVIDUAL HIGH COURT PRACTICE RULES 2013.

AND

IN THE MATTER OF ARTICLES 22(1), 23(1), 27 AND 165(3), B, D, (II) OF

THE CONSTITUTION OF KENYA

IN THE MATTER OF SECTION 19,20,21,22,23,24,25,27,28,48,50,258 and 259 of the Constitution

IN THE MATTER OF SECITON 3 (1) OF HE SEXUAL OFFENCES ACT NO. 3 OF 2006

AND

IN THE MATTER OF SECTION 333(2) OF THE CRIMINAL PROCEDURE CODE

SHIDA KATANA THOYA.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Shida Katana Thoya – Petitioner

Mr. Mwangi for the DPP

R U L I N G

The petitioner was charged, tried, convicted and sentenced to 25 years imprisonment by the trial court in Criminal Case No. 1865 of 2006 at Malindi for the Offence of rape contrary to section 3 (1) of the Sexual Offences Act. Being aggrieved with both conviction and sentence he preferred an appeal to the High Court on consideration of the matter on appeal the Court dismissed the appeal. On conclusion and sentence with the issue in stipulation is to have the sentence reduced to either 15 years or 10 years imprisonment as per the averments in the supporting affidavit.

Determination

The question is whether this is a proper case to review the sentence. The basic tenets of the Court's jurisdiction is to be found under Article 50 6 (a) (b) of the Constitution. These provisions provide for a new trial by an accused person where it relates to his or her proceedings and

the process of an appeal has been exhausted or the period to file an appeal lapsed before any such intention would take effect. Further, that the accused has come across new and compelling evidence notwithstanding the existence of a valid judgement of the Court.

This jurisdiction on review in criminal law rules the queue in the realm of Civil law as discussed by the Supreme Court of India in the case of ***Ariban Tuheshwar V Ariban Pishak Sharma [1979] 4 sec 389*** as follows; -

> ***"The power of review may be exercised on the discovery of new and important matters of evidence which, after exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time of the person seeking the review or could not be produced by him at the time with the order was made; it may be exercised where some mistake or error apparent on the face of the record is found, it may also be exercised on any of the grounds; but it may not be exercised on the ground that the decision was erroneous on the merits."***

That would be the pronounce of a Court of a Court of appeal. A power of review is not to be confused with the appellate powers, which may enable an appellate Court to correct all manners of errors, committed by the subordinate court.

The procedural jurisdiction vested in the High Court by the Constitution afore cited, calls for the exercise of discretion which in every case, must be exercised judicially and judiciously on sufficient materials. To be sure, discretion is the art of being discrete. This in exercising judicial discretion, the Court is expected to ask judiciously by being guided by available relevant facts and within the precincts of law and doing what is just and proper with specific reference to the facts of this case.

New and compelling evidence is the threshold to meet the ends of justice in the review of the impugned order. In ***Haridas V Srutusha Rani Banik & oths CA NO. 7948 of 2004,*** the court held; -

> ***"There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterized as vitiated by error apparent. A review is by no means an appeal in disguise whereby an erroneous decision is the rehearse and connected, but its only for patent error which without any elaborate argument one could point to the error and say here is a substantial point of law which strikes one in the face and there could reasonably be no two opinions abstract, a clear case of error apparent on the face of the record would be made out, but there are definitive limits to the exercise on the discovery of new and important matter of evidence. It may be exercised where some mistake or error apparent on the face of the record is found, it may also be exercised on any analogous ground, but it may not be exercised on ground that the decision was erroneous on merit".***

In the instant petition, the petitioner avers that section 333(2) of the Criminal Procedure Code was not complied with by the trial court. However, the facts to proof the error or mistake apparent for non-compliance of that statutory provision are insufficient. This Court would only act on the material availed by the deponent and not to engage in a fishing expedition for the evidence which might be in favor of the petitioner. This is inconsonant with section 107 (1) of the Evidence Act. Therefore, the sum effect of the petition is that under Article 50 (6) (b) of the Constitution the petition is disallowed for want of merit. It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF JULY, 2021

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R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Mwangi for the DPP

2. The Petitioner