REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

PETITION NO. E026 OF 2021

(From original criminal case No. 284 of 2013 at Malindi and HCCR APP NO. 15 of 2015 at Malindi)

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 ARTICLE 22 (1) OF THE CONSTITUTION 2010

AND

IN THE MATTER OF ARTICLES 23 (1) and 165(3) OF THE CONSTITUTION

IN THE MATTER OF ARTICLE 19, 20, 24 AND 27 OF THE CONSTITUTION

AND

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

SIFA KAZUNGU KAMBETSA.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION .....RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Sifa Kazungu Kambetsa – Petitioner

Mr Mwangi for the state

R U L I N G

The issue raised in this petition is simple namely whether the Court has jurisdiction to review its own decision, orders, reliefs and judgement if so whether in the instant petition the Court should exercise discretion for the benefit of the petitioner.

Background

The petitioner, was arrested, charged, tried, convicted and sentenced to 25 years imprisonment for the offence of defilement contrary to section 8 (1) as read with section 8 (3), of the Sexual Offences Act No.3 of 2006. Being aggrieved with both conviction and sentence an appeal was lodged before the session judge ***Weldon Korir J***. In reference to the appeal all matters at stake were reviewed and at the end of it a variation of sentence was made where the term imprisonment of 25 years was substituted with a period of 20 years. The petitioner rested his case at that stage without preferring an appeal to the Court of Appeal. In the course of serving sentence, he has become aggrieved with the sentence, as a consequence lodged the current petition.

Determination

The jurisdiction of the Court is donated by Article 50 (6) (a) & (b) of the Constitution limited to entertain a new trial only on new and compelling evidence and secondly, in circumstances where the petitioner had a right of appeal but that time has since lapsed. In my view the High Court judgement on all various forms is final as being determinative of the rights of the parties to the criminal trial process.

As provided for in Article 50 (6) (a) (b) of the Constitution, the new trial on review may be only exercised on the discovery of new and important matter of evidence which is so compelling that it will enable this court to correct the error or mistake apparent on the face of the record. The requirement is that for a petitioner to furnish good and compelling reasons for the court to revisit a finalized case on the merits. It is therefore relevant to note that to be criterion attached to the provisions of the Constitution. On review of an order or impugned sentence attempts have been made, in this petition to persuade the Court to admit the case again to a fresh hearing putting into consideration the famous ***Muruatetu*** case which declared mandatory sentences unconstitutional.

It is clear and understandable that from the context of the petition, there isn't any new and compelling evidence to review the judgement of the trial court and that of the 1st appeals court. The spirit and letter in terms of Article 50 (6) (a) & (b) of the Constitution does not apply this petition. The finality of the decision is paramount and there are no extenuating nor compelling circumstances to re-open the proceedings. This jurisprudence in civil law in effect applies ***Mutatis Mutandis*** to the criminal jurisdiction on this unique forum on review of sentences, under the Constitution, provides:

> ***"As section 7 of the Civil Procedure Act implied by proved as a final judgement being res judicata is not easily varied or set aside unless the petition or application contains material of new compelling evidence error, irregularity, incorrectness or impropriety of the orders which if left to stand will occasion prejudice and an injustice to the right holder."***

On the whole, having taken into account the catalogue of issues raised by the petitioner, this Court is not persuaded existence of any new or compelling evidence availed to enable the Petitioner of a remedy under Article 50 (6) (a) (b) of the Constitution. Moreover, with recent clarification in ***Francis K. Muruatetu Ruling*** delivered on 6th July, 2021 by the Supreme Court the substantiality of the issues raised find no room in placing reliance on the case.

As already noted, the initial principle rendered by the Apex Court on unconstitutionality of mandatory death sentence is only applicable to murder convictions under section 204 of the Penal Code. The rationale for these new directions is that there is no importation of the principle to other penal laws under the Sexual Offences Act or robbery with violence as earlier envisaged by the various Courts.

It must be emphasized that ***Muruatetu*** is no longer good law to those convicted under the Sexual Offences Act or Robbery with Violence distinctively providing for mandatory sentences.

As a consequence, the contention by the petitioner to have his sentence reviewed is non-justiciable under the principles evolved in ***Muruatetu*** one and two by the Supreme Court. They was ascertained once and for all, and in the ensuing criminal proceedings, the facts cannot be re-litigated between the petitioner and the state. The doctrine of res judicata specifically to address adjudicatory issues in the realm of civil law applies to cases of this nature on review under Article 50 (6) (a) & (b) of the Constitution.

As applied, a final judicial decision pronounced by a judicial decision, more fundamentally under the exhaustion of the right of appeal over a criminal matter between the parties would be a subject matter for estoppel to be invoked.

In terms of Article 23 (1) and 165 (3) of the constitution, a constitutional matter includes any issue involving the interpretation, protection or enforcement of the constitution. In other words, a petitioner seeking to attack a finding of the trial court or any decision of a superior court on sentence must in his petition clearly indicate how the issues he raises interact with the interpretation, protection or enforcement of fundamental rights in the bill of rights. I am of the opinion that Article 50 (6) (a) & (b) is a forum of the last resort only invoked within the criteria outlined therein. This means in our system of courts judicial decisions must be given with finality save where exceptional circumstances call for the reopening of the proceedings. The exception to res judicata is the one stipulated under Article 50 (6) (a) (b) of the constitution.

The whole world is bound by the judgement, so that a person relying upon a decision of this kind lacks privity for the court to admit a new trial. As a result, the petition is ordered to be dismissed.

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

.....

R. NYAKUNDI

JUDGE

In the presence of

Sifa Kazungu Kambetsa – petitioner

Mr Mwangi for the state