



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

MISC CRIMINAL APPLICATION NO 13 OF 2020

STEPHEN CHEROTICH CHIRCHIR.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an application from the judgement of the Kabarnet High Court in

Criminal Appeal No. 28 of 2018, Stephen Cherotich Chirchir v Republic)

RULING

1. Pursuant to the provisions of articles 22, 23, 50 (1), 50 (2), (P), 159, 165 (3) (9) and 259 Of the 2010 Constitution of Kenya and section 333 (2) of the Criminal Procedure Code (Cap 75) Laws of Kenya, the applicant seeks the following orders.

1) *spent*

2) an order that the court considers the period the applicant has been in custody as required by section 333 (2) of the Criminal Procedure Code and to take into account the decision of the Court in Robert Achapa Okello v Republic, Criminal Petition No. 63 of 2018 at Kisumu.

2. The application is based upon five (5) following grounds, with the major grounds being the following. This court has jurisdiction to determine this petition under the provisions of article 165 (3) (9) of the 2010 Constitution of Kenya and the relevant provisions of the Probation of Offenders Act. The Judiciary Sentencing Guidelines also obliges the court to take into account the time an accused has been in custody during trial. The spirit of the Constitution is moving away from the retributive to restorative justice.

3. In addition to the foregoing grounds the application is supported by a 15 paragraphs supporting affidavit of the applicant, whose major averments are as follows.

4. The applicant was charged with stock theft in Eldama Ravine Law courts and at the end of the trial he was convicted and sentenced to 7 years imprisonment. The applicant then filed an appeal in the High Court of Kenya at Kabarnet being Criminal Appeal No. 28 of 2018. The High Court after hearing the appeal dismissed it for lacking in merit; which precipitated this petition.

5. This court has jurisdiction to determine this petition pursuant to the provisions of article 23 and 165 (3) (9) of the 2010 Constitution of Kenya.

6. The applicant urges the court to order the sentence imposed by the trial court to run from the date when the applicant was arrested.

7. The applicant has further deposed that he has undergone rehabilitation programs and courses while in prison and now he is reformed. He has also deposed that he was a young person of tender age.

The submissions of the applicant

8. In this court the Mr Chebii, counsel for the applicant has submitted that he had been in custody for 20 months, which he wants this court to take into account as required by section 333 (2) of the Criminal Procedure Code. In other words, the applicant seeks remission of his sentence.

9. Mr. Chebii has further submitted that this is a constitutional application and therefore this court has jurisdiction to entertain the application. He has further submitted that his client is only seeking reduction of sentence. He further submitted that since this is a constitution petition, there is no time limit within which to file the application in court.

10. Finally, counsel has submitted this court is not sitting as an appeal court over the judgement that dismissed the applicant's appeal in its entirety.

The submissions of the Respondent

11. Mr. Abwajo, counsel for the Respondent has submitted that this court has jurisdiction to entertain this application by virtue of article 165 (3) (9) of the 2010 Constitution of Kenya.

Issues for determination

12. I have considered the affidavit and the grounds advanced in support of the application in the light of the applicable law. As a result, I find the following to be the issues for determination.

- 1) Whether this court has jurisdiction to determine this application.

Issue 1

13. The applicant has deposed that his appeal to the High Court at Kabarnet being Criminal Appeal No. 28 of 2018 against this conviction and sentence of 7 years imprisonment in respect of stock theft was dismissed in its entirety. It therefore follows that the power of this court is spent in relation to this matter. In other words, this court is functus officio.

14. Furthermore, the provisions of article 165 (3) (6) of the 2010 Constitution of Kenya only donates to the High Court supervisory jurisdiction over the subordinate courts and over bodies and persons that exercise quasi-judicial functions. The aforesaid provisions read as follows.

“(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”

Furthermore, article 162 (1) of the 2010 Constitution of Kenya clearly sets out the courts referred to as superior courts; whose provisions reads as follows:

“The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).”

15. The clause 2 courts referred to herein above are the Employment and Labour Relations Court and the Environment and Land Court.

16. It is very clear that the High Court is expressly forbidden from supervising any superior court by article 165 (7) of the Constitution. It is for this reason that this court lacks jurisdiction to entertain this application. It therefore follows that the submissions of both counsel that this court has jurisdiction to entertain the instant application or petition lacks merit and hereby dismiss those submissions.

17. Furthermore, there is a time limit within which to file applications and petitions that challenge alleged individual constitutional violations. Constitutional violations may be challenged during the hearing of a criminal appeal in the High Court or in the Court of Appeal or in the Supreme Court; and those appeals must have been admitted in those courts in accordance with the relevant provisions of the applicable law. For instance, a person convicted of a criminal offence in a subordinate court has to appeal within 14 days or such time as the High Court may allow upon application.

18. An aggrieved party may also challenge his conviction and sentence under article 50(6) of the 2016 Constitution of Kenya if there is new and compelling evidence that has become available.

19. The submissions of Mr Chebii that there is no time limit within which to challenge alleged constitutional violations is without merit and hereby dismiss it.

20. In the premises, I find that this application is incompetent as this court lacks jurisdiction to entertain it and it is hereby struck out.

RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT KABARNET THIS 29TH DAY OF JULY 2021.

J M BWONWONG'A

JUDGE

In the presence of:

Mr. Kemboi Court Assistant.

Applicant present in person.

Mr. Mong'are for the Respondent.