



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CRIMINAL APPLN. NO. 337 OF 2019

ASHMOND VISU OWINO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. In his chamber summons application filed in court on 23rd June 2019, the applicant, *Ashmond Visu Owino* approached this court seeking three substantive orders which I reproduce verbatim hereunder:

i. That the Hon court may be pleased to invoke section 362 of the CPC thus supplied with subordinate court proceedings for perusal and satisfaction.

ii. That this Hon court be pleased to make an order to vary the meted sentence on account of a critical medical condition and discount time spent in remand in pursuant to section 333 (2) of the CPC and section 35 of the PC.

iii. That the court be pleased to make any other order which it deems as fit and just.

2. In the grounds premising the application and in his supporting affidavit, the applicant averred that he was convicted and sentenced to death in Makadara Criminal Case No. 1967 of 2013; that the entire trial was unreasonably delayed with the result that he spent 6 years in remand custody; that after lodging his first appeal in the High Court, his death sentence was substituted with a sentence of ten years imprisonment on 13th February 2019; that his sentence should be reviewed by discounting the period he had spent in custody as the same was not factored in the sentence substituted by the High Court.

3. At the hearing, both the applicant and the respondent chose to prosecute the application by way of oral submissions. In his submissions, the applicant reiterated his prayer for sentence review urging me to order that the time he had spent in custody prior to his conviction and sentence should form part of his sentence; that the trial court failed to take that period into account when imposing sentence.

4. In her oral submissions in opposition to the application, learned prosecuting counsel *Ms Chege* urged me to note that as the applicant was convicted of the offence of robbery with violence and sentenced to death, *Section 333 (2)* of the *Criminal Procedure Code* on which the application was anchored was inapplicable in his case.

5. Counsel further submitted that the application lacked merit and ought to be dismissed since the appellant had lodged an appeal to the High Court against both conviction and sentence and though his appeal against conviction was dismissed, his appeal against sentence was allowed and the death sentence was substituted to 10 years' imprisonment; that when imposing the substituted sentence, the High Court (*Hon Kimaru, J*) considered the period the appellant had hitherto spent in custody.

6. In response, the applicant admitted as true the submissions made by *Ms Chege* regarding the results of his appeal but he nevertheless maintained his prayer for reduction of his sentence.

7. I have considered the application and the submissions made by both parties in support and in opposition thereof. I have also read the trial court's record and the judgment of *Hon. Kimaru, J* in HCR.A No. 36 of 2018.

8. I have confirmed from both records that indeed the applicant was convicted of the offence of robbery with violence contrary to *Section 296 (2)* of the *Penal Code* and was sentenced on 16th February 2018 to suffer death in accordance with the law. As he was aggrieved by his conviction and sentence, he proffered an appeal to this court being HCR.A No. 36 of 2018 which was heard and determined by *Kimaru J* on 13th March 2019. In his judgment, the Hon. Judge upheld the application's conviction but following the Supreme Court's decision in ***Francis Karioko Muruatetu & 5 Others V Republic, [2017] eKLR***, he set aside the death sentence and substituted it with a sentence of 10 years' imprisonment. When substituting the sentence, the Hon Judge stated as follows:

“... this court has taken into consideration the period that the appellant was in lawful custody both before his conviction and after his conviction by the trial court. ...”

9. In his application, the applicant has invoked this court’s supervisory jurisdiction over criminal proceedings in subordinate courts by way of revision. The revisional jurisdiction of this court is donated by *Section 362* as read with *Section 364* of the *Criminal Procedure Code*. *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.”

10. From the above statutory provision, it is abundantly clear that this court’s revisional jurisdiction can only be exercised over orders or decisions made by subordinate courts in criminal proceedings. The provision does not mandate the High Court to review decisions made by courts of concurrent jurisdiction or other superior courts. This position is fortified by *Article 165 (6)* of the *Constitution of Kenya 2010* which provides for this court’s supervisory jurisdiction in the following terms:

“(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.”

11. *Article 50 (2)* of the *Constitution* which guarantees the right to a fair trial also stipulates that:

“(2) Every accused person has the right to a fair trial, which includes the right—

(a)

(b)

(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.”

12. As noted above, both the *Constitution* and the *Criminal Procedure Code* do not give the High Court power to exercise supervisory jurisdiction over decisions made by courts of concurrent jurisdiction or other superior courts.

13. In *Samuel Kamau Macharia & Another V Kenya Commercial Bank*, the Supreme Court held that a court of law can only exercise jurisdiction conferred on it either by the *Constitution* or other written law or both; that a court should not arrogate to itself jurisdiction not conferred by the law or expand its jurisdiction through judicial craft.

14. In view of the foregoing, I find that the instant application is misconceived. Having benefited from a previous sentence review in this court, the applicant ought to have explored other remedies instead of coming back to the same court seeking orders the court had already granted. In his application, the applicant is in effect inviting this court to sit on appeal over a decision made by a court of concurrent jurisdiction which is not permissible in law. If the applicant was aggrieved by the decision of *Kimaru J* as he appears to be, he ought to have filed an appeal to the Court of Appeal instead of filing the instant application.

15. In the circumstances, I do not find any merit in the instant application and it is hereby dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY 2021.

C. W. GITHUA

JUDGE

In the presence of:

Applicant present

Ms Kimani holding brief for Ms Ndombi for the respondent

Ms Karwitha: Court Assistant