REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL REVISION CASE 135 OF 2019

HESBON KHAYIZI ALIZULULA .....APPLICANT

VERSUS

REPUBLIC .....RESPONDENT

RULING

The applicant **HESBON KHAYIZI ALIZULULA** has filed this application, seeking sentence review on 2.10.2020. The same is brought under section 333(2) of the Criminal Procedure Code. The applicant, in his submissions has relied heavily on the decision of the Supreme Court of Kenya in the case of ***Francis Karioko Muruatetu and Another Versus Republic (2017),*** commonly referred to as the ***Muruatetu*** case, basically on the need of the court to take into account the special factors of mitigations in passing sentence.

The applicant has also relied on the case of ***Ahmed Abolfathi Versus Republic (2016***) where it was held;

> ***"It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period allegedly spent in custody in the sentence that it metes out to the accused person …. The appellant's sentence of imprisonment to run from the date of his arrest on 19.6.2012.***

The applicant has gone ahead to plead for remorse and in the process also exposes his apologies to the victims and the society. He has also declared the courses he has undergone while in prison including carpentry and Bible studies. He states that he has been rehabilitated.

At the end of his submissions the applicant has urged for review of his sentenced and prayed that he is considered for a non-custodial sentence. At the same time, he pleads that the period he spent in custody be considered in his sentence.

The Respondent/state has opposed this application by submitting that the applicant was first convicted in Kibera, Criminal Case Sexual Offence 66/2013, and sentenced to serve 20 years' imprisonment. His appeal to the High Court, number criminal appeal 20/2016 was heard with the Hon. Justice Kimaru delivered the Judgment on 21.6.2018, in which his sentence was reduced to 15 years' imprisonment with effect from 30.11.2015, date of sentence of the lower court. That the court therefore heard his prayers and took same into account. That this court is therefore functus officio and this application ought to be dismissed.

I have considered this application and the submissions made both by the applicant and the state Respondent. As I see it, this application is on 2 separate and distinct limbs. I shall accordingly deal with the 2 limbs separate of each other.

The first limb of this application is based on the principles declared by the Supreme Court in the Muruatetu case. That the mandatory nature of the death sentence is unconstitutional. For our case, the mandatory nature of the sentence under section 8(1) and 8(4) of the Sexual Offences Act, No. 3 of 2006. Based on the finding in the Muruatetu case, the applicant has submitted that the court ought to have considered his mitigation and circumstance of his case along the perimeters of:-

i) Age of the offender

ii) Being a first offender

iii) Whether he pleaded guilty

iv) Character and record of the offender

v) Whether it is gender based offence

vi) Remorsefulness of the offender

vii) Possibility of reform

viii) Any other the court may consider relevant.

As already stated, the applicant has by this application raised additional mitigating factors. The question therefore whether the principles enumerated in the Muruatetu case can apply in favour of the applicant at this stage of the trial. Several factors are relevant in determining this.

First, I have perused the sentencing proceedings before the lower court of 30.11.2015. It is clear that the applicant was accorded the opportunity to mitigate. He duly mitigated and in the court noted the same.

Second, it is worth noting that the applicant, being aggrieved of the sentence, appealed to court. The Honourable Justice L. Kimaru, again took into consideration the evidence tendered before the trial court, including the mitigation of the applicant. In the Judgment of the Honourable Judge, the sentence on the applicant was reduced to 15 years' imprisonment, down from 20 years' imprisonment as ordered by the trial court.

Having been given the opportunity to mitigate and the same having been duly considered by both the trial court, and this court (Hon. Justice Kimaru). The sentenced meted out by this court on appeal is also proper and within the law. I am in the circumstances convinced that the sentence meted out against the applicant is proper and in line with the directions of the Supreme Court in the Muruatetu case. This ground in this application therefore has no merit and the same fails. I so find.

The 2nd ground raised by the applicant in this application is that under section 333(2) of the Criminal Procedure Code. that the period spent in custody awaiting trial ought to be accounted for in his sentence. The said section reads at the proviso as follows:-

"Provided that where the person sentenced under subsection (1) has prior to the sentence, been held in custody, the sentence shall take into account the period spent in custody."

I have considered the sentence of the court read out on 21.6.2018. It states specifically that the sentence is to run from the date of conviction and sentence before the trial court i.e 30.11.2015. The Honourable Judge clearly made a determination on this issue. I share concurrent jurisdiction with the Honourable Justice Kimaru. It is therefore improper for this court to reconsider a decision of the Honourable Judge. For lack of Jurisdiction, I refrain from interfering with the considered finding of the Honourable Judge.

The sum total is that this application of the applicant, Hezbon Khayizi Alizulula, filed herein on 2.10.2020 lacks merit. I accordingly dismiss it wholly. Ordered accordingly.

D. O. OGEMBO

JUDGE

29.9.2021.

Court:

Read out in open court (on-line) in the presence the applicant (Kamiti) and Mr. Chebii for the state.

D. O. OGEMBO

JUDGE

29.9.2021.