



REPUBLIC OF KENYA



**Mbuvi v Republic (Criminal Miscellaneous Application  
59 of 2020) [2021] KEHC 172 (KLR) (21 October 2021) (Ruling)**

Neutral citation: [2021] KEHC 172 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CRIMINAL MISCELLANEOUS APPLICATION 59 OF 2020**

**MW MUIGAI, J**

**OCTOBER 21, 2021**

**BETWEEN**

**JAMOCK KAMAKYA MBUVI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Applicant herein, together with another person were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code the particulars being that on the 18<sup>th</sup> day of September, 2011 at Simba Market, Wolwa Location in Makueni District within Makueni County jointly murdered Jackson Nzioka Mutuku.
2. In High Court Criminal Case No. 31 of 2012, the Applicant pleaded not guilty and the case proceeded to full hearing before this court whereby the Applicant chose to remain silent in his defense. Judgment was delivered by Hon Justice D.K. Kemei on 16<sup>th</sup> September 2019.
3. After hearing the evidence, this court found the both accused persons guilty of the offence of murder and convicted them accordingly. Upon hearing the advocates for the accused persons in mitigation, the prosecution response in respect of the mitigation, time spent by the accused persons on remand before conviction and considered the probation officers report, this court on 18<sup>th</sup> December, 2019 sentenced the Applicant to serve 23 years imprisonment from the date of conviction.

**RESENTENCING**

4. Aggrieved by the court sentence, vide the Chamber Summons filed on 5<sup>th</sup> June 2020, the Applicant sought review/revision of the sentence of 23 years imprisonment. According to the Applicant, he submitted that the sentence is too harsh and excessive.



5. The Applicant responded to Martin Mwongera averments whereby he averred that this court failed to consider Article 50(2) (p) in sentencing. According to the Applicant, this court pursuant to Article 165(3) (a) has unlimited original jurisdiction in criminal and civil matters and can review the legality of the sentence of 23 years and alter the same on review. He also placed reliance on Section 364 of the Criminal Procedure Code to assert that this court can exercise its discretion as per the power of the High Court on revision. He averred that the Chamber Summons lodged before this court is not an abuse of the court process.

#### APPLICANT'S SUBMISSIONS

6. The Applicant written submissions were filed on 19th February, 2021, the Applicant submitted that he appreciated the sentence imposed on him by this Court but in light of his age, 43 years old, the sentence was excessive.
7. According to the Applicant, he did not mitigate at the time he was called upon by this court to do so. He submitted that he did not know the importance of mitigation and therefore now pleads that he is greatly remorseful for committing the offence of murder. According to him, at the time of the trial the Applicant submitted that as was considered in the case of *DPP vs Betty Njoki Mureithi [2016]eKLR*,  
a Court can vary or review its own orders if new matters are brought to its attention that were not within the knowledge of an Applicant when the order sought to be varied was granted.
8. The Applicant deposed that he did not mitigate at the time he was called upon the Court to do so as he did not know the importance of mitigation and therefore now pleads that he is greatly remorseful for committing the offence of murder.
9. The Applicant submitted that although he participated in the unfortunate events that led to the deceased's death, he was not himself and could not think coherently as he was highly intoxicated from alcohol inhibition. According to him, at the time of committing the offence he was not himself and could not think coherently as he was highly intoxicated from alcohol inhibition. Reliance is placed on an inspiration writer Stuart Turton that 'Bars can't build better men and misery can only break what goodness remains'.
10. He relied on the case of Republic vs John Nganga Gacheru & Anor [2018] eKLR which considered influence of alcohol of drugs even though not raised as a defense or could diminish criminal culpability ought to be considered in sentencing.
11. On the sentence to be imposed, the Applicant placed reliance of the case of *Michael Kathewa vs. R [2018]eKLR* where the court took into account the Sentencing Policy Guidelines(2016) and the Supreme Court decision in Petition NO.15 of 2015 *Francis Karioko Muruatetu & Another vs Republic & 5 Others [2017] eKLR*. Further reliance is placed on the South African case of *Mbolongo Mbatha Samuel Vusi James case No. 170/2018*. This court is urged to consider the following regarding the Applicant;
- i. The Applicant is now aged 43 years and has matured enough to enable him make wise decisions and be of guidance to others to abstain from such behavioral practice.
  - ii. He has been rehabilitated by the prison and now reformed hence not a nuisance to the community and should be given a second chance of life.
  - iii. He is very remorseful and urged the court to exercise mercy and humanity.



iv. He was intoxicated hence unable to appreciate the consequence of his actions.

12. The Applicant has urged this court to find the time already served in custody from the date of the arrest on 17th September 2012 as envisaged in Section 333(2) of the CPC as sufficient punishment or in the alternative consider the Applicant's age to grant him non-custodial sentence to enable him serve the community or this court to grant him a sentence that is fair, just and reasonable in the circumstances in promoting reform, rehabilitation and transformation while in custody.

#### PROSECUTION RESPONSE

13. In opposition, the Prosecution Counsel Martin Mwongera in his Replying Affidavit sworn on 22<sup>nd</sup> June, 2020, averred that the Chamber Summons is ill advised, frivolous, and an abuse of the court process. He averred that the Applicant should appeal to the Court of Appeal hence this court should not interfere with the sentence but dismiss the Chamber Summons in entirety for lack of merit.

#### PROSECUTION SUBMISSIONS

14. On the Prosecutions part, it has been submitted that this court heard the Applicant's case and determined it substantively. According to the Prosecution, the Applicant should first exhaust his right of appeal to the Court of Appeal pursuant to Article 50 (2) (q) CoK 2010, where the court is in a position to scrutinize both the conviction and sentence imposed by this court.
15. According to the Prosecution, this court is therefore functus officio. Reliance is placed on the case of *Telkom Kenya Ltd vs. John Ochanda (Suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya Ltd) [2014] eKLR* and in *Jersey Evening Post Ltd vs. Al Thani [2002] JLR 542 at 550* cited by the Supreme Court in *Raila Odinga & 2 Others vs. IEBC & 3 Others [2013] eKLR*. The Prosecution prays that the application be dismissed.

#### DETERMINATION

16. I have considered the application, affidavits in opposition and in support as well as parties' respective written submissions. The question for determination would be whether this is a case that warrants the exercise of this court to revise the sentence imposed on the Applicant by this court.
17. The Applicant though not on appeal raised certain pertinent issues. The Applicant raised the issue that at the time of committing the offence he was not himself and could not think coherently as he was highly intoxicated from alcohol inhibition. This Court has perused the Trial Court's Proceedings and found that from 4<sup>th</sup> April 2018 when the Court gave Ruling on a case to answer, upto 12<sup>th</sup> June 2019, is when through his advocate on record informed the Court that he opted and elected to remain silent. The 1<sup>st</sup> Accused/Applicant reiterated the same position to the Court. Therefore, since the issue of intoxication was not raised during defense it cannot be considered at this stage as it is not a retrial or an appeal that is before this Court.
18. The Applicant submitted that he did not mitigate when called upon by court to do so. However, I note from the court record that on 16<sup>th</sup> October 2019, Mr. Langalanga advocate for the 1<sup>st</sup> Accused person and Applicant herein, made oral submissions in respect of mitigation on behalf of the Applicant. Hon. Kemei J. who was seized with this case, took into consideration the oral submissions made in respect of mitigation. The Probation Officer's report was also considered by the court during pre-sentence proceedings that culminated with the Sentence meted through Sentence Ruling of 18<sup>th</sup> December 2019.
19. It is submitted by the Applicant that this court under Section 364 of the CPC can exercise its discretion as per the power of the High Court on revision. Section 364 grants the High Court powers on revision



- to ‘proceedings in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge’ However, this court is of equal, concurrent and competent jurisdiction as the Trial Court that convicted and sentenced the Applicant and cannot revise the orders of the Court.
20. In the case of Muchemi J. in *George Gathuru Njoroge vs. Republic* [2021] eKLR where the Court considered Section 362 and 364 of CPC empowers the High Court to review the orders of the Trial Magistrate’s Court where a mistake, irregularity or illegality is found to have occurred or where such orders were given without jurisdiction. It follows therefore that these provisions are applicable to reviews from the Magistrate’s Court orders.
21. The Prosecution submitted that this court is *functus officio* and the proper forum would be an appeal to the Court of Appeal. Reliance is placed on the case of *Jersey Evening Post Ltd vs. Al Thani*[2002]JLR 542 at 550 where the court stated that:-
- “A court is *functus* when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court *functus*, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available.”
22. Through an advocate, the Applicant’s mitigation was considered by this court. I note that this court in arriving at the sentence considered the guidelines with regard to mitigating factors applicable in a re-hearing sentence for the conviction of a murder charge as set out in *Muruatetu’s case*(*supra*). The court took into account the period the Applicant spent in remand before conviction. This court having heard the Applicant and made its final sentence cannot rehear this matter. In my view this court is *functus officio*.
23. In the case of *Joseph Maburu alias Ayub vs. Republic* [2019] eKLR where Kiarie Waweru Kiarie J. stated that:-
- “Sentencing is a judicial exercise. Once a judge or a judicial officer has pronounced a sentence, he/she becomes *functus officio*. If the sentence is illegal or inappropriate the only court which can address it is the appellate one. Black’s Law Dictionary Tenth (10th) Edition describes defines sentence as:
- The judgment that a court formally pronounces after finding a criminal defendant guilty; the punishment imposed on a criminal wrongdoer.
- Remitting a matter to the trial court which had become *functus officio* after sentencing flies in the face of the doctrine of *functus officio*. It amounts to asking the trial court to clothe itself with the jurisdiction of an appellate court. This is an illegality.”
24. The Applicant has urged this court to find the time already served in custody from the date of the arrest on 17th September 2012 as envisaged in Section 333(2) of the CPC as sufficient punishment.
25. Article 50 2 (p) CoK 2010 prescribes;
- [that a person is entitled] to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing;



26. The Trial Court in its Ruling/Sentence of 18<sup>th</sup> December 2019 considered Francis Karioko Muruatetu & Anor vs R 2017 eKLR and considered all mitigating factors and report during pre- sentence proceedings. Reference was made to the Judiciary Sentencing Policy Guidelines with particular focus on Clause 23.7. on aggravating and mitigating circumstances, before/at the point the sentence was meted out. The Trial Court in its Ruling of 18<sup>th</sup> December 2019 stated in part as follows;

‘The 1<sup>st</sup> accused was arrested on 17.9.2012 and the record indicated that the 2<sup>nd</sup> Accused was arrested on 6.7.2013. Hence, the 1<sup>st</sup> Accused spent 7 years in remand before conviction and the 2<sup>nd</sup> Accused spent 6 years and 2 months before conviction which period [the Court] has taken into account in passing sentence against each convict.’

The Trial Court already complied with requirements of Section 333(2) of the CPC. This Court cannot do more or interfere with lawful and legal sentence.

27. Article 50 (q) CoK 2010, prescribes that a person is entitled if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

28. In the upshot, this Court lacks jurisdiction to review the sentence. The Chamber Summons is an abuse of the court process. It lacks merit and is hereby dismissed. [The Applicant is at liberty to lodge an appeal in the Court of Appeal under Section 379 CPC].

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 21<sup>ST</sup> DAY OF OCTOBER, 2021.**

**M.W. MUIGAI**

**JUDGE**

