REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

MISCELLANEOUS CRIMINAL APPLICATION NO. 11 OF 2020

KANUNI OLE NTUTU.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

1. The Applicant herein was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** in ***Naivasha High Court Criminal Case No. 10 of 2015 (formerly Nakuru High Court Criminal Case No. 32 of 2014)***. After a plea bargaining agreement, he pleaded guilty to a lesser charge of manslaughter and was consequently sentenced to twenty (20) years imprisonment on 29th July, 2015 by Hon. Meoli, J.

2. The Applicant has now approached this court vide a Notice of Motion dated 28th February 2020 brought under **Section 333 (1)** and **(2)** of the **Criminal Procedure Code**. He seeks for review of the said sentence to probation or acquittal.

3. The application is supported by the Applicant's Affidavit sworn on 5th March, 2020. The Applicant's case is that he engaged an advocate after conviction only to be informed that he had appealed out of time. He avers that he has served 9 years so far and has reformed to the extent that he was enlisted in the presidential pardon list but he does not how far that went. He also states that he has on several occasions requested the prison department to release him but they advised him to file the instant application. Lastly, he urges the court to grant the order sought in the interest of justice.

4. The Applicant filed written submissions on 9th November, 2021 in which he tendered a fresh mitigation and highlighted the skills he has acquired in the course of his rehabilitation journey in prison thus far. He also urged the court to consider the period that he spent in remand custody before he was sentenced as provided under **Section 333(2)** of the **Criminal Procedure Code**.

5. The application was also orally canvassed before this court on 9th November, 2021 by Ms. Maingi who represented the Respondent and the Appellant who appeared in person. Ms. Maingi submitted that the only recourse that the Applicant has is to appeal to the Court of Appeal as his mitigation as well as the probation report was duly considered.

6. In rejoinder, the Appellant reiterated his prayer for substitution of the sentence with a non-custodial one. He submitted that the death was unfortunate as the deceased was drunk and his children have been suffering since his incarceration.

7. The only issue for determination herein is whether the Application is merited. To begin with, the jurisdiction of this court is provided for under **Article 165** of the **Constitution** and includes unlimited original jurisdiction in criminal and civil matters; jurisdiction to enforce bill of rights; appellate jurisdiction; interpretive jurisdiction; any other jurisdiction, original or appellate conferred on it by any legislation; and 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. The said Article does not clothe this court with a jurisdiction to review a decision of a court of concurrent jurisdiction. Further, the revisionary jurisdiction of this court under **Sections 362 and 364** of the **Criminal Procedure Code** is only limited to proceedings from subordinate courts.

8. The sentence which the Applicant now seeks to review was imposed by a court that has concurrent jurisdiction with this court. That means that this court cannot therefore review the said sentence as doing so would amount to sitting on appeal against the decision of a court of concurrent jurisdiction which is unacceptable under the law. In my view, this court became *functus officio* the moment Hon. Meoli J. pronounced herself on the sentence and the only recourse that the Applicant was left with at that point was to move the Court of Appeal which is clothed with the jurisdiction to hear appeals from the High Court under **Article 164(3)** of the **Constitution** and **Section 379(1)** of the **Criminal Procedure Code**.

9. I find persuasion in the case of ***Joseph Maburu alias Ayub v Republic [2019] eKLR*** where the court 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 judgement 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."***

10. In any event, I have perused the court record and I note that when the Applicant pleaded guilty to manslaughter upon the plea bargain agreement, he was duly informed that he only reserved the right to appeal against the legality of the sentence which he is not challenging. In addition, it is evident from the record that the Applicant was given an opportunity to mitigate before being sentenced and the court took the same into consideration when imposing the sentence.

11. In the upshot, I find that the Applicant's application dated 28th February, 2020 lacks merit and is hereby dismissed. It is so ordered.

DATED AT NAIVASHA THIS 29TH DAY OF NOVEMBER, 2021.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of;

1. Applicant in person.

2. Ms. Maingi for the Respondent**.**