



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISCELLANEOUS APPLICATION NUMBER 100 OF 2018

PAUL MURIUKI KAROKIAPPLICANT

VERSUS

REPUBLIC..... RESPONDENT

RULING

1. The petitioner herein was charged, tried and found guilty of the offence of **Robbery with Violence Contrary to Section 296(2) of the Penal Code in Nakuru CMCRC no 590 of 2000**, consolidated with **Nakuru CMCRC no. 894 of 2000, Republic vs James Ndiritu Gichigo**. The case was tried by S. M. Muketi Senior Resident Magistrate (as she then was, now deceased). This offence was alleged to have been committed on 30th January 2000. The complainant was John Ng'ang'a Wachira and was robbed of various house hold goods including TV's, radios and clothing.
2. The petitioner was also charged with Robbery with Violence Contrary to Section 296(2) in **Nakuru CMCRC 589 of 2000** together with **James Nderitu Gichigo** and **Moses Ikinya Kamau** following consolidation of **NAKURU CMCRC no. 589 of 2000** with **NAKURU CMCRC no. 1143 of 2000** on 12th July 2000. The offence was alleged to have been committed on 27th February 2000 at Ngata Farm where motor vehicle registration no. KLU 235 and other items were stolen, and the complainant was John Ng'ang'a Wachira. The matter was heard by N. M. Kiriba Senior Resident Magistrate (as he then was).
3. In both cases the petitioner and his co-accused were found guilty and convicted and sentenced to death.
4. The case where the robbery happened on 27th February 2000 (CMCRC no. 589 of 2000) (Hon. Kiriba SRM) the petitioner and his co-accused filed separate appeals which were consolidated, heard and the appeal dismissed by Hon. *M. Apondi and L. Kimaru JJ* on 24th February 2006.
5. The two appellants then filed their appeal in Court of Appeal CRA no. 176 of 2006. This was heard by Hon. *Waki, Nambuye and Kiage JJAs*, who dismissed the appeal on 12th November 2015 upholding the conviction and sentence of death.
6. In the case where the robbery happened on 31st January 2000, (CMCRC 589 of 2000) (Hon S.M Muketi SRM) the petitioner and his co-accused filed High Court Criminal Appeals 191 and 192 of 2001 consolidated. The appeals were allowed, the conviction quashed and sentence set aside by Hon. *D. K. Maraga and W. Ouko JJ* (as they both were) on 26th May 2010.
7. The petitioner herein filed undated Notice of Motion on 30th May 2018 seeking orders;
 1. *THAT application be certified urgent and be heard on priority basis.*
 2. *THAT the honorable court be pleased to grant a re-hearing of the sentence in criminal case number 589 of 2000 at chief magistrate court Nakuru.*
 3. *THAT the honorable court be pleased to receive mitigation from the applicant herein for consideration of an appropriate sentence devoid of the mandatory death sentence which has since declared unconstitutional by supreme court of Kenya.*
 4. *THAT the honorable court be pleased to issue any other order it may deem fit for interest of justice.*
 5. *THAT the application is supported by the annexed affidavit of the applicant and further grounds will be adduced at the hearing of this application.*

8. Supported by his undated affidavit;

1. THAT I am a Kenyan male adult of sound mind and thus competent to swear this affidavit.
2. THAT I was the accused person in criminal case number 589 of 2000 at Nakuru Law Court.
3. THAT I was convicted and sentenced to suffer death for the offence of robbery with violence contrary to section 296(2) of the penal code.
4. THAT I lodged an appeal at high court Nakuru vide criminal appeal number 100 of 2002 which was dismissed on 24.02.2006.
5. THAT I further appealed before court of appeal at Nakuru under criminal appeal number 176/06 which was dismissed on 12.11.2015.
6. THAT the finding of the Supreme Court at Nairobi petition no. 15 of 2015 at Nairobi Francis Karioko Muruatetu and Wilson Thirimu Mwangi has since declared the mandatory nature of death sentence unconstitutional.
7. THAT the honorable court is bound by the decision of the Supreme Court under article 163(7) of the constitution.
8. THAT the order of the Supreme Court in the case of MURUATETU did not bar the courts below from conducting sentence review in already concluded capital cases.
9. THAT this honourable court has jurisdiction to hear re-sentencing and met out appropriate sentence in line with the recent decision in **WILLIAM KITTINY VS R (2018) ECLR.**
10. THAT this court will be discharging its constitutional obligation pursuant to article 20(3) (a) (b) of the constitution as read with the principles in MURUATETU and the guidelines relative active case monuments of cases in the magistrate court and high court as gazette in the gazette No. 1340 dated the 29th day of February 2016 by retired chief Justice Mutunga.
11. THAT I will be relying on the following law and authority in persuading this honorable court to conduct a sentence re-hearing.
 - (a) FRANCIS KARIOKO MURUATETU AND ANOTHER VS REPUBLIC (2017) KLR.
 - (b) JOHN NGANGA GACHERU AND ANOTHER VS REPUBLIC (2018) ECLR
12. THAT I the applicant is a pauper and unable to pay costs.
13. THAT the facts deponed herein above is true to the best of my knowledge belief and understanding.

9. Before that Notice of Motion could be heard, the petitioner, on 30th September 2019 filed Chamber Summons under Certificate of Urgency seeking orders:

1. THAT the honorable court be pleased to allow my prayers for amendments of the original petition no 100 of 2018 that was based on sentence rehearing.
2. THAT the honorable court be pleased to call the original trial records in Cr Case file no 590 of 2000 and 589 of 2000 CM's court Nakuru and the various judgments of High Court and Court of Appeal No. 191 of 2002 and of OB No. 21/23/2/2000 for perusal to enable the court to review and make its own findings.
3. THAT the honorable court has powers under article 50(2) (a) and article 165(3) (b) of the Constitution of Kenya (2010) and section 264 of the Criminal Procedure Code to hear and determine this matter.
4. THAT other grounds to be adduced in the sworn supporting affidavit of PAUL MURIUKI KAROKI (attached) among other grounds to be adduced during the hearing of this application.

In his supporting affidavit he deponed the following:

1. THAT I am Kenyan male adult of sound mind and thus competent to swear this affidavit.
2. THAT I pray to substitute the above petition with this present application based on article 50(2) (o) and (Q) of the Constitution of Kenya (2010) and Section 264 of the Criminal Procedure Code seeking for the court review of this matter.
3. THAT I was charged twice in one case comprising of the same facts and particulars see Cr Case No 589 of 2000 and 590 of 2000 CM's court Nakuru.

4. THAT my rights under article 50(2) of the Constitution of Kenya were violated.
5. THAT the trial court convicted me in both criminal cases vide CR case No 589 of 2000 and 590 of 2000 CM's court Nakuru and sentenced me to suffer death as the case were brought under section 296(2) of the Penal Code (robbery with violence).
6. THAT I pray to be present before the Hon court to illustrate to the court by producing proof of the hearing of this application.
 7. THAT I am a convict hence a pauper who cannot incur the costs of preparation of this application thus pray the same to be waived.
 8. THAT the facts deponed herein above is true to the best of my knowledge and understanding.

10. When the application came for hearing on 5th March 2020, the applicant was unrepresented. He submitted that he was relying on the documents he had filed; he Court of Appeal judgment in CoA CRA no. **176 of 2001**, the two high court judgments on appeal and the Lower Court judgments. He had also filed some form of submissions.

11. The application is premised on **Articles 50(2) (o) and (q)** and **Section 264 of the Criminal Procedure Code**.

12. **Article 50** is about the right to fair hearing, rights of an accused that constitute a fair trial.

50(2) (o) Provides for the right not be tried for an offence in respect of an act or omission for which the accused has previously been either acquitted or convicted.

50(2) (q) for the right, if convicted, to appeal to, or apply for review, by a higher court as prescribed by law.

I noted that Section 264 of the Criminal Procedure Code is repealed.

13. The petitioner's key argument is that he was charged twice on the same facts and particulars in **Nakuru CM CR Cases no. 589 of 2000 and 590 of 2000**, and in each case the trial court found him guilty, convicted and sentenced him to death.

14. In response Ms. Chelang'at prosecuting counsel argued the re-sentencing application the petitioner had abandoned. That the appellant had robbed the same family twice, on 31st January 2000 and 27th February 2000. She however brought out the fact that the petitioner was on death now as the Court of Appeal had confirmed his sentence in CoA CRA no.176 of 2006.

15. The issue then is: - **whether** the Applicant was tried for an offence he had already been tried in violation of **Article 50(2) (o) of the Constitution** and, **whether** this court can review the judgments of the lower court, its own judgments and that of the Court of Appeal.

On the first issue

16. From the foregoing it is demonstrated that the petitioner was charged in two separate files. The robberies were alleged to have been committed on different dates, on 31st January 2000 and 27th February 2000, against the same complainant. From the particulars of the charge sheets it is evident that the offences were committed on different dates, different items were stolen and the only constant was, the complainant. In each file the co accused were different.

17. Regarding the robbery of 31st January 2000 the High Court (*Maraga and Ouko JJs* as they then were) quashed the conviction. The petitioner picked certain pronouncements from that judgement, the fact that the learned judges therein analysed the OB entries regarding the two incidents, the petitioner's complaints that he was in custody on the 27th February 2000 and could not have committed the said robbery. The judges said;

"After serious considerations of the whole matter, we have reached the conclusion that the first Appellant's persistent complaint is not without basis. Having been arrested on 23.2.2000, he could not have been involved in the robbery of 27.2.2000 and found with the PW1's panga which was the basis of his conviction. The OB record relating to the suspects found at the accident scene on 27.2.2000 and the investigation diary of the same accident having mysteriously disappeared and no evidence having been adduced of the Appellants' treatment for the injuries they allegedly suffered in that accident, we are unable to accept PW4's testimony that the two Appellants in this case were found unconscious in that accident. As that allegation was the basis of the these two appellants' conviction in Nakuru Criminal Case No. 589 of 2001, we doubt if the Honourable Justices Muga Apondi and Luka Kimaru could have upheld their conviction in that case if the above OB details had been availed to them.

18. The Court of Appeal in CRA No.176 of 2006 took great issue with those pronouncements. Quoting the same passage from **HCRA 191 and 192 of 2001** consolidated the Court of Appeal – *Waki, Nambuye, Kiage JJA* said;

"The High Court in H.C.CRA No. 191 & 192 of 2001 expressed itself as follows:-

"Item 3 which is OB No. 21/23/2/2000 of Nakuru Police Station records the arrest of the first appellant, Paul Muriuki, on 23.2.2000. There is nothing to show that he was ever released thereafter. How then could he have been involved in the robbery of 27/2/2000....

After serious consideration of the whole matter, we have reached the conclusion that the first appellant's persistent complaint is not without basis. Having been arrested on 23.2.2000 he could not have been involved in the robbery of 27.2.2000..."

We are of the considered view that the High Court in H.C.CR. A No. 191 & 192 of 2001 was seized only of the appeal in relation to Criminal Case Number 590 of 2000. **The court had no jurisdiction to consider, delve or purport to pronounce itself on issues relating to Criminal Appeal No. 589 of 2000 which had been determined before another court of concurrent jurisdiction properly and fully seized of the matter.** As a general principle a court ought to limit its comments to matters relevant to the case and to its decision on the issues raised therein. That is the effect of this Court's decision in **SHEIK t/a HASA HAULIERS -vs - HIGHWAY CARRIERS LTD. [1982-88] KLR 306** which, though made in a civil matter, applies with equal force to all cases.

We find and hold that Maraga & Ouko, JJ. erred in purporting to make findings on the appellants' conviction in **Criminal Case No. 589 of 2000 and its being upheld on appeal when they were not seized of the evidence and full circumstances therein.** The pronouncement was a needless foray at a tangent way beyond their remit and served only to cause confusion and anxiety and to embarrass not only the learned Judges in the High Court appeal subject of this appeal but also potentially this Court.

Consequently, we find and hold that the decision of the High Court introduced as "additional evidence" was in respect of Criminal Case No. 590 of 2000 and has no bearing or effect on the appeal before us which emanates from Criminal Case No. 589 of 2000. Not that it would bind this Court. Moreover, as it was not a finding of guilt by a court of competent jurisdiction and therefore lacks the imprimatur of conclusiveness under Section 47A of the Evidence Act. **We further find that the High Court had no basis for making a finding that the appellants were in custody on the material day, that is, 27th February, 2000. Indeed, we note from the proceedings that the appellants' in their defences gave evidence to the effect that they were not in custody on the material day." (emphasis mine)**

On the second issue

19. Can this court review the judgments herein referred to as requested by the petitioner?

20. The Court of Appeal spoke. I cannot add or subtract from this, save to explain, that the Court of Appeal upheld the petitioner's conviction, in **Criminal Case Number 589 of 2000.** That means that the Court of Appeal upheld the finding of the lower court and those of the High Court, that the petitioner faced two separate trials for two separate incidents. Every other argument the petitioner has raised about the OB, about the decision of the **High Court in 191 and 192 of 2001**, or any argument attacking the integrity of the trials? Those matters were settled by the Court of Appeal, in Appeal no 176 of 2006 and would not be the subject of a review by this court.

21. Why?

22. The powers of review of this court are set out under **Article 165 (6) and (7) of the Constitution and Section 362 of the Criminal Procedure Code. It states:**

*(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.***

*(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before **any subordinate court or person, body or authority referred to in clause (6)**, and may make any order or give any direction it considers appropriate to ensure the fair administration of justice (emphasis mine)*

23. I suspect that the petitioner intended to rely on **Section 364 of the Criminal Procedure Code** on powers of the High Court on revision.

24. **Article 50(2) (q)** states: *(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.* It provides for appeal or review in accordance with the law. The law does not envisage a situation where the High Court sits on appeal of its own decision or review of the decision of the Court of Appeal. This court has the power to review the orders of the subordinate court in exercise of its supervisory powers. It cannot supervise itself, though it can correct errors on the face of the record, because upon pronouncement of the sentence, it is rendered *functus officio*. That is why **Article 50(2) (q)** speaks of a "higher court".

25. The petitioner may be justly aggrieved but this court is the wrong forum for this application.

26. I find therefor that record shows that he was tried on two different charges with different facts, and that has been settled by the Court of Appeal. Any application for review would have to be placed before that court and an appeal can only lie in a higher court.

27. I also find and hold that this court has no jurisdiction to sit on appeal of its own judgment, or review or revise a judgment of the Court of Appeal.

28. The petition therefore has no merit and is dismissed accordingly.

Dated, delivered and signed at Nakuru this 3rd day of August, 2020.

Mumbua Matheka

Judge

In the presence of VIA ZOOM

Court Assistant Martin

For state: Ms Wambui

Applicant: Present