REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION CASE NO.82 OF 2019

BYRON ROBERT OTIENO..... APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Byron Robert Otieno, was convicted of the offence **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The High Court (Lesiit J) held that the prosecution had established, to the required standard of proof beyond any reasonable doubt, that the Applicant did on 9th May 2013 at Kariobangi North, within Nairobi County kill Dennis Njenga Wambui (the deceased) with malice aforethought. The Applicant was sentenced to death in a manner provided by the law. Aggrieved by his conviction and sentence, the Applicant filed an Appeal to the Court of Appeal.

Upon considering the Applicant's appeal, the same was dismissed. The Court of Appeal held that:

> ***"In our view, the evidence adduced against the applicant was plain and straight forward. PW2 was an eye witness. He saw the applicant stab the deceased and he gave a detailed narration of what transpired both before and after the stabbing. Then there was the evidence of PW3, the deceased's mother. The deceased ran to his mother and told her he had been stabbed by "Byi". PW3 understood "Byi" to refer to the appellant, a friend to the deceased who often visited him at her (PW3's) home. In his defence, the appellant did not deny the altercation. He however seemed to say that he was acting in self defence. The evidence of PW2 and the dying declaration of the deceased was that it was the appellant who stabbed the deceased. The deceased had accompanied PW2 to a phone repairer whilst not armed. The knife belonged to the appellant. He removed it from his person and stabbed the deceased. We find that the evidence against the appellant was direct and overwhelming. It did not require further corroboration. The evidence was not contradictory and neither was it full of inconsistencies."***

The Court of Appeal then upheld the conviction and sentence.

That would have been the end of the matter. However, it appears that the Appellant was not satisfied with the decision of the Court of Appeal especially in relation to the sentence that was meted on him. He made an application to this court, invoking the Supreme Court decision of **Francis Karioko Muruatetu and another vs. Republic [2017] eKLR**, seeking to have the sentence that was confirmed by the Court of Appeal re-looked into. The Applicant's application is coached in form of mitigation. He told the court that he was remorseful and regretted the decision that led to the death of the deceased. He stated that at the time of the incident, he was a 20 year old, young and impressionable man. He pleaded with the court to consider the current status of his family who are suffering in his absence. He asked the court to give him a second chance at life. During the period of his incarceration, he had learnt his lesson and recognized the folly of his wayward behaviour. In essence, the Applicant pleaded with the court to consider a reduction of sentence.

Ms. Chege for the State opposed the application. She submitted that the Court of Appeal decision was rendered on 1st February 2020. This was a **Post-Muruatetu** decision. If the Applicant wanted his sentence to be reconsidered, he ought to have raised the issue in his appeal before the Court of Appeal. Having failed to do so, the applicant cannot come to the High Court to seek the reversal of a decision of a higher court. Learned prosecutor submitted that this court was *functus officio* and did not have jurisdiction to consider the Applicant's application. In the event the court was not persuaded by the above argument, learned counsel urged the court to find that the period that the Applicant has been in remand custody i.e. 6 years, was not sufficient punishment for the serious offence that the Applicant committed. The Application for resentencing ought to be dismissed.

This court has carefully considered the rival submission made by the parties to this application. It was clear to the court that the issue as to whether this court has jurisdiction to entertain this application is a pertinent one. The Supreme Court in **Francis Karioko Muruatetu vs. Republic [2017] eKLR** having declared mandatory death sentence to be unconstitutional, *inter alia*, on the basis that it denied a person who has been convicted to mitigate his sentence, directed those who had been adversely affected to make appropriate applications before the High Court for remedy. The Court of Appeal in **Jeff Mutunga Muliva vs. Republic [2019] eKLR** re-emphasized the critical role that the sentencing process plays in determination the sentence to be meted on an accused. The court held as follows:

> ***"The centrality of properly-conducted sentencing hearing assumes greater significance when considered in light of the Supreme Court's decision in Francis Karioko Muruatetu and Another vs. Republic [2017] eKLR where mandatory death sentences were declared unconstitutional. Thus, it not the case that a murder conviction must necessarily lead to the imposition of the sentence of death. The court's hand are no longer tied. Sentencing being a trial function, the proper order to make in this dismissed appeal is that the case be and is hereby remitted to the High Court for re-hearing in sentencing only consistent with the guidelines pronounce by the Supreme Court in the Muruatetu case (Supra). To that end, the case shall be mentioned before the Judge hearing Criminal cases at the High Court at Makueni…"***

This decision is however not entirely reflective of how the Court of Appeal deals with the issue of resentencing or sentencing when considering an appeal in light of the **Muruatetu** decision (Supra). In some cases, the Court of Appeal has resentenced Appellants, after specifically citing the Supreme Court decision in the **Muruatetu** case. An example of these cases are **Jared Koiti Injiri vs. Republic [2018] eKLR** and **Christopher Ochieng vs. R [2018] eKLR.** It is important to point out that all these decisions were rendered by the Court of Appeal while considering appeals from decisions that were rendered by the High Court before the Supreme Court rendered itself in the **Muruatetu** decision. The appeals were considered by the Court of Appeal after the **Muruatetu** decision had been pronounced by the Supreme Court.

In the present application, it was clear to this court that Ms. Chege, the Learned prosecutor has a point when she submits that the Applicant **SHOULD** have raise the issue of his sentence when he presented the appeal before the Court of Appeal. It was evident that the Applicant **DID NOT** raise the issue of the suitability of his sentence in light of the Supreme Court's decision in the **Muruatetu** case. That being the case, this court agrees with Ms. Chege that this court lacks jurisdiction to relook into the issue of the sentence of the Applicant when the Court of Appeal has pronounced itself of the issue. The Court of Appeal, being a court superior to the High Court, cannot have its decision subjected to review by an inferior court.

In the premises therefore, this court holds that the Applicant's application lacks merit since it has been filed before a court that lacks the requisite jurisdiction to consider his plea to be resentenced. This court advises the Applicant to file an appeal before the Court of Appeal, so that the issue as to whether the High Court has jurisdiction to consider an application whose Appeal on both conviction and sentence has already been considered by the Court of Appeal. This is more so in the circumstance where the Applicant was aware that he could invoke the **Muruatetu** case before the Court of Appeal with a view to have his sentence re-looked.

In the premise therefore, the Application herein cannot be allowed. It is hereby dismissed. It is so ordered.

DATE AT NAIROBI THIS 29TH DAY SEPTEMBER 2020.

HON. L. KIMARU

JUDGE