

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

CRIMINAL APPLICATION NO. 68 OF 2019

PETER MUSYOKA HARUN.....APPLICANT

-VERSUS-

REPUBLIC.....PROSECUTOR

RULING

1. The Applicant **PETER MUSYOKA HARUN** brought a Notice of Motion filed on 24.4.2019 seeking a resentence hearing. The application is under *inter alia* Article 50(2)(Q) of the constitution and based grounds in his supporting affidavit that he was convicted of murder and appealed to the Court of Appeal whereupon the appeal was dismissed and has thus sought a review under Article 50 (2) (p) (q) of the Constitution. The court directed that the matter be canvassed vide written submissions.

2. The petitioner/applicant submitted that he was entitled to a resentence hearing. He submitted that he was remorseful and the record speaks to the fact that while in prison he attained several skills as per the certificates presented before the court. The state opposed the application and submitted that this court is functus officio hence the application should be directed to the Court of Appeal.

3. I have considered the application. The issues for determination are whether the court has jurisdiction to review a conviction and whether the applicant is entitled to resentencing. The application is brought under **Article 50 (2) (p) and (q)** of the Constitution which states that the accused person has a right:

(p) 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; and

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

4. The right to resentencing under the above provisions are a principle of fair trial and also are subject to the law and more specifically the supreme law of the land.

5. Under the mandatory terms couched in the above provisions, right to resentencing that is allowed under Article 50(p) is permitted if the prescribed punishment had changed before sentencing. From the available record and from the provisions of Article 50(q) the court has no jurisdiction to entertain the application. The jurisdiction to do so is vested with the Court of Appeal and this court cannot purport to exercise powers that it is not vested with. In the case of **Suleiman Shabhal vs Independent Electoral and Boundaries Commission & 3 Others {2014} eKLR**, court observed that "it is an established principle of law that the relief sought ought to be granted cautiously and sparingly, most judiciously and ensuring the supremacy of the constitution is not eroded.

6. The applicant had been tried by this court in the murder case where he was convicted and that he had moved to the higher court namely the Court of Appeal. The applicant cannot come directly to this court for resentencing by bypassing the Court of Appeal. He should first approach the said court which has power to review the sentence or direct him to come to this court for resentencing. The applicant has not presented any such order or directions from the said court for compliance.

7. The upshot of the foregoing is that the applicant's application filed on 24.4.2019 lacks merit and is dismissed.

It is so ordered.

Dated and delivered at Machakos this 23rd day of November, 2020.

D. K. Kemei

Judge