REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL REVIEW NO. 12 OF 2020

ABIUD MUCHIRI ALEX.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

A. Introduction

1. The Applicant moved this court vide an application dated 14/02/2020 seeking for orders that the sentence imposed upon him be revised downwards and in doing so the court do consider giving him non-custodial sentence.

2. The background of the application was that the applicant was convicted for the offence of robbery with violence contrary to Section 296(2) of the Penal code in Siakago Criminal Case No. 674 of 2011and was sentenced to death. He then appealed to the High Court in HCCRA No 32 of 2013 and to Court of Appeal in Criminal Appeal No. 21 of 2014 and both appeals were dismissed. The applicant proceeded to file an application for resentencing pursuant to the Supreme Court Muruatetu Petition being Embu High Court Petition No. 5 of 2018. The petition was allowed by reviewing the sentence of death to twenty (20) years imprisonment. It is this resentencing orders by the High Court which aggrieved the applicant and gave rise to this application.

3. The applicant's case is that he has been in prison custody for nine (9) years awaiting hearing and determination of his appeals in the superior courts. He states that he has reformed and urges this court to consider the time he had spent in custody prior to sentencing under Section 333(2) of the Criminal Procedure Code.

4. At the hearing of the petition, the applicant canvassed the application by way of written submissions while the respondent made oral arguments in response. The applicant in his submissions reiterated his position in the application that he had exhausted all the avenues of appeal and had further benefitted under Supreme Court **Muruatetu decision**. However, he submitted, the instant application was brought under Section 3332(2) of the Criminal Procedure Code seeking consideration of the period he spent in custody before sentencing by the trial court.

5. Ms. Mati for the respondent opposed the application and submitted that the application was misconceived as the sentence had already been reviewed in Application No. 5 of 2018 to twenty (20) years. She thus prayed that the application be struck out for lack of merit. In rebuttal, the applicant submitted that the instant application was different from the one he had earlier filed being Petition 5 of 2018 since the instant application was for consideration of his sentence pursuant to Section 333(2) of the Criminal Procedure Code.

B. Issues for determination

6. I have considered the petition herein and the submissions by the parties herein. In my opinion, the main issue for determination is whether the appeal is whether the instant application is merited.

C. Analysis of the law and determination

7. The prayers of the applicant herein is that the time he spent in custody be taken into account pursuant to the provisions of **Section 333(2) of the Criminal Procedure Code**. The said section provides that: -

> ***"Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.***
>
> ***Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody (emphasis mine)."***

8. This duty is further buttressed under clauses 7.10 and 7.11 of the Judiciary Sentencing Policy Guidelines and in the cases of **Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR** and **Bethwel Wilson Kibor vs. Republic [2009] eKLR)].**

9. It is therefore clear that it is mandatory that the period which an accused has been held in custody prior to being sentenced ought to be taken into account by the trial court in meting out sentence unless it is hindered by other provisions of the law.

10. I have perused the court record herein and confirm that it is indeed correct that upon the conviction and the sentence the applicant appealed to the High Court and to the Court of Appeal and that the two appeals were dismissed and the death sentence upheld. Generally, under the doctrine of precedents, the High Court cannot review decisions of the Court of Appeal as it is a superior court under the hierarchy of court structure as provided for under the Constitution.

11. However, this court can review the said decision of the Court of Appeal pursuant to the resentencing jurisdiction as was bestowed to it by the Supreme Court in **Francis Karioko Muruatetu& Another v Republic [2017] eKLR** where the Court of Appeal has upheld a decision by its inferior court imposing a mandatory minimum sentence. It is pursuant to this jurisdiction that this court reviewed the sentence in Petition No. 5 of 2018 from death to twenty (20) years imprisonment. This is the sentence that the applicant applies to be reviewed. The question which ought to be determined is whether this court can review its own decision.

12. It is trite law that a court of law can only exercise jurisdiction as conferred upon it by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. As I have indicated, the sentence which the applicant wishes to have revised was passed by this court upon application for resentencing under the principles of the Muruatetu case (supra). As such the applicant is basically seeking that this court to review its own decision regarding sentence of twenty (20) years imprisonment and further invoke the provisions of Section 333(2) of the Criminal Procedure Code.

13. The jurisdiction of this court is provided for under Article 165 and pursuant to that article, this court has *unlimited original jurisdiction in criminal and civil matters; jurisdiction to enforce bill of rights; appellate jurisdiction; jurisdiction to interpret the Constitution and supervisory jurisdiction over subordinate courts* and ***any other jurisdiction, original or appellate, conferred on it by legislation***. In my opinion, this court in the said petition in resentencing considered all the issues in relation to the matters before it and came up with the sentence of twenty (20) years imprisonment. The court noted that the applicant had served seven (7) years in prison since the date of conviction and as a result of which his sentence was subsequently reviewed under the **Muratetu decision**. The applicant will now only serve the remaining twelve (12) which may be further reduced by remission that may be given by the Commissioner of Prisons under Section 46 of the Prison's Act.

14. As such it is my opinion that this court is bereft of jurisdiction to entertain the application herein as the same is tantamount to review its own orders for resentencing. In my considered view, the only time this court can review its own decision is in exercise of the resentencing jurisdiction pursuant to **Muruatetu's decision.**

15. From the application, the Applicant cited Sections 362 and 364 of the Criminal Procedure Code as being some of the provisions under which the application was brought. However, under the said provisions, this court can only exercise revisionary jurisdiction over the sentence and/or proceedings of a subordinate courts for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of the subordinate court in issue and which was not the case herein. Section 362 and 364 are not applicable to the facts of this application since the applicant seeks to review the decision of the High Court.

16. It is my considered opinion that this court lacks jurisdiction to revise its own orders regarding sentence.

17. The application is incompetent and it is hereby struck out.

18. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 19TH DAY OF NOVEMBER, 2020.

F. MUCHEMI

JUDGE