REPUPLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CRIMINAL APPLICATION NO. 183 OF 2019

LESIIT, J

DOMINIC SHIKORA..... 1ST APPLICANT

JUSTUS KHAKAYI..... 2ND APPLICANT

EDWIN MWAKA MAGULI ..... 3RD APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULINGON APPLICATION FOR REVIEW OF SENTENCE.

1. The Applicants in this Miscellaneous Criminal Application are **DOMINIC SHIKORA, JUSTUS KHAKAYI and EDWIN MWAKA MAGULI, the** 1st, 2nd and 3rd Applicants respectively. They had been charged together in one count of **murder** contrary to **section 203** of the Penal Code.

2. The three Applicants were convicted by R. Korir, J of a reduced charge of **manslaughter** contrary to **section 202** of the **Penal Code**, on 19th April 2018, after a full trial.

3. The trial judge was transferred before she could pass the sentence. This court therefore took the mitigation of the Applicants given on their behalf by their counsel. After considering the mitigation, I passed the sentence on the Applicants on 12th June, 2018. I sentenced the Applicants to 7 years imprisonment each.

4. They have come to this court by way of a chamber summons, under **Article 50(2)(q)** of **Constitution**. They have filed typed mitigation and some have annexed certificates they have obtained since their imprisonment. The chamber summons by each of the Applicants are similar. They seek prayers as follows:

a. That this court be pleased to make an order for the review of imposed sentence.

b. …

c. That this court be pleased to make an order to call upon the subordinate court proceedings for perusal and satisfaction

d. …

e. That this court be pleased to invoke section 333(2) of the CPC, hence time spent in remand.

f. That this court be pleased to invoke section 35 of the Penal Code.

5. I have considered the application, the grounds upon which each of the chamber summons application is premised, together with the Applicants' submissions by way of mitigation which they urged in open court, in addition to those filed. I have also considered the submission by the State in which the learned Prosecution Counsel left the matter for the determination of the court. In addition, I have had an occasion to peruse the record of the proceedings.

6. **Article 50 (2) (q)** of the **Constitution** prescribes as follows:

> **" Every accused person has a right to a fair trial, which includes the right -**
>
> **(q) if convicted, to appeal to, or apply for review by a higher court as prescribed by law."**

7. The Applicants have invoked a constitutional provision to buttress their applications before this court. That provision empowers accused persons convicted of an offence to either appeal or apply for review to a court that is of a higher jurisdiction to the one that concluded their case.

8. The Applicants were tried by the high court. The court that can hear their appeal or review is the Court of Appeal. They have sought a review of the sentence, and have asked in their prayers that this court should ask the subordinate court which heard their case to submit the proceedings so that this court can satisfy itself.

9. The Applicants are misled as their application for review of sentence has been made to the same court which heard them. The power to call for subordinate court records is exercised by the high court calling for proceedings of the magistrates' court under **section 362** to **367** of the **CPC**. The high court has no power to call for its own record for purposes of review as envisaged under **chapter IX** of the **CPC**.

10. **Section 379** of the **CPC** provides that a person convicted in a trial held by the high court may appeal to the Court of Appeal. There is no provision for the high court to hear appeals from itself, or to review its own sentence.

11. There is new jurisdiction for re-sentencing which has come about following the Supreme Court judgment in the case of **Muruatetu and another vs. Republic SC Consolidated Petitions Nos. 16 and 16 of 2015**. That court directed that where courts passed mandatory sentences where the court's discretion was curtailed should re-sentence the convicted persons afresh after hearing them on mitigation. Even if that was the jurisdiction the Applicants were seeking to invoke, their applications would still not help them. This is because the Applicants' were sentenced, not to a mandatory set sentence but to an imprisonment term for an offence which does not call for a mandatory sentence. The application does not therefore fall under that category of cases. Besides, the court heard each of the Applicants in mitigation before they were sentenced. It can be said that the sentence passed was in compliance with the cited Supreme Court decision, even though the offence did not call for a mandatory sentence.

12. I find that the Applicants applications are incompetent, in all the circumstances of the case. I confirmed from each of them that they had not exercised their right of appeal to the Court of Appeal in this matter. What the Applicants should do is file an appeal to the Court of Appeal, and urge all those issues that they conversed before me, as that is the correct court which has the power to entertain them, everything being equal.

13. In the result, having considered these consolidated applications I find them incompetent for the reasons given herein above. The applications are dismissed in their entirety, with no orders as to costs.

DELIVERED AT NAIROBI THIS 29th DAY OF AUGUST, 2019.

LESIIT, J

JUDGE