REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

PETITION NO. 07 OF 2019

DAVID NGASURA NYAMONGO................................PETITIONER

=VRS=

REPUBLIC..RESPONDENT

JUDGEMENT

On 12th October 2018 this court sentenced the petitioner to thirty (30) years imprisonment for the offence of murder. He is by the petition filed herein on 9th April 2019 seeking a review of that sentence on the grounds that his plea in mitigation was ignored, that this court did not when sentencing him consider his age; that his trial dragged on for eight years which was not taken into account and that his judgement was also delayed for a whole year without any explanation at all. He has in support of the petition relied on the cases of **Douglas Muthaura Ntobwi Meru HC Misc. Criminal Application No. 4 of 2015, John Nganga Gacharu & others v Republic Kiambu HCCR 81 of 2001** and **Robert Okello v Republic Kisumu Petition No. 63 of 2018.**

At the hearing of the petition which proceeded orally the petitioner submitted that he was the accused in Nyamira HCCR No. 69 of 2015 where he was sentenced to thirty (30) years imprisonment which sentence he wanted this court to reduce. He submitted that he did not have a problem with the conviction and so he did not appeal to the Court of Appeal. He pleaded with this court to consider his health, his age and the fact that he had suffered a lot in remand and hence reduce the sentence accordingly. He supplied to this court a copy of the judgement and assured it that he had not filed a similar petition in the High Court at Kisii.

The petition is opposed. Counsel for the respondent submitted that the issues raised by the petitioner were a preserve of the appellate court and stated that the thirty (30) years imprisonment took into account the **Francis Muruatetu & Another v Republic [2017] eKLR** case and the petitioner's mitigation. Counsel contended that the petitioner cannot come to mitigate again and more importantly that this court cannot review its own sentence as it has no power to do so.

In reply the petitioner submitted that whereas he could go to the Court of Appeal that court does not consider the time spent in remand. He contended that this was the proper court to deal with that period.

I have considered the petition and the rival submissions very carefully. Before I make a determination let me first set the record straight. It is indeed true that the trial of the petitioner took an inordinately long period. This however can be explained on the ground that when he was charged – 18th October 2010 – there was only one High Court in this region. That court was sitting in Kisii and there were few judges but very many cases. It is precisely for that reason that the Judicial Service Commission established High Courts in Migori, Homa Bay and then Nyamira in 2015 and the cases can now be heard expeditiously. The appellant's case was transferred to Nyamira the offence having been committed within this jurisdiction. The case had already begun in Kisii but after the transfer it picked up in earnest and by 17th October 2017 the hearing had been concluded and only submissions remained to be filed. Then the now petitioner's co-accused escaped from custody and the trial was put on hold. The trial judge had also retired and the station was to remain without a judge for almost a year. However, when it was eventually decided to proceed, without the petitioner's co-accused, a judgement date was given and within three months the same was delivered. All this was communicated to the petitioner personally during the court attendances and it is surprising to hear him state that no explanation was given for the delay.

On the merits of the petition, my finding is that this court has no power to grant the orders sought, namely to reduce the sentence imposed. First, it has no jurisdiction to sit on appeal over its own decision. If as the petitioner states the sentence is excessive then his recourse lies in an appeal to the Court of Appeal. His contention that he chose not to appeal but instead to bring this petition is far from the truth as a Notice of Appeal has already be lodged in that court and the same communicated to this court. The petitioner has an inalienable right to exhaust his right of appeal and that cannot be taken away from him so that bringing this petition should not be regarded as a privilege but a right.

The second reason is that this court has no power to grant the petition because this court does not have jurisdiction to review its own decisions either. The remedy for review lies with a higher court as provided in **Article 50 (2) (q) of the Constitution** which states: -

“50. Fair hearing

(2) Every accused person has the 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.”

In this case the higher court as prescribed by the law is the Court of Appeal.

In the petition the petitioner contends that the sentence did not take into account his age and the period he spent in remand. That again is far from the truth. In sentencing him this court stated: -

> **“……. The accused has been in custody since 2010 and taking that period into account I sentence him to serve thirty (30) years imprisonment.”**

As this court has no jurisdiction to grant the prayers sought the petition herein is dismissed. It is so ordered.

Dated, signed and delivered in Nyamira this 26th day of September 2019.

E. N. MAINA

JUDGE