

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.32 OF 2015

BENSON NJIHIA WANJIRU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Benson Njihia Wanjiru was charged and convicted of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. He was sentenced to death by the trial court (Mombasa Chief Magistrate’s Court). His appeal against conviction and sentence to the High Court (Mombasa) was dismissed. Not deterred, the Applicant filed an appeal to the Court of Appeal. His appeal on conviction was dismissed by the Court of Appeal on 28th July 2006. His appeal on sentence was however allowed. The death sentence was set aside and substituted by an order of that court directing that the Applicant be detained at the President’s pleasure. This was after the court had determined that the Applicant was a minor at the time the offence was committed.

The Applicant has now moved this court by invoking **Articles 48, 51(1) and 53(1)(f)** of the **Constitution** seeking to have the decision of the Court of Appeal directing that he serves detention at the President’s pleasure revised and an appropriate sentence be meted in the circumstances. The Applicant averred that at the time of his conviction, he was a minor and therefore he should not have been sentenced to serve a custodial sentence. He reiterated that his application was not an appeal but rather he was invoking this court’s constitutional jurisdiction with a view to determining whether the sentence that he has served so far was proportionate taking into account that he was a child at the time the offence was committed. He deponed that his rights as a “*child*” were infringed when he was tried and convicted as an adult. He was also detained in custody pending trial as an adult. After his conviction, he has been in prison as an adult. He urged the court to take into consideration the fact that he had already served thirteen (13) years in prison at the time the application was heard.

At the hearing of the application, the Applicant presented to the court written submission in support of his application. He also presented to the court decided cases in support of his case. He also relied on the **Convention on the Rights of the Child** in support of his case. In his submission, the Applicant stated that under **Section 191(1)** of the **Children Act**, he should not have been sentenced to serve a custodial sentence in prison because at the time he was a “*child*”. It was his case that being a “*child*” at the time, his right to fair treatment by being sentenced to serve a proportionate sentence had been infringed. He invoked the **Convention of the Rights of the Child** and the **African Charter on the Rights and Welfare of the Child** in support of his argument that no child should be imprisoned after conviction. He reiterated that **Section 191(1)** of the **Children Act** specifically prohibited a child from being sent to prison after conviction. Since he was no longer a child, the Applicant pleaded with the court to take into account the said infringement of his rights as a child and direct that he serves an proportionate sentence. In that regard, the Applicant relied on the High Court decision of **Sebastian Okwero Mrefu –Vs- Republic [2014] eKLR** where the court, taking into consideration the entire circumstances of the case, converted a death sentence to a custodial sentence. In essence, the Applicant submitted that this court has jurisdiction to remedy a wrong which had been inflicted upon him by exercising its constitutional jurisdiction of review.

The application was opposed. The Respondent filed grounds in opposition to the application. The

Respondent contends that the application is an abuse of the due process of the court. The court was *functus officio*. The Applicant's case was heard and determined by the then highest court in the land. This court therefore lacks jurisdiction to entertain the application. The Respondent argued that the issue of the Applicant's age was considered and determined by the Court of Appeal. Ms. Nyauncho for the State reiterated these grounds when she made her oral submission before court.

This court has carefully considered the facts of this application. The first hurdle the Applicant must overcome is the question whether this court has jurisdiction to entertain the application. The Applicant argued that this application did not seek to invoke the appellate jurisdiction of this court but rather it strictly sought to invoke this court's revisionary jurisdiction in regard to the question of sentence. On the other hand, the Respondent is of the firm view that the issue regarding the Applicant's sentence was water under the bridge. This is because the Court of Appeal has already rendered its determination on the question of sentence. It is the Respondent's case that this court is *functus officio*.

This court has considered this argument on the question of jurisdiction. Whereas this court has sympathy with the position that the Applicant finds himself in, this court agrees with the Respondent that this court has no jurisdiction to entertain the Applicant's application. The Court of Appeal rendered itself on the question of sentence of the Applicant, although it appears that the sentence may have been rendered without taking into consideration the provisions of **Section 191(1)** of the **Children Act**. This court cannot remedy that failure by the Court of Appeal to take cognizance of that section of the law. The only court that can remedy that apparent oversight is the Court of Appeal. The Applicant is at liberty to pursue that issue with the Court of Appeal. The Applicant can also take the route of directly appealing to the President through the Power of Mercy Committee. The authorities that the Applicant cited in support of his application were rendered by courts of concurrent jurisdiction to this court when they were properly entertaining appeals which had been lodged in the said courts from the decisions of the magistrate's courts. The Applicant's case is different.

It is clear from the foregoing that the application by the Applicant cannot be allowed. This court lacks jurisdiction to hear the application. The Applicant's remedy lies elsewhere. The application is dismissed. It is so ordered.

DATED AT NAIROBI THIS 25TH DAY OF MAY 2016

L. KIMARU

JUDGE