Nasoro v Republic (Petition E010 of 2023) [2025] KEHC 94 (KLR) (17 January 2025) (Judgment)

Neutral citation: [2025] KEHC 94 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

PETITION E010 OF 2023

M THANDE, J

JANUARY 17, 2025

BETWEEN

ALFRED CHIRIBA NASORO ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Applicant herein was charged and convicted of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code in Malindi HCCR No. 36 of 2010 and sentenced to death. Aggrieved by the said conviction and sentence, the Applicant preferred an appeal in the Court of Appeal namely Civil Appeal No. 41 of 2016. The appeal was dismissed and both the conviction and sentence upheld.

2. The Applicant has come back to this Court vide a Petition, seeking review of his sentence. He contends that he was sentenced to the mandatory sentenced as prescribed under Section 204 of the Penal Code without consideration of his mitigation. Further that the Supreme Court in Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) (Petition 15 & 16 of 2015 (Consolidated)) [2017] KESC 2 (KLR) (14 December 2017) (Judgment) (Muruatetu case) declared the application of mandatory death sentence unconstitutional and allowed those aggrieved to lodge re-sentencing applications in the High Court. He further argued that mandatory sentences are discriminatory in nature contrary to Article 27 of *the Constitution*, because they give differential treatment to a convict under the impugned provisions distinct from those convicted of other offences which do not impose mandatory sentences.

3. The Applicant urged the Court to review his sentence and grant him a lenient sentence informed by his mitigation and the unique facts and circumstances of his case.

4. b ed that although the trial Judge did not impose the death sentence but the determinate sentence of 30 years, he failed to consider the report of the World Health Organisation on human life expectancy

which currently stands at 64.4 years for male persons. He claimed that given his current age of 38 years, a sentence of 30 years is excessive as it would go beyond life expectancy. He relied on the case of Ali Abdalla Mwanza v Republic [2018] eKLR where the Court of Appeal reduced a sentence of 40 years to 20 years. He further stated that he has reformed urged the Court to give him another chance considering that he is a first offender. The Applicant further seeks that the period spent in custody pending trial be taken into account, pursuant to Section 333(2) of the Criminal Procedure Code.

6. The Respondent chose not to respond to the Application and left the matter to the Court.

7. At the very outset, this Court must determine is whether it has jurisdiction to entertain the Application before it. The law, is that this Court may only exercise that jurisdiction which has been conferred upon it by *the Constitution*, statute or both. This was succinctly stated by the Supreme Court in the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, as follows:

> A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.

8. This Court derives its jurisdiction principally from Article 165(3) of *the Constitution* which confers upon it unlimited original jurisdiction in criminal and civil matters. The provision clearly delineates and demarcates what the Court can and cannot do. The jurisdiction of this Court includes supervisory powers. By dint of Article 165(6) however, this Court cannot supervise superior courts. It provides:

> The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

9. The superior courts in the court system in Kenya are listed in Article 162 (1) of *the Constitution*, which provides:

> The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).

10. It is common ground that it is this Court that both convicted and sentenced the Applicant. Additionally, the Applicant unsuccessfully appealed to the Court of Appeal which upheld both the conviction and sentence. What he now seeks is that this Court reviews its own decision and that of the Court of Appeal, a jurisdiction it does not have. In this regard, I associate with the holding in John Kagunda Kariuki v Republic [2019] eKLR, where Ngugi, J, (as he then was) stated:

> 10. In the present case, the Applicant's appeal has already been heard by the High Court. He cannot return to the High Court for a review of the sentence imposed. He is at liberty to make an argument for reduced sentence at the Court of Appeal.

11. At the helm of the Court system in Kenya is the Supreme Court followed by the Court of Appeal. This Court falls below the Court of Appeal. After the Applicant was convicted by this Court, he appealed to the Court of Appeal and the same was dismissed. That decision of the Court of Appeal is binding on this Court. In light of this, to entertain this matter in respect of which the Court of Appeal has

pronounced itself, no matter how compelling the arguments placed before it, would be to violate the constitutional judicial hierarchical norm.

12. In the case of Kenya Hotel Properties Limited v Attorney General & 5 others [2020] eKLR, where the Court of Appeal stated:

> As we stated at the beginning of this judgment this appeal is disturbing. The multiplicity of endless proceedings around the same dispute does not bode well for the administration of justice...Its latest rising is the most baffling of all because the petition filed before the High Court sought strange prayers in that the Court there was being asked to annul, strike out, reverse or rescind a judgment of this Court, its elder sibling. In a system of law that is hierarchical in order, such as ours is, it seems to us that such a thing is quite plainly unheard of and for reasons far greater than sibling rivalry. *The Constitution* itself clearly delineates and demarcates what the High Court can and cannot do. One of things it cannot do by virtue of Article 165(6) is supervise superior courts.
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> Moreover, under Article 164(3) of *the Constitution*, this Court has jurisdiction to hear and determine appeals from the High Court. Its decisions are binding on the High Court and all courts equal and inferior to it. It is therefore quite unthinkable that the High Court could make the orders the appellant sought as against a decision of this Court to quash or annul them, or that it could purport to direct this Court to re-open and re-hear a concluded appeal. We consider this to be a matter of first principles so that the appellant's submission that the issue pits supremacy of the courts against citizens' enjoyment of fundamental rights is really misconceived because rights can only be adjudicated upon by properly authorized courts. Any declaration by a court that has no jurisdiction is itself a nullity and amounts to nothing. It matters not how strongly a court feels about a matter, or how impassioned it may feel or how motivated it may be to correct a perceived wrong; without jurisdiction it would be embarking on a hopeless adventure to nowhere.

13. This finding of the Court of Appeal was affirmed by the Supreme Court in Kenya Hotel Properties Limited *v Attorney General & 5 others (Petition 16 of 2020*) [2022] KESC 62 (KLR) (Civ) (7 October 2022) (Judgment), which stated:

> 55. We need to emphasize and reiterate that Mutunga CJ did not in any way state that the High Court may in any way, purport to overturn or order final decisions issued by higher courts than itself to start de novo, especially on appeals that have been finally concluded by the highest court at the time. Furthermore, the concurrence by Mutunga SCJ cannot override the judgment by the majority, despite what the appellant chooses to submit. As was thus rightly noted by the High Court and the Court of Appeal, the rule of thumb is that superior courts cannot grant orders to reopen or review decisions of their peers of equal and competent jurisdiction much less those court higher than themselves.

14. I am duly guided by the cited decisions. The Petitioner's appeal was heard and determined by the Court of Appeal, a fact that the Applicant admits. He cannot therefore invite this Court to tread on forbidden ground by reopening the matter to rehear the same. This would defy the constitutional hierarchy of the courts. This Court lacks jurisdiction to supervise a superior court. It cannot therefore entertain a matter, leave alone grant orders therein, to reopen or review the decisions of its peers of equal and competent jurisdiction, much less those of a court higher than itself.

15. In light of the foregoing, the Court finds that the Petition herein is incompetent and the same is hereby struck out.

DATED, SIGNED AND DELIVERED IN MALINDI THIS 17TH DAY OF JANUARY 2025

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M. THANDE

JUDGE