Leshan v Republic (Criminal Revision E024 of 2024)
[2025] KEHC 2444 (KLR) (Crim) (6 February 2025) (Ruling)

Neutral citation: [2025] KEHC 2444 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYANDARUA

CRIMINAL

CRIMINAL REVISION E024 OF 2024

CM KARIUKI, J

FEBRUARY 6, 2025

BETWEEN

MICHAEL LENKILILI LESHAN ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Applicant herein was charged with the offense of robbery with violence contrary to Section 295 as read with section 296 of the *Criminal Procedure Code* in the Chief Magistrate's Court in Engineer in Criminal Case Number 224 of 2019.

2. The Applicant denied the charges as preferred against him by the prosecution and the matter was set down full trial hearing. The prosecution called a total of 10 witnesses whereas the defense side gave unsworn defense and did not call any witness. After trial, the Applicant was found guilty of the charges and was consequently convicted and sentenced to thirty years (30) imprisonment.

3. Being utterly dissatisfied and aggrieved by the decision of the trial court he lodged an appeal before High Court Naivasha registered as Criminal Appeal No E025 of 2021 which was found lacking merit and consequently dismissed.

4. The Applicant has now moved to this court requesting that this honourable court be pleased to re-hear and review his sentence due to his poor health.

5. Applicant's Submissions

6. On jurisdiction, reliance was placed on the case of Boniface Waweru v Mary Njeri and another H.C. Misc. Application No 639 of 2005 (unreported), *Lilian "S v Caltex Oil Kenya Ltd* (1989) KLR, *Samuel Kamau Macharia and another v Kenya Commercial Bank Ltd and 2 others*, Application No 2 of 2011,

and Article 165(5)(a)(b) of the *Constitution*. It was stated that this court has jurisdiction to hear and determine my application.

7. The Applicant submitted that the *Constitution* of Kenya in its letter and spirit moves or rather is moving away from retributive justice to restorative justice. He stated that he has been in custody for almost six years which is an enough deterrence sentence as the court considers that his health condition continues to deteriorate. He stated that he also fruitfully engaged in vocational training and has acquired viable skills. He has also undergone counselling sessions i.e. theological courses which have led to a positive change in behavior. This change of behavior has earned him a recommendation by the prison authorities. Reliance was placed on Sentencing guidelines as enumerated in the *Sentencing Policy Guidelines*, 2016 and Mitigation factors as eructated in the case law of Francis Karioko Muruatetu 2017, Article 50 (2)(p) of the *Constitution*

8. It was asserted that the Applicant has maintained a harmonious relationship his fellow inmates and members of staff and he has undergone a lot of transformation and is now a totally reformed person. He stated that he is utterly remorseful for the offence he committed and deeply regrets the circumstances that led to the same. Further, he has always maintained close contact with his parents who have undergone unintended and irreparable pain since my incarceration. That his parents and siblings are more than willing to accept him in the society if given a second chance and so is his community.

9. The Applicant averred that the period that he spent in custody during trial was however not considered while sentencing contrary to the provisions of the Section 333 and Section 333(2) of the *Criminal Procedure Code*.

10. The Applicant prayed that this court: -

    I. Find this application meritorious and allow it in its totality.

    II. Issue an order that my sentence be reduced to the least severe sentence in accordance with the provisions of article (50) (2) of the *Constitution* in the interest of justice.

    III. Issue an order directing that the Applicant herein be set at liberty due to health conditions that continue to deteriorate.

    IV. Invoke the provisions of section 333 and section 333(2) of the *Criminal Procedure Code*.

    V. Find that the time served is appropriate

11. Respondent's Submissions was not in file at the time of drafting this verdict.

12. Analysis and Determination

13. Michael Lenkilili Leshan, the Applicant herein was charged with defilement contrary to Section 295 as read with section 296 of the *Criminal Procedure Code* . The Applicant was found guilty and was sentenced to serve to thirty years (30) imprisonment.

14. The Applicant was aggrieved by the said conviction and sentence and filed an appeal to the High Court. The appeal was duly heard. Consecutively, the appeal was dismissed.

15. The Applicant has now filed the present application before this court in which he seeks resentencing pursuant to the decisions in *Francis Karioko Muruatetu & another v R* (2017) eKLR and the Sentencing guidelines as enumerated in the *Sentencing Policy Guidelines*. The Applicant has returned to this same Court which has already dismissed his Appeal, asking for the same sentence imposed by the Magistrates Court to be reduced. In my considered view and finding, the Applicant's resource is

to appeal at the Court of Appeal, not come back to this same High Court. This Court cannot sit on appeal on a decision of its own.

16. From the import of the *functus officio* doctrine this court cannot consider the application for resentencing. Once a court becomes *functus officio*, the only orders it can grant are review orders which are an exception to the *functus officio* doctrine. The Supreme Court in *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others* [2013] eKLR stated that:

> " A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available."

17. Moreover, in the case of *Joseph Maburu alias Ayub v Republic* [2019] eKLR, Kiarie Waweru J held as follows:

> " Sentencing is a judicial exercise. Once a judge or a judicial officer has pronounced a sentence, he/she becomes *functus officio*. If the sentence is illegal or inappropriate the only court which can address it is the appellate one. Black's Law Dictionary Tenth (10th) Edition describes defines sentence as:
>
> "The judgement that a court formally pronounces after finding a criminal defendant guilty; the punishment imposed on a criminal wrongdoer."
>
> Remitting a matter to the trial court which had become *functus officio* after sentencing flies in the face of the doctrine of *functus officio*. It amounts to asking the trial court to clothe itself with the jurisdiction of an appellate court. This is an illegality."

18. In the result the Applicant's application filed on 9th April 2024 lacks merit. Thus, the makes the orders;

    i. The same is dismissed.

    ii. Orders apply to revision E077/2024, E027 of 2024.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 6TH DAY OF FEBRUARY, 2025

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CHARLES KARIUKI

JUDGE