Ndehi v Republic (Miscellaneous Criminal Application E194 of 2024)
[2025] KEHC 2845 (KLR) (Crim) (6 March 2025) (Ruling)

Neutral citation: [2025] KEHC 2845 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

MISCELLANEOUS CRIMINAL APPLICATION E194 OF 2024

AB MWAMUYE, J

MARCH 6, 2025

BETWEEN

JAMES IRUNGU NDEHI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Applicant herein was charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The Trial court convicted and sentenced him to death. Being dissatisfied with the decision, he appealed both the conviction and sentence to the Court of Appeal in Nairobi in Criminal Appeal No. 121 of 2020, which appeal was dismissed in its entirety on 07.07.2023. The death sentence was however commuted to life imprisonment by His Excellency the President.

2. He has now approached this Court for resentencing and asked this court to take into account that he is now reformed through the rehabilitation programs offered in prison.

3. The Applicant filed submissions dated 28th November, 2024 where he stated that in light of the case of Francis Karioko Muruatetu & Another vs Republic [2017] eKLR , mandatory maximum sentence was declared unconstitutional thus convicts of murder including himself, are at liberty to file an application for reopening their cases for determination on the role of mitigation for sentence hearing.

4. He further stated that he was arrested in the year 2009 at the age of 63 years and has spent 15 years in custody. He further stated that health issues have cropped up due to his old age making it difficult to cope with the harsh prison life.

5. The Applicant submitted that he has taken full advantage of the rehabilitative programs offered in the correctional facility and since acquired grade 3 certificate in shoe making and several Bible related

courses elevating him to block elder. He further urged this Honourable Court to consider the period he has been incarcerated for 15 years as enough punishment for rehabilitation and reformation for the offence committed.

6. The Respondents did not file any response or written submissions to counter the application.

7. The first issue that this court must determine is whether this court has the jurisdiction to entertain the Application. The law is that this court may only exercise that jurisdiction which has been conferred upon it by *the Constitution*, statute or both.

8. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR the Supreme Court succinctly stated:

> "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."

9. 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 which include the Supreme Court, the Court of Appeal and the High Court.

10. It is common ground that the Applicant has unsuccessfully appealed to the Court of Appeal. What he now seeks is that this court reviews its own decision and that if the Court of Appeal, a jurisdiction it does not have.

11. I associate with the holding in John Kagunda Kariuki v Republic [2019] eKLR where Ngugi J, (as he then was) stated:

> "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."

12. The hierarchy of the court system in Kenya is the Supreme Court followed by the Court of Appeal then the High Court. After the Applicant's appeal in this Court was dismissed, 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.

13. I am guided by the decision of the Court of Appeal in the case of Kenya Hotel Properties Limited v Attorney General & 5 others [2020] eKLR where it 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 thing it cannot do by virtue of Article 165 (6) is supervise superior courts.

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 right 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.

14. 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 courts higher than themselves."

15. The Applicant's appeal was heard and determined by the Court of Appeal, a fact that the Appellant admits. He cannot therefore invite this court to tread on forbidden ground by reopening the matter thus defying the constitutional hierarchy of the courts.

16. In order to apply for re-trial, Article 50 (6) of *the Constitution* provides:

> "(6) A person who is convicted of a criminal offence may petition the High Court for a new trial if-
>
> a. A person's appeal if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and
>
> b. new and compelling evidence has become available.

17. For one to invoke the above provision, two conditions must be fulfilled. The first condition is that the Applicant's appeal must have been dismissed by the highest court to which the Applicant is entitled to

appeal or that the Applicant did not appeal within the time allowed for appeal and the second condition is that new and compelling factual evidence has become available.

18. The Appellant herein has not met the conditions set out in Article 50(6). Although he has shown that he has exhausted the course of appeal, to the highest Court with jurisdiction to try the matter, being the Court of Appeal, he has not demonstrated the availability of new evidence which could not be availed during trial which if adduced would probably have led to a different verdict. This Honourable court cannot therefore once again entertain an application for revision of sentence with respect to the same matter.

19. Having regard to the reasoning above and having found that this Court lacks jurisdiction to entertain this Application, I find that I must down my tools. (See: Owners of the Motor Vessel "Lilian S" vs Caltex Oil (Kenya) Ltd [1989] eKLR

20. Consequently, I find that this Application lacks merit and I therefore dismiss it, parties to bear their own costs. File closed accordingly.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 6TH DAY OF MARCH, 2025.

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BAHATI MWAMUYE

JUDGE