Kelian v Republic (Criminal Revision E006 of 2023)
[2024] KEHC 938 (KLR) (7 February 2024) (Judgment)

Neutral citation: [2024] KEHC 938 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KILGORIS

CRIMINAL REVISION E006 OF 2023

F GIKONYO, J

FEBRUARY 7, 2024

BETWEEN

JEREMIAH OLOSHIRO KELIAN ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(Revision from Original Conviction and Sentence in Kilgoris PMCR No 253 of 2012, Kisii HCCRA No 28 of 2013, and Kisii HCCR Rev 145 of 2019)

JUDGMENT

Sentence review

1. Before the court is an undated application for sentence review filed on July 10, 2021. The applicant is seeking for reduction of the sentence of 20 years to a lesser jail term.

Brief background of this case

2. The applicant was charged, convicted, and sentenced to 20 years imprisonment for the offence of attempted murder contrary to section 220 (a) of the *Penal Code* in Kilgoris PMCR No. 253 of 2012.

3. The applicant filed his first appeal, Kisii HCCRA No. 28 of 2013, which was dismissed on October 30, 2015. See *Jeremiah Oloshiro Kelian v Republic* [2015] eKLR

4. The applicant applied for a review of the sentence *vide* Kisii HC Criminal Revision No. 145 of 2019 whereby the application was declined. The applicant stated that he appealed to the Court of Appeal but has not provided evidence of the outcome of the said appeal.

5. The applicant was again dissatisfied with the decision of the Court of Appeal and has lodged the present revision application.

6. The applicant orally submitted that he has served a substantial part of the sentence and he was arrested when he was young.

7. Mr. Okeyo prosecution counsel orally objected to the application arguing that no reason has been adduced to impeach the sentence and as such the applicant should apply for presidential amnesty.

Analysis and Determination

8. An application for review of sentence was declined by the High court at Kisii. The applicant also intimated to the court that he has filed an appeal in the Court of Appeal. He, however, did not provide evidence of the outcome of the appeal. He has now applied for review of sentence before this court.

Abuse of office

9. Following the Muruatetu decisional law, Courts have received all manner of applications for resentencing. Some are merited. Others are purely contrived abuse of process. And, courts have lamented of the fragrant abuse of process of the court in the name of resentencing.

10. Every time the court encounter such application as this, rings high a work of court in *Baragoi Rotiken v R* [2022] eKLR on state of affairs in court following Muruatetu decisional law, as follows: -

> Great flood came...
>
> Following the landmark decisional law in Muruatetu case, the motion of cases in which convicted persons sought for reduced or lesser sentences on the basis of the principle laid down therein, resembled the tides rising in the sea. Each successive wave rushes forward, breaks, and rolls back; but the great flood is steadily coming in. At the initial glance, the waters seem retiring; so did the applications. When you look a little longer on the waters, you think the waves were rushing capriciously to and from; so was with the applications. But, we kept looking over time, and saw the sea mark disappear one after another; minimum and mandatory sentences in *Sexual Offences Act* and other offences constantly dissipated on the basis of the principle laid down in the Muruatetu decisional law. There was now no illusion that the applications will not cease coming. It also became clear to the precedent-setting court-the Supreme Court of the Republic of Kenya- of the general direction in which the ocean is moving- and that it was no longer a mere recoil of a wave which regularly follows every advance, but a great general ebb of monumental proportions; a great flood steadily coming in.
>
> Turning the tide
>
> Extraordinary determination was necessary to stop the tide causing the flood. On 6/7/2021; in an attempt to turn and stem down the tides, the Supreme Court, hemmed application of Muruatetu decisional law to sentences in murder cases only. The Supreme Court reiterated that its decision in the Muruatetu case did not invalidate mandatory sentences or minimum sentences in the *Penal Code*, the *Sexual Offences Act* or any other statute, and accordingly cautioned as follows: -
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> "It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the *Constitution*".

A sigh of relief; applications founded on Muruatetu decision, but which did not relate to section 204 of the *Penal Code*, were now deemed to be incompetent, and were consequently dismissed. However, the

repose was ephemeral; the directions were not a foreclosure of the applicant's right to seek appropriate remedy or reduced sentence through the appellate process or on the basis of the *Constitution*. Now, courts are again faced with a great number of applications or petitions based on the *Constitution* in which arguments similar to those in Muruatetu case are being advanced in respect of all sentences which deny court discretion in sentencing. The application before me is one of such type. Aluta continua....

11. But, now the great flood is coming inland with dangerous debris. Inmates are using resentencing to abuse the process of the court and defeat the course of justice.

    1. Its time a signage is erected: 'Liberal access to justice does not mean access to chaos and indiscipline' (The Supreme Court of India in the case of *D Nyandeo Sabaji Nail and another v Mrs Pranya Prakash Khadekar and others* (Petition Nos 25331-33 of 2015, Dr D Y Chandrachud J).

12. A pointed illustration of one such abuse was expressed in the case of *Ogwoka v Republic* (Criminal Appeal 171 of 2018) [2023] KECA 564 (KLR) (12 May 2023) (Judgment)) Kiage, Tuiyott & Ngugi, JJA as follows;

> " 9. Needless to say, the appellant's hopes are a chimera. The procedural posture of the case, as it stands presently, is that no proper appeal is before us. The appellant functionally aborted his appeal against both conviction and sentence by electing, un- procedurally – we must add - to file a petition for resentencing at the High Court while this appeal was still pending before us. For all intents and purposes, the appeal that was pending before us was extinguished. Similarly, the appellant's hope that he could somehow turn this appeal against his conviction and sentence as affirmed by the High Court in Kisii High Court Criminal Appeal No. 16 of 2015 into an appeal against the sentence (of imprisonment for thirty years) which was imposed by the High Court following his petition for resentencing in Kisii High Court Constitution Petition (Application) No. 24 of 2019 is misguided. Indeed, all the appellant can get from this Court is a firm admonition for abusing the court process by simultaneously pursuing two actions in two layers of the court system. His appeal herein stands dismissed. If the appellant wishes to appeal against the sentence imposed in Kisii High Court Constitution Petition (Application) No. 24 of 2019 (the resentencing judgment), he must file a separate appeal against that decision – if, indeed, he can persuade the Court that the decision is appealable on its facts and, of course, after overcoming the procedural hurdle of being out of time.
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> 10. Beyond dismissing this appeal, it is necessary, for good order, for this Court to pen a few words by way of guidance to the High Court (and appellants) who may find themselves in the same situation as the appellant in the future. These guidelines are necessary because of the real potential for judicial embarrassment and abuse of court which may occur where a shrewd, perhaps dishonest, inmate simultaneously pursues both an appeal before this Court and a petition or application for resentencing before the High Court. Such an inmate would end up with two judicial pronouncements from two layers of the court system; and the outcome (especially on sentence) may potentially conflict. Such an eventuality would not only cause judicial embarrassment but

would amount to an abuse of the judicial process by allowing an inmate to "game" the system with the hope of cherry picking the outcome that best favours him.

11. In order to guard against this in future cases, we propose the following four guidelines:

    a. Where an appellant has filed an appeal to this Court, it is improper for that same appellant to pursue an application or petition for resentencing at the High Court. Such an appellant would have to make an election to either withdraw his appeal to this Court or to institute a petition or application for resentencing action.

    b. Where a litigant has filed both an appeal to this Court and a petition or application for resentencing at the High Court, the proper course is for the High Court to stay the petition or application before it and have the litigant come before this Court to either progress his appeal or to withdraw it.

    c. In those cases where the High Court has ascertained that the inmate had filed an appeal to this Court, the High Court should only proceed with the petition or application for resentencing once it has confirmed vide an order of this Court that the appeal which was pending before this Court has been withdrawn.

    d. As a matter of good practice, when a High Court is moved by an inmate through a petition or application for resentencing, it should request for certification from the Court of Appeal registry serving the area where the High Court is located attesting that the inmate in question does not have an appeal arising from the same trial pending before the Court of Appeal. The High Court should only proceed with the hearing of the petition or application for resentencing upon certification by the Court of Appeal registry that the inmate does not have an appeal pending before this Court or certification that any such appeal has been withdrawn.

12. Needless to say, these guidelines hold, mutatis mutandis, in respect to a Muruatetu resentencing petition to a Subordinate Court and a related appeal from the Subordinate Court to the High Court.

13. Following these guidelines will streamline the somewhat confounding spaghetti-like procedural maze that has characterized the appellate criminal justice system since the Muruatetu Case was handed down by the Supreme Court. This will not only economize scarce judicial resources but also forestall the erosion of the credibility of the judicial system which might result if inmates are incentivized to pursue multiple avenues in different courts which might result in potentially contradictory sentences.

14. Turning to the appeal before us, we now formally dismiss it."

13. In the circumstances of this case- resentencing was declined by this court and he has a pending appeal in the Court of Appeal- the application before the court is utter abuse of process of the court.

14. And, as Dr D Y Chandrachud J (supra) warned: -

> 'This Court must view with disfavour any attempt by a litigant to abuse the process. The sanctity of the judicial process will be seriously eroded if such attempts are not dealt with firmly.'

15. The application herein is dismissed.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 7TH DAY OF FEBRUARY, 2024.

.....

Hon. F. Gikonyo M.

Judge

In the presence of:

C/A – Mr. Leken

Applicant - Present

Mr. Moranga for DPP – Present