Kipshan v Republic (Criminal Petition E007 of 2022)
[2024] KEHC 2173 (KLR) (6 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2173 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KILGORIS

CRIMINAL PETITION E007 OF 2022

F GIKONYO, J

MARCH 6, 2024

BETWEEN

MONEI KIPSHAN ..... PETITIONER

AND

REPUBLIC ..... RESPONDENT

(Revision from Original Conviction and Sentence in Kilgoris SPMCR No. 676 of 2015, Kisii HC Misc Criminal Application No 4 of 2020)

JUDGMENT

Sentence review

1. In the undated application, the petitioner is seeking for review of his sentence.

2. The application is based on the grounds that the mandatory nature of the sentence is inhumane and excessive and that as such the petitioner's rights under Articles 27(1)(2) and 50(2)(p) of *the Constitution* have been violated.

3. The application is expressed to be brought under articles 25, 27(1)(2)(b)(6),24,165(3)(b)(d), 159(2)(a)of *the Constitution*, section 333(2) of the *CPC* and the judiciary sentencing policy guidelines.

Brief background of this case

4. The petitioner was charged with incest contrary to section 20(1) of the *Sexual Offences Act*. He was also charged with an alternative charge of Indecent Act contrary to section 11 (1) of the *Sexual Offences Act*. The applicant was found culpable and convicted by the trial court and sentenced to 20 years imprisonment.

5. The petitioner appealed on both conviction and sentence at the High Court at Kisii and his conviction was upheld while the sentence was enhanced to life imprisonment.

6. Following the judgment by the High Court at Kisii, the petitioner filed a second appeal before the Court of Appeal. His appeal was considered and found to be meritorious on the issue of sentence and consequently, the sentence by the High Court was set aside and they restored the 20-year sentence imposed by the trial court.

7. The petitioner filed an application seeking an order for retrial (resentencing) vide Kisii HC Misc Criminal Application No 4 of 2020. The petitioner's application was dismissed for failing to meet the conditions of Article 50 (6) of *the Constitution*. See *Monei Kipshan v Republic [2021]* eKLR.

8. The petitioner orally submitted that he is 65 years old, reformed, and a sole breadwinner. He urged this court to reduce his sentence and give him a more lenient sentence.

9. Mr. Okeyo prosecution counsel submitted that no reason has been adduced to warrant interference with the sentence.

Analysis And Determination

10. The application herein is aimed at reviewing the sentence which had been reviewed by the Court of Appeal. A similar application was also dismissed by the High Court at Kisii.

Abuse of process

11. In the case of Ogwoka v Republic (Criminal Appeal 171 of 2018) [2023] KECA 564 (KLR) (12 May 2023) (Judgment Kiage, Tuiyott & Ngugi, JJA) noted 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."

12. The petitioner filed a second appeal whereby the high court's decision was set aside and the petitioner sentenced to 20 years. He then moved to Kisii High Court seeking retrial and resentencing. His application was dismissed.

13. From the history of this matter, the petitioner is bent on abusing the court process in seeking a resentence in this court which dismissed his earlier petition for resentence. The Court of Appeal dealt with the question of sentence with finality. Any subsequent resentencing application-unless permitted in law- to this court is abuse of process.

14. The only appropriate action is for this court to swiftly remove the abuse. Accordingly, the application herein is dismissed.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 6TH DAY OF MARCH , 2024.

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HON. F. GIKONYO M.

JUDGE

In the presence of:

C/A – Mr. Leken

Mr. Okeyo for DPP - Present

Applicant - Present