Ogwoka v Republic (Criminal Revision E029 of 2022)
[2024] KEHC 2170 (KLR) (6 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2170 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KILGORIS

CRIMINAL REVISION E029 OF 2022

F GIKONYO, J

MARCH 6, 2024

BETWEEN

DANIEL NYAMUSWA OGWOKA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(Revision from Original Conviction and Sentence in Kilgoris PMCR No. 946 of 2011, Kisii HCCRA NO. 16 of 2015, Kisii HC Const. Pet. Appl. No. 24 of 2019 and Court of Appeal at Kisumu Criminal Appeal 171 of 2018)

JUDGMENT

Sentence review

1. In an undated application filed on 20.07.2022, the applicant is seeking for reduction of the sentence of 30 years to a lesser jail term.

2. The application is expressed to be brought under articles 19(1), 21(1), 22(4), 23(3)(a), 24,25(c), 27(1)(2),28, 29(c), 48, 49(g), 50(2), 159(1)(2)(a)(b) (c), 163(7), and 151(1)(2) of the *Constitution*.

Brief background of this case

3. The applicant was charged, convicted, and sentenced to life for the offence of Defilement Contrary to Section 8(1) (2) of the *Sexual Offences Act* No. 3 of 2006 in Kilgoris PMCR No. 946 of 2011.

4. The applicant filed his first appeal, Kisii HCCRA No. 16 of 2015, which was dismissed on 15.09.2015. See *Daniel Nyamuswa Ogwoka v Republic* [2016] eKLR.

5. The applicant applied sentence re-hearing vide Kisii HC Const. Pet. Appl. No. 24 of 2019 wherein the life sentence was set aside and the applicant was sentenced to serve (thirty) 30 years' imprisonment

from the date of sentence by the trial court on 24.10.2012. See *Daniel Nyamuswa Ogwoka v Republic* [2020] eKLR.

6. The applicant filed a second appeal, Court of Appeal Kisumu CRA No. 171 of 2018, which was also dismissed. See *Ogwoka v Republic* (Criminal Appeal 171 of 2018) [2023] KECA 564 (KLR) (12 May 2023) (Judgment)

7. The applicant has now filed the present revision application before this court.

8. The applicant orally submitted that he is 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 orally objected to the application arguing that this court has no jurisdiction.

Analysis and Determination

Abuse of process

10. It is about this applicant that, the Court of Appeal in its judgment in the second appeal by the applicant herein (*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.
>
> 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."

11. Despite the foregoing findings and observations about this applicant, he has the audacity to come to this court for further re-sentencing. The applicant has terribly abused the court process.

12. These abuses are the unintended consequences of application of the principle set in the Muruatetu decision, which this court likens to 'Muruatetu great flood coming inland with dangerous debris.'

13. There is absolute need to stem down these kinds of abuses of court process. The Directions by the Court of Appeal will no doubt go a long way to curbing this fragrant abuse of court process by inmates.

14. The revelations in the Court of Appeal case should also prompt digging of statistics by the Judiciary of similar or identical abuses, not only to establish the number of cases where such abuse of process has occurred, but also the nature of the abuses and whether they were realized. It will also help in the making of policy as well as judicial decisions to deal with the abuse. Will further inform the need and type of ingenious methods and possibilities within the CTS, e-filing system and case monitoring systems to raise an alert of the possibility of abuse of process especially where filings relate to the same party. The court administration should be able to check out and evaluate the alerts.

15. This court has had encounter with real contrived scheme to defeat justice, whereby an inmate it re-sentenced to 30 years imprisonment, subsequently, and without making full disclosure, sough and secured another resentencing to 20 years from another High Court. The court discovered the scheme when the co-accused sought to rely on the latter decision to seek similar lighter sentence.

16. Nonetheless, appropriate measures were taken and the subsequent re-sentencing was set aside for it had been procured through deceit and fraud.

17. It bears repeating that, appropriate Systems, protocols and regulations on resentencing should be the saving grace rather than the blessing of luck as was in the case under discussion.

18. Without much ado, the application herein is contrived and shameless abuse of the process of the court. And, is accordingly dismissed.

19. Orders accordingly.

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

.....

HON. F. GIKONYO M.

JUDGE

In the presence of:

C/A – Mr. Leken

Mr. Okeyo for DPP - Present

Applicant - Present