Qanchora v Republic (Miscellaneous Criminal Application 68 of 2019) [2024] KEHC 3503 (KLR) (15 March 2024) (Ruling)

Neutral citation: [2024] KEHC 3503 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

MISCELLANEOUS CRIMINAL APPLICATION 68 OF 2019

JN ONYIEGO, J

MARCH 15, 2024

BETWEEN

ABDUBA GOLICHA QANCHORA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The applicant herein was tried and convicted of the offence of defilement in Criminal Case No. 460 of 2013 at Wajir Law courts. The accused pleaded not guilty to the charge and the matter went to full trial. The trial court upon hearing and considering the evidence before it convicted the applicant and thereafter sentenced him to serve life imprisonment.

2. Aggrieved by both the conviction and sentence, he appealed vide the High Court Criminal Appeal Case No. 96 of 2016 at Makueni. The appeal was subsequently dismissed. Undeterred, he appealed to the court of appeal vide court of appeal criminal appeal number 11 of 2014. The said appeal is to date pending hearing and determination before the court of appeal.

3. Subsequently, he filed the current application on 23.08.2019 seeking for orders inter alia; that this Honourable Court be pleased to review his sentence.

4. The application in a nutshell is based on the fact that after having been tried and convicted, he was sentenced to serve a life imprisonment. That he had learnt his lessons given that he had been reformed and rehabilitated while in the prison. That he was remorseful for having perpetrated the offence; he urged that the court should consider the circumstances under which the offence was committed as he was young and not possessed of proper morals. He urged that by this court allowing the application herein, the same would offer him an opportunity to regain his life and correct his mistakes. He thus urged this court to grant the prayers sought.

5. Directions were taken that the application be canvassed by way of written submissions.

6. The applicant in his written submissions filed on 17.11.2023 together with his oral submissions urged on 15.02.2024, beseecheds this court to review his sentence noting that he had withdrawn his appeal at the Court of Appeal for a reconsideration of his sentence before this court. He relied on Petition No. 15 of 2015, *Francis Karoko Muruatetu and Another and Jared Koita Njiri v Republic* (2109) eKLR where the court considered the minimum sentences as being unconstitutional as the same denied the accused person an opportunity to mitigate and further, the trial court to judicially exercise its duty in regards to sentencing.

7. He further urged that in the interest of justice, this court ought to exercise its inherent power and thus allow the application. He reiterated that he did not wish to proceed with his appeal at the Court of Appeal hence the application herein. He urged this court to find his application merited and thereby consider time spent in custody as commensurate to the sentence that ought to be meted out in such a circumstance.

8. Mr. Kihara, the learned counsel for the prosecution in rebuttal submitted that the application herein was underserved as the same had been determined by a court of equal jurisdiction to this court. That the same notwithstanding, the applicant had previously filed an appeal before the Court of Appeal which was heard and determined. As a consequence, counsel urged this court to dismiss the application for the same was in want of merit.

9. I have considered the application herein together with the submissions by both parties. In my view, the only issue for determination is whether the order for resentencing can be granted.

10. The applicant has invoked the resentencing jurisdiction of this court as was laid down by the Supreme Court in *Francis Kariuki Muruatetu & Another v Republic* Petition No. 15 and 16 of 2015(*supra*) wherein the Learned Judges held that Section 204 of the *Penal Code* was unconstitutional in so far as it provided for the mandatory death sentence for the reasons that it limited the trial court's exercise of discretion while sentencing. The court while remitting the matter to the High Court for re- hearing on sentence held that: -

> " The facts in this case are similar to what has been decided in other jurisdictions. Remitting the matter back to the High Court for the appropriate sentence seems to be the practice adopted where the mandatory death penalty has been declared unconstitutional. We therefore hold that the appropriate remedy for the petitioners in this case is to remit this matter to the High Court for sentencing..."

11. In this case, the applicant urged the court to consider the time already served and thus review his sentence.

12. It is trite that 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 judgment 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. [Also See *Republic vs Ongaro & another* (Criminal Case 62 of 2013) [2023] KEHC 2309 (KLR)".

13. From the foregoing, I find that I have no jurisdiction to entertain the applicant's application in resentencing and as a consequence, the applicant's prayer for resentencing is hereby declined as this court is functus official and that a similar prayer is still pending before the court of appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 15TH DAY OF MARCH 2024.

J.N.ONYIEGO

JUDGE