Kimonjo v Republic (Criminal Revision E095 of 2023)
[2024] KEHC 9342 (KLR) (25 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9342 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL REVISION E095 OF 2023

JK NG'ARNG'AR, J

JULY 25, 2024

BETWEEN

JOHN KABIRO KIMONJO ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Applicant was charged in Murang'a Senior Principal Magistrates Court Criminal Case No. 1222 of 2010, Republic v John Kabiro Kimonjo & 2 Others. In Count I, the Applicant was charged with the other accused persons for the offence of attempted robbery with violence contrary to Section 297 (2) of the *Penal Code*. In Count II, the Applicant was charged with the offence of assault causing actual bodily harm contrary to Section 251 of the *Penal Code*. In Count III, the Applicant was charged with being in possession of cannabis contrary to Section 3 (1) (2) of the *Narcotic Drug and Psychotropic Substances Control Act* No. 4 of 1994.

2. The Applicant was found guilty and convicted in the three counts in a judgment delivered on 9th June 2011 by Hon. E. J. Osoro (SRM) while the other two accused persons were not found guilty. The trial court then sentenced the Applicant to death in Count I, 2 years imprisonment in Count II and 2 months imprisonment in Count III. Owing to the nature of the sentence, in Count I, the sentences in Count II and III remained in abeyance.

3. Dissatisfied with the decision of the trial court, the Applicant filed an appeal in Murang'a High Court Criminal Appeal No. 96 of 2015 on grounds that the learned magistrate erred in law and in fact by relying on doubtful evidence and convicting him on charges that were not adequately proved. In a judgment delivered by Kiarie Waweru Kiarie, J. on 19th August 2016, court found that conviction of the Appellant was based on sound evidence and the Appeal was dismissed.

4. The Applicant now seeks the audience of this court through a Notice of Motion application filed in court on 9th February 2023 pursuant to Article 159 and 165 of the *Constitution* and Section 346 of the Criminal Procedure Code. The Applicant prayed for orders that the court reviews the sentence of death that was commuted by presidential order to life imprisonment and substitute it with a more lenient sentence. The Applicant also prayed that the court be pleased to order that the two sentences of 2 years imprisonment in Count II and 2 months in Count III which were ordered by the trial court to be in abeyance be quashed/set aside as they constitute double jeopardy in law and serve no purpose in relation to punishment or rehabilitation.

5. In support of the application, the Applicant stated that when the original sentence was passed, the trial court had no discretion to consider mitigating circumstances. The Applicant also argued that circumstances of the case were not as aggravating to warrant the sentence. That on the night of the incident, the thugs never made it into the house in question, that the thugs ran away as soon as the complainant's family raised alarm, that they did not portray any physical aggression or intention to harm the complainant and his family, and did not depict any signs of preparedness for physical confrontation. The Applicant further claimed that the sentences in Count II and III put in abeyance serve no purpose as the sentence in Count I is more than enough punishment. That the offence in Count II constitutes the offence in Count I and it is an aggravating circumstance that distinguishes robbery from robbery with violence. Therefore, being charged for the offences in Count I and Count II amounts to double jeopardy.

6. The Applicant filed submissions on mitigation on 21st March 2024 that he is remorseful, that he is a first offender, that he has reformed having taken rehabilitative programs in prison, and that he is suffering from terminal illness. He prayed that court takes into consideration the period of 14 years spent in custody pursuant to Section 333(2) of the *Criminal Procedure Code* in handing him a lenient sentence.

7. This court has considered the application herein, grounds in support and submissions as well as the trial court and appellate court proceedings. The application has invoked revisionary powers of this court under Section 364(1) of the *Criminal Procedure Code* that: -

> " In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may: -
>
> a. in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
>
> b. in the case of any other order other than an order of acquittal, alter or reverse the order."

8. The section above shows that the revisionary jurisdiction of this court is in respect to subordinate courts. Further, Article 165 (6) and (7) of the *Constitution* have conferred supervisory jurisdiction over subordinate courts and not over courts of concurrent jurisdiction or superior courts. Kiage, J. while reviewing the decision of a judge in a decision of concurrent jurisdiction in the case of *Bellevue Development Company Ltd v Francis Gikonyo & 7 Others* (2018) eKLR held: -

> " have no difficulty upholding the learned Judge's holding that as a judge of the High Court he had no jurisdiction to enquire into or review the propriety of the decisions of the Judges, who were of concurrent jurisdiction as himself. In our system of courts, which is hierarchical in nature, judges of concurrent jurisdiction do not possess supervisory jurisdiction over each other. No judge of the High Court can superintend over fellow judges of that court or of the

superior courts of equal status. That much is plain common sense. It has, moreover, been expressly stated in Article 165(6) of the *Constitution* in these terms;

"The High Court has supervisory jurisdiction over the subordinate courts and over any other person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court."

9. The Applicant appealed against the decision of the trial court in Murang'a High Court Criminal Appeal No. 96 of 2015 where the court had found that conviction of the Appellant was based on sound evidence and the Appeal was dismissed. The application touched on the substratum of the appeal that was already heard and determined by a court of concurrent jurisdiction. This court therefore lacks jurisdiction to entertain the application as was held in the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* (1989) KLR 1 as follows: -

'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

10. In light of the foregoing, this court downs its tools and cannot take a further step. The court finds no merit in the application and it is therefore dismissed.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 25TH DAY OF JULY, 2024.

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J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

Present Advocate for the Applicant

Present Advocate for the Respondent

Court Assistant – Peter Og'indi