NNN v Republic (Miscellaneous Criminal Application E025 of 2022) [2023] KEHC 665 (KLR) (3 February 2023) (Ruling)

Neutral citation: [2023] KEHC 665 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

MISCELLANEOUS CRIMINAL APPLICATION E025 OF 2022

LN MUGAMBI, J

FEBRUARY 3, 2023

BETWEEN

NNN ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The applicant NNN was arraigned before Embu High Court for an offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code* in Criminal Case Number 28 of 2003.

2. The particulars of the charge were that on the 20th day of September, 2002 at Gichiche Sub-location, Karie Village in Mbeere District within Eastern Province, he murdered Tarasila Mwendia Njagi.

3. After a full trial, he was found 'guilty but insane' for the offence of murder by the High Court (W Karanja, J) on October 5, 2010 and ordered to be detained at the President's pleasure pursuant to section 167 (1) (b) of the *Criminal Procedure Code*.

4. The applicant subsequently appealed against this special finding before the Court of Appeal Sitting in Nyeri in Criminal Appeal Number 443 of 2010 - NNN Vs Republic. The Court Appeal upheld the decision of the High Court. The parting shot by the Court of Appeal was rendered as follows:

> " ...We have said enough to show that this appeal is devoid of merit. We hereby dismiss it and affirm the judgment and orders of the High Court..."

5. In the present application filed on June 15, 2022, and supported by the affidavit of the applicant, he prays for the following orders:

    a. That the Honourable Court be pleased to find that it has jurisdiction to hear and determine this application

b. That the Honourable Court be pleased to call for original trial records in High Court Criminal Case Number 28 of 2003 at Embu in a bid to satisfy itself on its contents and issue appropriate orders and directions in line with orders dated 1st of February 2022 in High Court Petition Number 226 of 2020 - *Isaac Ndegwa Kimaru & 17 Others*.

6. Further, in his submissions, the Applicant included the following additional prayers:

i. This Honourable Court be pleased to find time already served in custody from the date of arrest in 2003 as sufficient punishment for the offence that was committed.

ii. The Honourable Court be pleased in the alternative to prayer number 1 and in consideration of the applicant's age to release him to go back home to the care of his family and kin for the remainder of his natural life.

iii. The Honourable Court be pleased to grant any other orders that it shall deem fit in the interest of justice.

7. This Application is opposed by the State. The State filed grounds of opposition on 12/10/22 together with its written submissions. The State framed four main grounds of opposition, namely:That the application lacks merit.That the Honourable Court lacks jurisdiction to review sentence confirmed by the Court of Appeal.That the application contravenes section 362 of the *Criminal Procedure Code*.

8. The applicant filed his written submissions on 29/8/22 and a rejoinder on 21/11/22 in response to the submissions by the State.

9. I have also ploughed through the record and noted that on the 26th of July, 2022; the applicant was presented before Justice Njuguna who ordered *inter-alia* that the applicant be escorted to Mathari Mental Hospital for a comprehensive medical assessment report and for a probation officer's report to assist the Court to arrive at just decision in the matter.

10. I have noted the Probation Officer, pursuant to the court order of July 26, 2022 subsequently filed the probation report dated November 17, 2022. He also placed on record the power of mercy pre-release report dated 2/12/2022 referenced PS/ADM/1/58/VOL.1/53 which could be indicative of a pending power of mercy application by the applicant. There was no comprehensive mental assessment report as at the time of dealing with this file.

11. The file was placed before me as part of High Court Service Week Exercise (RRI). The parties appeared before me virtually, M/s Mary Gakuo for the State and Applicant in person on 20/1/2023 when both confirmed their written submissions were already on record and readiness for the ruling.

12. In his submissions, the applicant stated that the filing of this application was triggered by Petition Number 226 of 2020- Isaac Ndegwa Kimaru & 17 Others which he was part of. In the Judgement delivered on February 1, 2022 by Justice AC Mrima, the Court found Sections 162 to 167 of the *Criminal Procedure Code* were unconstitutional, and flowing from that decision, made orders as follows in paragraph 148 of the said judgment:

iii) An accused person who is found to be unfit to stand trial or continue participating in a criminal trial due to mental challenges or an accused who is tried and convicted of a criminal offence, but found insane at the time of committing the crime is a person with disability and ought to be accorded the necessary protection and assistance required under the *Constitution* and the law.

iv. The persons who are detained in Prison facilities in Kenya under the President's pleasure ought to be arraigned before courts which committed them and the courts must take charge of those persons and make appropriate orders and directions.

13. He further referred to paragraph 152 (h), (i) and (j) of the said Judgment where he enumerated the additional directions made by the court as follows:-

h) An order hereby issues that any Prison facility in Kenya holding any person with mental challenges facing criminal trial or who has been tried and special finding made that such person was 'guilty' but 'insane' and be detained at President's pleasure shall forthwith make arrangements and arraign such a person before the Court that committed the person to the facility.

i) Once any person with mental challenges facing a criminal trial has been tried and a special finding made that such a person was guilty but insane is arraigned before court pursuant to order (h) above, the Court shall make appropriate orders and directions upon taking into account the mental status of the accused and the period the accused has been detained at the President's pleasure.

j) In the event the Prison facility is unable to arraign such a person before Court as ordered in order (h) above, the facility shall immediately so inform and the Court shall make appropriate orders and directions as it deems fit.

14. The applicant conceded the fact that he was rightfully convicted and since his detention under the President's pleasure, he explained that he has undergone several psychiatric assessments which confirmed that he is now of sound mental status. As such, he has been taken through a number of prison rehabilitation programmes which include spiritual and tailoring courses that would enable him engage in gainful employment and relate well with people hence he is no longer a threat to anybody.

15. He also submitted that he is now an elderly man of 72 years of age and with that age, the prison environment has proved extremely difficult for him since he has put with daily struggles competing for daily provisions such as food with younger inmates not to mention the affliction from age-related ailments like high blood pressure and poor eyesight. He referred to two High Court decisions where age was the key factor that was considered in revision of sentences by the High Court, the case of *Wilson Kipchirchir Koskei Vs R* (2019) Eklr And *Wilson Waitegei Vs R* (2021) eKLR.

16. The State through Prosecution Counsel, Ms Mary Gakuo strenuously opposed this application citing Article 50 (2) of the *Constitution*. It was argued on behalf of the State that the High Court sentence was upheld by the Court of Appeal and as per Article 50 (2) (q) of the *Constitution*, once convicted, the only recourse was to the applicant was to appeal or to apply for review before a Higher Court.

17. The State's position was that in a criminal process, both the *Constitution* and the *Criminal Procedure Code* were clear that only a higher court could revise an order or sentence of another court. As such, the State stand was that the Court of Appeal having affirmed the decision of the High Court, this court lacked authority to deal with that matter.

18. In a brief rejoinder, the Applicant cited article 50 (6) and argued that it permitted a person who is convicted of a criminal offence to petition the High Court for a new trial if that person's appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal. He argued that this was a demonstration that the High Court is under constitutional obligation to determine matters that have been dismissed even by the highest court.

19. He also cited the decision of the Supreme Court to allow the High Court to resentence the prisoners whose appeals had been dismissed by the Court of Appeal as a clear indication of the Constitutional mandate of the High Court even in matters dismissed by the Court of Appeal.

Analysis

20. It is clear to me that the applicant wants this Court to review the orders made by the High Court on October 5, 2010 in which it was ordered that he be detained at President's pleasure pursuant to Section 167 (1) (b) of the *Criminal Procedure Code*. These orders were subsequently confirmed by the Court of Appeal on July 6, 2016.

21. The basis of this application is the decision made in the High Court Petition Number 226 of 2020 by Justice AC Mrima. The applicant submitted that he was one of the petitioners.

22. One difficult that this application poses is that the High Court in that Petition declared that Sections 162-167 of the CPC unconstitutional but did not stop at that. It went ahead and directed that those people that were in prison pursuant to Section 167 (1) (b) of the *CPC* be produced before the Courts that committed them to be dealt with appropriately.

23. The question then becomes, was the order directed to courts below the High Court or did it include courts of concurrent jurisdiction and other higher courts, as in this case, the Court of Appeal which is higher in hierarchy? If so, is it implementable without violating the jurisdictional principle?

24. Under Section 362 of the *Criminal Procedure Code*, the powers of revision are vested in the High Court and apply only in respect of proceedings before a subordinate court. It provides:-

> " The High Court may call for and examine the record of any criminal proceedings before any subordinate court for purposes of satisfying itself as to correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court."
>
> 19. Section 364(1) reinforces this position and indicates what the High Court is authorised to do in the exercise of its revisionary jurisdiction over the subordinate court.

25. This statutory position draws its legitimacy from Article 165(6) of the *Constitution* which clothes the High Court with wide ranging powers in supervising the subordinate courts and any other person, body or the authority exercising a judicial or quasi-judicial function, but, it says clearly, "but not a Superior Court."

26. Indeed, the succeeding provision, Article 165 (7) defines the extent of this jurisdiction with particularity and in my view, is more expansive than what is circumscribed under section 364 of the *Criminal Procedure Code*. Article 165 (7) provides:

> " For purposes of clause (6), the High Court may call for the record of proceedings before any subordinate court or person, body or authority referred to in clause (6), and make any order or give any direction it considers appropriate to ensure the fair administration of justice."

27. The emphasis here is the courts, persons or bodies over which the supervisory power of the High Court is exercisable and the extent to which the High Court is permitted to go; it can 'order or give any direction' for so long as in its discretion, it is appropriate for ensuring fair administration of justice.

28. It is the High Court which directed that the applicant be detained at the President's pleasure pursuant to Section 167 (1) (b) of the *Criminal Procedure Code*. Further, the order was affirmed on appeal by the Court of Appeal. Although differently constituted, the orders in the High Court Petition Number 226 of 2020 which the applicant relies on to make this application came from the High Court. Ideally, there is nothing unusual for the High Court to declare a statutory provision unconstitutional as that is within its jurisdiction. However, a challenge emerges when orders appear to be directed to courts generally (oblivious of the hierarchical of their status) that:-

> " Once any person with mental challenges facing a criminal trial has been tried and a special finding made that such a person was guilty but insane is arraigned before the court... the court shall make appropriate orders and directions upon taking into account the mental status of the accused and the period the accused has been detained at the President's pleasure"

29. This rekindles the words of Justice Murithi in *Civicon Ltd Vs Kenya Revenue Authority* (2014) eKLR when he asserted:-

> " ...The supervisory jurisdiction is over subordinate courts under Article 165 (6) of the *Constitution*..."

30. My mind is therefore clear that the orders made in Petition Number 226 of 2020 could not apply, and were not intended to be directed at the existing orders made by the Superior Courts, let alone the Court of Appeal. Indeed, the supervisory jurisdiction given to the High Court does not extend to other superior courts. In fact, even the High Court cannot alter its final orders in a criminal trial. They can only be altered upon an appeal or review to a higher court. High Court Petition No 226 of 2020 being a decision from a Court of concurrent jurisdiction cannot re-open the case concluded before another High Court with finality. It is even inconceivable that a decision already affirmed by the Court of Appeal can be re-opened at the direction of High the Court.

31. Such a scenario would bring back the messy state of affairs that Supreme Court decried in *Muruatetu* case (Petition 15 &16 of 2015 - 2021 KESC31 KLR) where the hierarchical status of the courts was thrown to the wind in the chaotic resentencing process that followed its decision. The Supreme Court in issuing directions that brought back the sanity made the following observation: -

> " ...There can be no justification for Courts below us, to take the course that has now resulted in pitiable state of incertitude and incoherence in sentencing framework in the country... Appellants whose sentence were confirmed by the High Court and the Court of Appeal have returned to Magistrates courts where, without reference to decisions of two superior courts, have had sentences revised..."

32. This disorderly state that the Supreme Court deprecated is what this application portends should I accede to the invitation to reconsider the final orders made by my sister after the full trial of this case oblivious of the fact that those orders were also confirmed by the Court of Appeal.

33. As a Judge of the High Court, I have no jurisdiction to inquire into the legality or appropriateness or otherwise of orders by another Judge of concurrent jurisdiction. It is even more intricate when such order has already been affirmed by the Court of Appeal.

34. Even assuming this matter was suitable for resentencing, the appropriate forum for pursuing the resentencing would be the Court of Appeal unless it were to specifically direct that the matter be dealt

with at the High Court for that particular purpose. It cannot therefore be supposed, as was submitted by the applicant that coming to the High Court is obvious just because the Supreme Court referred the resentencing process to the High Court in *Muruatetu* Case. In that case, the Supreme Court made very specific orders to that effect and justified its decision with reasons as to why it was sending it to the High Court. In the instant application, there is no specific direction by the higher court (Court of Appeal) which affirmed the order directing the High Court to act accordingly.

35. The decisions of the High Court referred to by the applicant in which the age of the factor of the appellants was considered in revising their sentences were dealt with appropriately in the right forum as the High Court was merely revising sentences meted out by the Lower Courts which it has power to supervise. In the instant case, those decisions are thus inapplicable.

36. In these proceedings, the High Court is *functus officio*. There are no more options left for the applicant before the High Court in this particular matter in absence of an order from a higher Court directing otherwise.

37. The application lacks merit and is hereby dismissed.

RULING DATED AND DELIVERED AT KIAMBU THIS 3RD DAY OF FEBRUARY, 2023.

L.N. MUGAMBI

JUDGE

In the presence of:-

Coram: L.N Mugambi

Court Assistant: Kinyua

For the Appellant: Present in person form Embu Prison

For Respondent: M/s Mary Gakuo for ODPP

COURT

Ruling delivered in open.

L.N. MUGAMBI

JUDGE