Njogu v Director of Public Prosecution (Miscellaneous Application 63 of 2020) [2023] KEHC 17477 (KLR) (18 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17477 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

MISCELLANEOUS APPLICATION 63 OF 2020

HM NYAGA, J

MAY 18, 2023

BETWEEN

JAMES MWAURA NJOGU ..... APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT

RULING

1. Through an undated application lodged on June 19, 2018, the applicant, James Mwaura Njogu, moved this court for sentence rehearing.

2. The facts as contained in the application indicate that the applicant was charged, convicted and sentenced to suffer death for the offence of robbery with violence contrary to section 296(2) of the *Penal Code* in Narok CM court criminal case No 615 of 2007. He avers that thereafter, he lodged an appeal at Nakuru High Court and Court of Appeal against both sentence and conviction through criminal appeal No 65 of 2007 & No 100 of 2009 respectively.

3. The applicant seeks a review of the sentence imposed by the CM court. He avers that the court in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (Muruatetu 1) & *William Okungu Kittiny v Republic* [2018] eKLR has since declared the mandatory nature of death sentence unconstitutional. He avers that this court is bound by the decision of the supreme court of Muruatetu 1 (supra) under article 163(7) of the *Constitution*.

4. The applicant avers that the order of the Supreme Court in did not bar the courts below from conducting sentence review in already concluded capital cases and that this court has jurisdiction to hear resentencing and mete out the appropriate sentence in line with the decision in *William Okungu Kittiny v Republic* (supra). That in doing so, the court will be discharging its obligation pursuant to article 20(3)(a)(b) of the *Constitution* as read with the principles in Muruatetu 1.

5. The respondent orally submitted that with the applicant's admission that his appeal before the Court of Appeal was dismissed, this court is bereft of jurisdiction to entertain this application.

Analysis & Determination

6. The first issue that arises for determination is whether this court has jurisdiction to entertain the applicant's application for resentencing, after his appeal was dismissed by the Court of Appeal.

7. An answer in the affirmative to the first issue will determine the second issue, whether the court ought to allow the application and mete out another sentence, other than the death sentence.

8. I will begin with the question of jurisdiction.

9. Jurisdiction is the authority of the court to hear and determine cases. The same may be general or specific, limited or unlimited and it may be conferred by the *Constitution* or Statute. Without jurisdiction, a court cannot adjudicate the case before it. Nyarangi, J.A in the often-cited case of The *Owners of Motor Vessel Lilian "S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1 at page 14 stated:

> "Jurisdiction is everything. Without it, a court has no power to take one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending the 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 the case of *Republic v Karisa Chengo & 2 others* (2017) eKLR the Supreme Court had this to state: -

> "... In the above regard, we note that in almost all the legal systems of the world, the term "jurisdiction" has emerged as a critical concept in litigation. *Halsbury's Laws of England* (4th Ed) Vol 9 at page 350 thus defines "jurisdiction" as "...the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision." *John Beecroft Saunders in his treatise Words and Phrases Legally Defined* Vol 3, at page 113 reiterates the latter definition of the term 'jurisdiction' as follows:
>
> > "By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing ....."
>
> From these definitions, it is clear that the term "jurisdiction", as further defined by *The Black's Law Dictionary*, 9th Edition, is the court's power to entertain, hear and determine a dispute before it..."

11. The court in *Samuel Kamau Macharia v KCB & 2 others*, civil application No 2 of 2011 stated as follows;

> " A court's jurisdiction flows from either the *Constitution* or Legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law"

12. The jurisdiction of this court is donated by the *Constitution* 2010. article 165(3) provides as follows; -

> " ... Subject to clause (5), the High Court shall have—
>
> (a) Unlimited original jurisdiction in criminal and civil matters;
>
> (b) Jurisdiction to determine the question whether a right or fundamental freedom in the bill of rights has been denied, violated, infringed or threatened;
>
> (c) Jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under article 144;
>
> (d) Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
>
> (i) The question whether any law is inconsistent with or in contravention of this Constitution;
>
> (ii) The question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
>
> (iii) Any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
>
> (iv) A question relating to conflict of laws under article 191; and
>
> (e) Any other jurisdiction, original or appellate, conferred on it by legislation...."

13. I have perused the court record and I do note that the applicant was charged alongside two other co-accused persons and they were convicted by the lower court of the offence herein and sentenced to death. The applicant and co accused persons appealed to this court *vide* criminal appeal No 65 of 2007 consolidated with criminal appeals Nos 66 of 67 of 2007 and which appeal was dismissed in the judgement of Hon M Koome, J (as she then was) and Hon M. Mugo, J (as she then was) delivered on May 14, 2009. The learned judges upheld the conviction and sentence by the trial court.

14. The applicant averred that he appealed against the above judgement before the Court of Appeal *vide* criminal appeal No 100 of 2009. There is evidence of a notice of appeal to the said court on record. However, the judgment in that appeal is not on record. The other appeal in the court file is by the applicant's co-accused i.e criminal appeal No 66 lodged to this court on May 26, 2009. During the hearing of the application the applicant informed the court that his co-accused persons had died while in custody.

15. Even though there is no judgment on the court record there is some indication that the applicant did file the appeal before the Court of Appeal. This being the case this court ought to tread very carefully, so that it does not give orders that seem to vary a decision of the Court of Appeal, which ranks higher in hierarchy than this court.

16. A lot of litigation has been presented to the superior courts, and even magistrates courts, as a consequence of the decision in Muruatetu 1 and *Francis Karioko Muruatetu & another v Republic: Katiba Institute & 5 others (amicus curie*(2021)eKLR Muruatetu 2.

17. It is to be noted that there has been no uniformity by the courts on how to handle the re-sentencing applications/petitions being filed in their hundreds. Specifically, there are no clear guidelines on where to present these petitions. I have come across some decisions of the magistrates' court reviewing the so-called mandatory sentences, without first procuring orders of the superior courts, even where the applicants had exhausted their appeals in the High Court and the Court of Appeal. In such cases, the magistrates' court could be accused, and rightly so, of having clothed themselves with the jurisdiction of the High Court, the Court of Appeal and even the Supreme Court.

18. I think that there is need to set guidelines, pursuant to the recent decided cases, on where each application ought to be done, depending on the highest court that dealt with the case. For instance, in this case, the applicant actually admitted that his appeal in the Court of Appeal was dismissed.

19. The case of Muruatetu 1 had no issues like the present one since the petitioners went to the Supreme Court, after exhausting their right of redress in the Court of Appeal. In any case the Supreme Court has the jurisdiction to deal with any matter that in its view raises questions of the constitutionality of any law.

20. In clarifying the import case of its earlier decision, in Muruatetu 2 the Supreme Court gave the following guidelines:

    i. The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under sections 203 and 204 of the *Penal Code*;

    ii ...

    iii. All offenders who have been subject to the mandatory death penalty and desire to be heard on sentence will be entitled to re-sentencing hearing.

    iv. Where an appeal is pending before the Court of Appeal, the High Court will entertain an application for re-sentencing upon being satisfied that the appeal has been withdrawn.

    v ....

    vi. An application for re-sentencing arising from a trial before the High Court can only be entertained by the High Court, which has jurisdiction to do so and not the subordinate court.

    .....

    viii. Where the appellant has lodged an appeal against sentence alone, the appellate court will proceed to receive submissions on re-sentencing.

    ix. These guidelines will be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals. They will also apply to sentences imposed under section 204 of the *Penal Code* before the decision in Muruatetu.

In Muruatetu 2 the Supreme Court then gave the following directives;

> " To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under section 40 (3), robbery with violence under section 296 (2), and attempted robbery with violence under section 297 (2) of the *Penal Code*, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases."

Subsequent to the 2 cases in the Supreme Court, there have been a number of notable decisions of the superior courts. In *Philip Mueke Maingi & others v Director of Public Prosecutions & another* (2022) eKLR the court was called upon to determine a petition by convicts charged with sexual offences and who had been sentenced to the so-called mandatory sentences. Justice V. Odunga (as he then was) held that;

> " In my view the opinion of the Supreme Court with respect to mandatory sentences apply with equal force to minimum sentences or non-optional sentences. My view is in fact supported by the Kenya Judiciary Sentencing Policy Guidelines where it is appreciated that:
>
> > Whereas mandatory and minimum sentences reduce sentencing disparities, they however fetter the discretion of courts, sometimes resulting in grave injustice particularly for juvenile offenders.
>
> To the extent that the *Sexual Offences Act* prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of article 28 of the *Constitution*. However, the court are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences.
>
> Taking cue from the decision in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (Muruatetu 1) those who were convicted of sexual offences and whose sentences were passed on the basis that the trial courts had no discretion but to impose the said mandatory minimum sentence are at liberty to petition the High Court for orders of resentencing in appropriate cases."

21. The petitioners in the above case invoked the guidelines set out in Muruatetu 2. It is not clear whether they had been to the Court of Appeal on further appeal before filing the petition.

22. The question to be answered is what the decision in Muruatetu 2 meant to those who had already had their appeals determined by the Court of Appeal. For those whose appeals are pending in that court, the Supreme Court was clear that they could only move the High Court once they had withdrawn their appeals in the Court of Appeal. That directive was clearly meant to avoid confusion, with the possibility of an applicant/petitioner making multiple applications to the two courts. It was also meant to re-affirm the established hierarchy of courts as set out in the *Constitution*, in which the Court of Appeal exercises appellate jurisdiction over this court.

23. In *John Gichovi Muturi v Republic* [2021] eKLR the court was faced with a situation where the applicant's appeal had been dismissed by a 2 judge bench. It held that;

> The law abhors that practice of a judge sitting to review a judgment or decision of another judge of concurrent jurisdiction. This is because the rule of the thumb is that superior courts cannot sit in review/appeal over decisions of their peers of equal and competent jurisdiction

much less those courts higher than themselves. The court which ought to deal with an issue arising out of the decision of this court is the Court of Appeal as it is the one with jurisdiction under article 164(3) of the *Constitution* and section 379(1) of the Criminal Procedure Code. This is in appreciating the provisions of article 50(2)(q) of the *Constitution* of Kenya 2010 which guarantees the right of a person if convicted, to appeal to, or apply for review by, a higher court as prescribed by the law."

That decision is to be contrasted with that of the court in *Siatikho v Republic* (miscellaneous criminal application 82 of 2020) [2022] KEHC 12168 (KLR) (9 June 2022) (Judgment). In that case the applicant, as in this case, had already canvassed his appeal in the Court of Appeal and it had been dismissed. He made an application similar the one herein to the High Court. The court did acknowledge this fact and still went ahead to re-sentence the applicant therein. The court recognised the fact that the applicant's co-accused had already benefitted;

> " In view of the above unique circumstances of this case, I am persuaded by the reasoning in *John Sila Mutua v Director of Public Prosecution* [2022] eKLR that the court ought to apply the same treatment to co-accused persons, unless there are compelling reasons for individual treatment, as this would offend the provisions of article 27 of the *Constitution*. I find no compelling reasons in the present case."

24. Given the uncertainty being witnessed over the matter, I think that it is better to go by the route that gives the applicant the full enjoyment of the 2 Muruatetu decisions. Hopefully, there will be a way out of this jurisprudential quagmire that we find ourselves in sooner rather than later.

25. The Court of Appeal in *William Okungu Kittiny v Republic*, Court of Appeal, Kisumu criminal appeal No 56 of 2013 [2018] eKLR applied the reasoning in the Muruatetu 1 case to the offence of robbery with violence. The court held that at paras 8 and 9 that:

> " (8) Robbery with violence as provided by section 296 (2) and attempted robbery with violence as provided under section 297 (2) respectively provide that the offender: -
>
> "...shall be sentenced to death."
>
> The appellant was sentenced to death for robbery with violence under section 296 (2). The punishment provided for murder under section 203 as read with section 204 and for robbery with violence and attempted robbery with violence under section 296 (2) and 297 (2) is death. By article 27 (1) of the *Constitution*, every person has inter alia, the right to equal protection and equal benefit of the law. Although the Muruatetu's case specifically dealt with the death sentence for murder, the decision broadly considered the constitutionality of the death sentence in general.
>
> .....
>
> (9) From the foregoing, we hold that the findings and holding of the Supreme Court particularly in paragraph 69 applies mutatis mutandis to section 296 (2) and 297 (2) of the Penal Code. Thus, the sentence of death under section 296 (2) and 297 (2) of the Penal Code is a discretionary maximum punishment. To the extent that section 296 (2) and 297 (2) of the Penal Code provides for mandatory death sentence the sections are inconsistent with Constitution."

"[11] Although the appellants' appeal was dismissed by the Court of Appeal on June 20, 2008, which was then the last appellate court, the constitutional petition filed in the High Court revived the case and by the time the Supreme Court rendered its decision, this appeal was still pending.(emphasis mine)

The decision of the Supreme Court only discouraged persons from filing petitions to the Supreme Court but the decision does not prohibit courts below it from ordering sentence re-hearing in a matter pending before those courts. By article 163 (7) of the *Constitution*, the decision of the Supreme Court has immediate and binding effect on all other courts. The decision of the Supreme Court opened the door for review of death sentences even in finalized cases.

(12) From the foregoing, the learned judge having partly found in favour of the appellant erred in law in not remitting the case for sentence re-hearing and the appeal is allowed to that extent. Now that the Supreme Court has opened the door for sentence re-hearing, the matter is remitted to the Chief Magistrate's Court, Kisumu, for sentence re-hearing and sentencing only. The Registrar of this Court to return the record of the Chief Magistrates Court at Kisumu-criminal case No 181 of 2004 as soon as reasonably practicable for sentence re-hearing and sentencing by the Chief Magistrate."

26. It appears from the above decision that an application for resentencing under the decisions in the 2 Muruatetu cases serves to re-open the proceedings, irrespective of the stage the matter had reached.

27. The applicant contends that mandatory death sentence was declared unconstitutional and is basically asking this court to apply the principles set out in Muruatetu 1 &2 (supra).

28. Taking cue from the decision in *William Okungu Kittiny's case* (supra), I find that this is a case where the applicant needs to benefit from the decision in Muruatetu 1 and 2.

29. The upshot of the above is that the objection by the state as to whether this court can resentence the applicant is overruled. I find that this court, sitting as a constitutional court, is seized of the jurisdiction to determine the matter, subject to the guidelines set out in Muruatetu 1 and 2. The court will only be able to entertain the resentencing , once it is satisfied that the appeal in the Court of Appeal is not pending. The court cannot accept a mere statement by the applicant in respect of that appeal.

30. Consequently, I direct that the Deputy Registrar procures the outcome or result of the applicant's appeal in the Court of Appeal (if any) forthwith. Depending on the results, the matter will proceed to the merits of the application itself.

31. Orders accordingly.

DATED, SIGNED & DELIVERED AT NAKURU THIS 18TH MAY, 2023.

H.M. NYAGA

JUDGE

In the presence of:

C/A Jeniffer

Ms Murunga for state

Applicant - present