JOM v Republic (Criminal Revision E002 of 2023)
[2023] KEHC 20313 (KLR) (6 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20313 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL REVISION E002 OF 2023

WA OKWANY, J

JULY 6, 2023

BETWEEN

JOM ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

({From the Original Conviction and Sentence of Hon. B. M. Kimtai – SPM Keroka dated & delivered on the 3rd day of July 2019 in the Original Keroka Senior Principal Magistrate's Court Sexual Offence Case No. 978 of 2016)

RULING

1. The Applicant herein was charged with the offence of incest contrary to section 20 (1) of the *Sexual Offences Act*. He was convicted of the said charge on July 3, 2019 and sentenced to serve 20 years imprisonment by the trial court at Keroka.

2. The Applicant Appealed against the said conviction and sentence vide HCCRA No 26 of 2019. Through a judgment rendered on January 23, 2020, E N Maina J dismissed the appeal and upheld the sentence.

3. The Applicant filed the Application dated January 11, 2023 seeking the review of sentence on the grounds that the sentence passed on him, as a minimum mandatory sentence was declared unconstitutional. The Application is premised on Articles 19 (1), (2), 23 (1), 25(9) (c), 27 (1), 28 (1), 50 (1) (2) (q) and Article 165 (3) of the *Constitution*, Sections 216, 329 and 333 (2) of the *Criminal Procedure Code*, Cap 75 together with the decision in High Court at Machakos, Petition No. E017 of 2021 by Odunga J.

4. The Application is supported by the Applicant's sworn affidavit and is based on the following grounds: -

1. That he was charged and convicted with the offence of incest contrary to section 20 (1) of the *Sexual Offences Act* and sentenced to serve 20 years jail term under the statute which was the minimum mandatory sentence in law hence, inconsistent with the Constitution.

2. That he was aggrieved and lodges an appeal against the trial court's decision vide High Court Criminal Appeal No 26 of 2019 and the same was dismissed on January 23, 2020 by Hon Esther Maina J

3. That he now kindly requests the Honourable Court to admit this humble Application of Petition for the review and revision of 20 years imprisonment for the hearing and determination on resentence Guideline Policy under the provisions of the law and constitutional avenues to protect and secure his rights contemplated under Article 27 (1) 28 and 50 (2) (p).

4. That the course and inception of these matters truly originated from a family and domestic conflict which has drastically undermined his life status, likewise to his family, wealth, premises, thus dumped into jail. (sic).

5. That despite being in prison and convicted and sentenced to serve 20 years imprisonment, he has never lost faith in life, that he is a law-abiding citizen and also a participant in civil and political rights for the essential aim of reformation and rehabilitation measures for the socio re-adaptation to the society under the prison training mechanisms and courses at hand.

6. That he has reformed in various doctrines of changes as a paralegal with a certified certificate and also obtained certificates and diplomas in spiritual transformation code of courses all verified in the Recommendation Letter by the Church Chaplain in charge of the inmates' fellowship program and the same will be attached as testimonials for proof.

7. That he is too languishing and mitigating sexual offenders are tremendously enduring suffering due to fabricated and framework scenarios disposing and wasting young and aged men in goal. (sic)

8. That he begs this Honourable Court to comply with the relevant provisions of the law as Section 216, 329 and 333 (2) of the Criminal Procedure Code after determination and analysis of this matter to establish trust on the Transformation of the Justice System.

5. This Application was canvassed orally in Court on May 30, 2023. The Applicant submitted that he was sentenced to serve 20 years imprisonment that he is seeking re-sentence from the court. He submitted that even though he had filed an appeal which was dismissed, he was seeking the Court's intervention to reduce his sentence because of the challenges that he is facing in prison. It was his submission that he did not get a fair trial because he was confused, stressed and fresh from college and would now like a chance to be reunited with his family.

6. On his part, the Prosecution Counsel submitted that the Applicant had appealed in HCCRA No 26 of 2019 which appeal was dismissed by Maina J. and that the only recourse available for the Applicant is to the Court of Appeal.

7. A perusal of the lower court record reveals that the Applicant was sentenced to serve 20 years and not life imprisonment as submitted by the Prosecution Counsel. I also note that the said conviction and sentence were upheld by this Court, differently constituted, when it dismissed the Appeal.

8. It is trite that sentencing is the preserve of the trial court. This is because it is the trial court that has the benefit of observing the witnesses first-hand. (See the Court of Appeal in England decision in *Coghlan vs Cumberland* (1898) 1 Ch. 704).

9. Similarly, in *Bernard Kimani Gacheru vs. Republic* [2002] eKLR, the Court of Appeal stated thus: -

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

10. The Constitution of Kenya contemplates, under Article 50, that every accused person will be accorded the right of appeal or revision if dissatisfied with the decision of the court. It states thus:-

> (2) Every accused person has the right to a fair trial, which includes the right—
>
> (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

11. Article 50 (2) (q) of the Constitution becomes applicable only where the decision under review was made by a subordinate court. In the present case, it was this Court that re-affirmed the sentence of the trial court. It therefore follows that this Court has already discharged its duty under the law and cannot go back and recall its own record for review as the court became functus officio the moment it rendered its judgment on the appeal. I find guidance in the decision of Ngugi J (as he then was) in where he held thus: -

> " 8. ..... In other words, persons whose appeals have already been heard by the High Court are not entitled to file fresh applications for re-sentencing in accordance with the new decisional law. To reach a different conclusion would lead to an ungovernable situation where all previously sentenced prisoners would seek review of their sentences....."

(See also Aburili J in the case of *Daniel Otieno Oracha vs Republic* [2019] eKLR).

12. It is my finding that this Court does not have jurisdiction to entertain the present Application as the appropriate court to determine this Application should the Court of Appeal under Section 379 of the Criminal Procedure Code. I find that there exist no legal provision permitting this Court to hear and determine appeals or reviews arising from its own decisions.

13. Further, it is trite that an aggrieved party may file an appeal or an application for review to higher court as prescribed by Article 50 (2) (q) of the Constitution and not from the same court that made the decision in question. In the present case, the Applicant already exhausted the avenue of appeal at the High Court and can therefore not have a second bite at the cherry by seeking a review from the same court on the same grounds.

14. In the end, I find that the Application lacks merit and I hereby dismiss it.

15. It is so ordered.

Ruling dated, signed and delivered at Nyamira via Microsoft Teams this 6th day of July 2023.

W. A. OKWANY

JUDGE