PMA v Republic (Criminal Revision E046 of 2022)
[2023] KEHC 20230 (KLR) (13 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20230 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL REVISION E046 OF 2022

WA OKWANY, J

JULY 13, 2023

BETWEEN

PMA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(Being a revision on the Conviction and Sentence of Hon. N. Kahara - Resident Magistrate Keroka dated and delivered on 19th April 2017 in the original Keroka Principal Magistrate's Court Sexual Offence Case No. 45 of 2016)

RULING

1. The Applicant herein was charged and convicted of the offence of incest contrary to section 20 (1) of the *Sexual Offences Act*. He was on April 19, 2017 and sentenced to serve life imprisonment by the trial court at Keroka.

2. On June 20, 2019, the Applicant filed an Appeal (HCCRA No 82/2017) challenging both the conviction and sentence by the trial court. The said Appeal was however dismissed on March 28, 2019 and the conviction and sentence upheld.

3. The Applicant has now filed the Application dated December 15, 2022 wherein he seeks a review of the sentence on the basis that life sentence as a minimum mandatory sentence was declared unconstitutional. The Application is brought under 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 and 329 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 premised on the following grounds: -

1. That the Petitioner was arrested, charged and convicted of defilement contrary to section 8 (1) as read with section 8(2) of the *Sexual Offences Act* No 3 of 2006 at the Principal Magistrate's Court at Keroka in Criminal Case No. 45 of 2016.

2. That the appealed to the High Court of Kenya in Nyamira vide HCCRA No 82 of 2017 which appeal was dismissed.

3. That the Petitioner has no pending appeal hence asking this Honourable Court to invoke the above decision when sentencing.

4. That the Petitioner herein was arrested on January 4, 2016 and convicted on April 24, 2017 and he so far spent six (6) years since his arrest and conviction hence asking the Court to kindly invoke Section 333 (2) of the *Criminal Procedure Code* when determining this matter.

5. That the Petitioner herein has undergone various Bible courses and attained a certificate namely 'Mind Set International Training, Nuru Lutheran' which certificate will be attached with submission when the matter comes up for hearing.

6. That this was a family case, and the family needs him back home as he was the breadwinner.

5. The Application was canvassed orally in Court on May 30, 2023. The Applicant submitted that he was sentenced to life imprisonment and urged this court to re-sentence him taking into account the period that he spent in custody while awaiting his trial before the lower court in line with the provisions of Section 333 of the *Criminal Procedure Code*.

6. On his part, Counsel for the Prosecution submitted that the Applicant had appealed in HCCRA No 82 of 2017 and the only recourse available to him was the Court of Appeal.

7. It is now a well settled principle that sentencing is a preserve of the trial court. 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."

8. I have considered the present Application and noted that the Applicant's sentence was upheld by this Court, on appeal. The *Constitution of Kenya* contemplates, at Article 50, that every accused person will be afforded a 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—
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> (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law."

9. A simple reading of the above Article reveals that it is only applicable in respect to review of a decision made by a court that is subordinate to the court to which the application for review has been presented. In the present case, it is this Court, differently constituted, that re-affirmed the sentence of the trial

court. I therefore find that this court cannot, having already discharged its mandate on appeal, is functus officio and cannot turn back and purport to review its own findings. I am persuaded by the decision of Aburili J in the case of *Daniel Otieno Oracha vs Republic* [2019] eKLR where the Petitioner had applied for review of a sentence imposed by a court of concurrent jurisdiction and while holding that the court did not have jurisdiction to review the said Judgment, the learned Judge observed that: -

> "14. The law abhors that practice of a Judge sitting to review a Judgment or decision of another Judge of concurrent jurisdiction. Reduction of sentence could only be considered by the Court of Appeal or if this court was sitting on appeal of a Judgment of the subordinate court or if the Petitioner was seeking for resentence after exhausting appeal mechanisms and not otherwise.....
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> 16. The Judgment of Abida Ali-Aroni J made in accordance with the law has not been challenged. This court cannot sit on appeal of its own Judgment or of court of concurrent competent jurisdiction when the Petitioner had an opportunity to ventilate his grievance before the Court of Appeal even if it was to challenge sentence alone.
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> 17. Good governance demands that cases be handled procedurally in the right forum. This is because the rule of the thumb 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 and that matters falling under the exclusive jurisdiction of Supreme Court under Article 163(3) cannot be dealt with by the High Court.....
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> 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. Taking a cue from the above decision, I find that this court lacks the jurisdiction to review the decision of a court of concurrent jurisdiction. It is my position that the right forum to address the Applicant's grievances will be before the Court of Appeal under Section 379 of the *Criminal Procedure Code*.

11. In the end, I find that this Application lacks merit and I accordingly dismiss it.

12. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS 13TH DAY OF JULY 2023.

W. A. OKWANY

JUDGE