Etira v Republic (Criminal Appeal (Application) E081 of 2023)
[2023] KEHC 23552 (KLR) (16 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23552 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT LODWAR

CRIMINAL APPEAL (APPLICATION) E081 OF 2023

RN NYAKUNDI, J

OCTOBER 16, 2023

BETWEEN

DAVID ETIRA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The undated application received in court on 7th July, 2023 is seeking sentence rehearing. The application has been expressed in the Kiswahili language and the applicant in essence seeks resentencing on grounds that he filed an appeal before this court, which was dismissed and that he has a young child who needs him since his parents are now deceased.

2. The applicant was convicted and sentenced to serve 15 years imprisonment for the offence of defilement contrary to section 8(1) (2) of the *sexual offences Act* No. 3 of 2006. Being aggrieved by the conviction, he preferred an appeal before this court which was dismissed for lack of merit by J.K. Sergon.

Analysis and Determination

3. I have considered the application and the grounds relied upon by the applicant. The chain of judicial steps taken by the applicant after conviction and sentence for defilement bear the answer to the single issue arising: whether the application should be allowed?

4. His appeal to this court against conviction and sentence was heard and dismissed by J.K. Sergon.

5. One of the issues brought out in the appeal was that the trial magistrate erred when he convicted him yet the prosecution did not tender credible evidence showing the victim's age. The applicant further argued that there was no witness who identified him as the person who committed the offence he was

convicted for. The Learned Judge considered the arguments by the Applicant and rendered himself as follows on the question:

> " PW2 was able to place the appellant in the centre of the offence. It is also clear from the evidence of PW3 that the victim was assessed as Nine (9) years old.
>
> Having re-evaluated the evidence tendered before the trial court; I am convinced that the appellant was properly convicted"

6. The Applicant wishes to take up on the issue of sentencing which was already determined in the appeal. The learned judge concluded that the sentence meted was not harsh or excessive. The applicant cannot therefore re-litigate the issue before this court. Neither can he seek a review of the findings of the Judge of the High Court in the self-same High Court. For this concurrent court to exercise jurisdiction on the subject matter the applicant by dint of the law must bring himself within the provisions of Article 50 (6) (a) & (b) of *the constitution* which reads as follows: A person who is convicted of a criminal offence may petition the High Court for a new trial if (a) the person's appeal, if any has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal and (b) new and compelling evidence has become available.

7. The judgement complained of by the Applicant namely, sentence to a term of imprisonment depends upon the exercise of a judicial discretion by the court imposing it. The manner in which a review against an exercise of discretion should be determined is governed by established principles. The list may not be exhaustive but includes an error of fact, law, acting upon wrong principles taking into account extraneous or irrelevant matters which affect the core of the sentence in question or ignoring material considerations in determining the final verdict. What are the matters in a prior court proceedings and sentence which cannot be resubmitted to the court of concurrent jurisdiction. In my view four factors might be considered in approaching a review or revisionary court to determine what issues must have been settled in the impugned judgement or order on sentence. Concessions, admissions, stipulation, and reasonable certainties. If a relevant fact in case for the state is conceded to the state by the accused, it is part of the judgement, Likewise an admission of a relevant fact is part of the judgement. Along with relevant stipulations, these are parts of the decision on the merits. Since they were not put in issue at the first trial, they cannot be put in issue in a later proceeding between the same parties. These are basic principles of law that judgements or rulings unless ordained by the law cannot be altered for purposes of obtaining a contrary result on an issue or cause of action to which there are fundamentals of justice and which have already been conclusively adjudged. It is readily apparent in Kenya that convicts have taken advantage of the lacuna in our criminal justice system to file an avalanche of applications, petitions, and or revisions on the same subject matter at various forums within the republic of Kenya seeking verdicts favourable to their course. This rationale of the many applications particularly on re-sentencing do in fact differ depending on the reasons for those individual cases. So the general verdicts arising out of the category of courts naturally should be viewed to constitute legal consequences on the certainty, uniformity, consistency, proportionate, and fairness of the whole scheme on sentencing. The perfect harmony in sentencing supposedly to guide the inferior courts on sentencing is lost. It is time that the general doctrine of res judicata to criminal litigation is generally appreciated and applied in cases where the call for the best interest of justice will be served. This should be distinguishable with conceptual framework that a person shall not be subject for the same offence to be twice put in jeopardy of life or limb. In a nutshell the application at bar rests entirely within the provisions of Section 382 of the *criminal procedure code* to demand of this court to have it dismissed for lack of merit.

8. As reproduced above, the Learned Judge specifically addressed the question of sentence and whether the same was deserved in the circumstances of this case. He ruled that it was. While our case law

now accepts that in specific circumstances a sentencing court might impose a sentence lower than the minimum sentence prescribed by statute, in this case, the High Court has pronounced itself on the appropriate sentence given that the accused person was properly convicted.

9. No doubt the applicant is attempting to engage in review upon review of the decision of this court- a practice that is akin to asking the court to sit on appeal over its judgment or one that borders abuse of process of the court. It is widely accepted in Kenya the re-sentencing is a particularly difficult mandate of the criminal justice process for it is considered to be every dependent on the exercise of judicial discretion. Leaving a lasting legacy in sentencing judgements should be the aspiration of every judge and magistrate as a yard stick to meet the interests of society and the rule of law. The application fails the threshold of Article 50 (6) (a) & (b) of *the constitution*.

10. In the circumstances of this case, the applicant is clearly engaging in abuse of the court process. Consequently, the Applicant cannot approach the High Court again for a review of the sentence. His only recourse is to file an appeal to the Court of Appeal.

In the upshot, the undated Application herein is dismissed.

Orders accordingly.

DATED AND SIGNED AT ELDORET THIS 16TH DAY OF OCTOBER 2023

In the Presence of:

Applicant

Mr. Yusuf for the State.

.....

R. NYAKUNDI

JUDGE