REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CRIMINAL REVISION NO. E007 OF 2020

(From Original Conviction and Sentence in Criminal Case Number 1440 of 2012 of the Magistrate's Court at Machakos)

JULIA WANGECI GITHUA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. This ruling is in respect of an undated application filed under certificate of urgency on 14.10.2020 seeking the following orders:

a. Spent.

b. This honourable court be pleased to issue further orders, directions or relief as it may deem fit to expedite in the circumstances of the application.

2. The application is supported by the affidavit of the applicant herein and on the grounds set out namely that;

a. The Applicant was charged and convicted for the offence of stealing motor vehicle and stupefying in order to commit a felony.

b. The Applicant applies to the Honourable court for review and consideration of the time spent in custody under section 333(2) of the Criminal Procedure Code.

c. That she is remorseful for the offence.

d. She has acquired industrial skills, making of mats, basket making, making soap, hand-wash, jik, sta-soft, yoghurt, cross stitch and peer counselling.

e. She has done safari ya mfungwa, discipleship, amazing facts, fellowship ministries and theology.

f. She is sickly and on medication and her health has deteriorated especially during the COVID-19 season.

3. The supporting affidavit only states that the Applicant was charged with the offence of stupefying contrary to section 279(c) of the Penal Code and attempt to transit in section 230 of the Penal Code and sentenced to serve 7 years. No other grounds are stated in it.

4. The application arises from Machakos Criminal case number 1440 of 2012.

5. The Respondent filed submissions on 9.12.2020 where counsel submitted that the Applicant had been charged with three counts being Stupefying contrary to section 230 of the Penal Code, attempted theft of goods in transit contrary to section 279 as read together with section 380 of the Penal Code and stealing contrary to section 275 of the Penal Code and was sentenced to 7 years, 3years and 1 year respectively for the three counts. The Respondent averred that the Applicant filed **Criminal Appeal number 47 of 2017**, which appeal was dismissed and the conviction and sentence upheld on 1st of October 2019. He submitted that the Applicant should proceed to the Court of Appeal as she had already been dealt with by this court. To support its case counsel relied on Article 50 (2) of the Constitution of Kenya , the case of **Telkom**

Kenya Limited vs. John Ochanda (suing on behalf of 996 former employees of Telkom Kenya Limited) (2014) eKLR and **RailaOdinga& 2 Others vs Independent Electoral & Boundaries Commission & 3 Others (2013) eKLR.**

6. The Respondent also submitted orally that the matter had been heard and determined and judgement entered by court number 1 in **Petition 44 of 2019** and thus this court became functus officio and cannot revise a sentence that has already been heard by court 1.

7. The Applicant in response to the submissions orally confirmed to this court that she had filed petition 44 of 2019 and she asked the court to consider the application as prayed.

8. I have looked at the application, the responses thereto, the submissions and find that the following issues arise for determination:

a. Whether the threshold for review of a sentence has been met.

b. Whether the revision is Res Judicata.

c. Whether this court has jurisdiction to determine this matter.

d. Whether the Applicant is entitled to the orders sought.

9. As regards the first issue, it is noted that the power of revision is provided for under sections 362 and 364 of the Criminal Procedure Code as follows:

362. Power of High Court to call for records

The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the 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.

363. ….

364. Powers of High Court on revision

(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;

10. In the case of **Republic vs. Ajit Singh s/o Vir Singh [1957] EA 822, 824** the Eastern African Court of Appeal considered the construction of then section 363 (5) of the Criminal Procedure Code (in the same terms as today's section 364 (5) of the CPC), as follows:

"Subsection 5 of s. 363 is in the following terms:

"(5) Where an appeal lies from any finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed."

The construction of this sub-section is not free from difficulty. The opening words appear to indicate that it is concerned with cases where a right of appeal presently exists; but the last three words seem to imply that if the right of appeal had existed and if the party aggrieved has not taken advantage of that right while it existed, then proceedings by way of revision shall not be entertained at his instance.

We do not propose to say which construction is correct; nor do we propose to say whether, in the instant case, an appeal by way of case stated did in fact lie.

11. In the case of **Director of Public Prosecutions v. Samuel Kimuchu& Another [2012] eKLR** the court stated that revisionary power exists in interlocutory and final orders, and held that-

"From the foregoing it is clear that the High Court cannot exercise revisional jurisdiction in an order of acquittal. It may however exercise the said jurisdiction in case of a conviction or in any other order. Accordingly, I join Ochieng, J. in Livingstone Maina Ngare's Case (supra) in holding that the High Court should exercise its jurisdiction if satisfied that any finding, sentence or order recorded or passed; or the regularity of any proceedings of any court subordinate to the High Court, did not meet the required standards of correctness, legality and propriety."

12. The court in the Samuel Kimuchu's case went on to discuss the Malaysian case of ***Public Prosecutor v. Muhari bin MohdJani and Another [1996] 4LRC 728, 734-5that –***

"The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of "paternal or supervisory jurisdiction" in order to correct or prevent a miscarriage of justice. In a revision, the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice…. If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion…. This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case".

13. In the case of **Livingstone Maina Ngare vs Republic (2011) eKLR** the learned judge in dealing with a revision held as follows;

"that the High Court should exercise its jurisdiction if satisfied that any finding, sentence or order recorded or passed; or the regularity of any proceedings of any court subordinate to the High Court, did not meet the required standards of correctness, legality and propriety."

14. I am convinced by the above authorities that the High Court has supervisory powers over decisions of the lower court and also with the submissions of the Respondent that the Applicant has a constitutional right to apply for review by a higher court. However whereas the same is true, the court can only review its decisions if it appears that there was an error apparent on the record or if there was an error on the procedure et al. The same should be done to the higher court.

15. In this case, the Applicant filed a petition No. 44 of 2019 in this court seeking to have the following orders granted;

1. A declaration that section 37 of the penal Code chapter 63 laws of Kenya is unconstitutional.

2. An order directing the 1st respondent to produce committal warrants in criminal case no. 544/2012, criminal case 1440 of 2012 and criminal case no. 568/2012 in court.

3. An order directing sentence of 10 years in criminal case no.568/2012, 7years in criminal case no. 1440/2012 and 5years in 544/2012 to run concurrently.

4. Order directing the 1st respondent to compute the sentences in criminal case no. 544/2012, criminal case 1440 of 2012 and criminal case no. 568/2012 and include period already spent in custody within the meaning of section 333 of the criminal procedure code.

5. Order directing the 1st respondent to compute the sentences of all other prisoners in the same situation to run concurrently and within the meaning of section 333 of the Criminal Procedure Code.

6. Any other Order that the court may deem appropriate in the circumstances.

16. I have noted that the prayers sought in petition 44 of 2019 particularly prayer 3, 4 and 5 are in the nature of a revision in the sense that they are asking the court to relook at the evidence of the lower court and circumstantial change in the Applicant's conduct that she feels warrants her release and/ or consideration in reducing her sentence.

17. I also note that the Applicant seeks similar orders in this case and is asking the court to take into consideration her conduct as well as time spent in jail in reducing her sentence. The case that this revision arises from is Mavoko criminal case number 1440 of 2012 which was the subject for consideration in the petition which petition has since been determined by a court of concurrent jurisdiction. Hence, this court is already functus officio and the only recourse is for the applicant to approach the Court of Appeal.

18. Furthermore, the Applicant has not demonstrated any new evidence or error on the record emanating from the lower court so as to satisfy the parameters for review. As pointed out by Odunga J which sentiments I agree with, the applicant can as well engage the prison authorities over her new quest to have the sentences reduced if she does not wish to approach the Court of Appeal. The learned Judge had this to say;

"Nothing prevents the petitioner from petitioning the Commissioner General of Prisons to exercise his powers pursuant to the above provisions if she feels that her status constitutes special grounds for further remission over and above that contemplated under section 46(1) of the *Prisons Act.*"

19. As regards the second issue, the issue of res judicata is captured in section 7 of the civil procedure Act, Cap 21 of the Laws of Kenya as follows;

"No court shall try a suit or issue in which the matter directly or substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a court of competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and finally decided by such court."

20. The Court of Appeal in **Africa Oil Turkana Limited (previously known as Turkana Drilling Consortium Ltd) & 3 others v Permanent Secretary, Ministry of Energy & 17 others [2016] eKLR** in discussing this principle found that;

The doctrine of res judicata has a long history and is founded on principles *[1]*. One of the underlying principles is that a

judgment of a court of concurrent jurisdiction directly upon the point is, as a plea, a bar, or as evidence conclusive, as between the same parties upon the same matter, directly in question in another court. There is also the principle that the judgment of a court of exclusive jurisdiction, directly on the point, is in like manner, conclusive upon the same matter, between different parties coming incidentally in question in another court, for a different purpose.[2]

47. The Supreme Court of England in Virgin Atlantic Airways Limited v Zodiac Seats UK Limited [2014] 1AC 160; [2013] 4 All E R 715 referred to res judicata as "a portmanteau term…used to describe a number of different legal principles with different juridical origin". The court in that case identified at least five different legal principles underlying the doctrine of res judicata. It is necessary to quote from that judgment at some length:

1. "The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see Conquer v Boot [1928] 2 KB 336. Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given upon it, and the claimant's sole right as being a right upon the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action…

2. …Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties…

3. …Finally there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger." *[Emphasis]*

21. The Applicant's Application for revision is ingeniously crafted to circumvent the principle of *res judicata* in that what she seeks before me are issues that were heard and determined Odunga J. Instead of the applicant moving to a higher court, she has decided to come back when already this court has determined her matter. I find the applicant's conduct to be one of forum shopping which must be discouraged.

22. The doctrine of *res judicata* is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice. This was the Court of Appeal position in **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR.**

23. Parties should not be allowed through craft to litigate in perpetuity. There must be an end to litigation. I am guided by the Court of Appeal in **John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR** where the court stated that;

"The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unravelling uncontrollably. In a nutshell, res judicata being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature. The general consensus therefore remains that res judicata being a fundamental principle of law that relates to the jurisdiction of the court, may be raised as a valid defence to a constitutional claim even on the basis of the court's inherent power to prevent abuse of process…"

24. As regards the third issue, matters of supervisory jurisdiction of the High Court is found in Article 165 (6) and (7) of the Constitution of Kenya 2010 in the following terms:

165 (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

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

25. The High Court has various divisions including but not limited to the criminal division and the Constitutional division. These are considered to be courts of the same status.

26. The Applicant has filed a Petition in the Constitutional court and has now sought for review in this court. When one is dissatisfied with a decision of a court, they either ought to apply for review in the same court or appeal to the higher court for determination of the matter.

27. In making a determination, I am inclined to look at the case as a wholesome, not just the court in which the matter is filed but also the consequential orders that are being sought by the parties. In this case, the Applicant is asking for review of her sentence based on her changed conduct and the skills she has managed to acquire whereas in the petition, prayer 3, 4 and 5 had asked for similar orders.

28. Having established that the prayers sought in the petition and the present matter are the same and having seen that Odunga J sitting in a court of similar status heard and determined the question of the sentence which the Applicant wants reduced, it can be deduced that this Application holds no water as the applicant is out on a forum shopping. The case before this court appears to be an attempt by the Applicant to bring the same cause of action as previously decided by Odunga J, albeit with ***"a few cosmetic changes."***

29. The issues in question were heard and determined by a court of competent jurisdiction and therefore the Applicant can only go to the appellate court if she is dissatisfied with the decision of the court.

30. As regards the fourth issue and in view of the foregoing observations, it is my finding that the Applicant's application for review of sentence lacks merit. The same is dismissed.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 12TH DAY OF MARCH, 2021

D. K. KEMEI

JUDGE