



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL REVISION NO. E016 OF 2020

JAMES WAWERU NDIKAA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. Before me is an application by the applicant and wherein he seeks revision of the sentence he is serving (10 years imprisonment) and the same be reduced downwards or substituted with a non-custodial sentence.

2. He pleaded that he was initially arrested and charged with murder contrary to Section 203 as read together with section 204 in Embu High Court's Criminal Case No. 7 of 2010 and sentenced to ten (10) years imprisonment and that he did not appeal against the said sentence but now seeks review of the same in conformity with the high court's decision in **Criminal Revision No. 4 of 2020 at Nyeri**.

3. The applicant filed his written submissions which he relied on in canvassing the application. On the part of the respondent, Ms. Mati the Learned Prosecution Counsel made oral submissions to the effect that this court can only review a sentence if it's illegal and that in the instant case, the sentence was very lenient.

4. I have considered the application, the applicant's submissions and further the oral submissions on behalf of the respondent. It is my considered view that the issue for determination is whether the application has merit.

5. As the applicant rightfully submitted, he was convicted by this court in Embu High Court's Criminal Case No. 7 of 2010 and sentenced to ten (10) years imprisonment. He rightfully pleaded that he did not appeal against the said sentence but opted to file the instant application for revision of the sentence. I have indeed perused the court records and I note that the applicant herein was convicted in the judgment delivered on 4.11.2019 by Hon. F. Muchemi J and later sentenced on the same day. This is after mitigation was offered on his behalf by his defence counsel. The court proceeded to sentence him ***"to serve ten (10) years imprisonment less the two years and nine (9) months spent in custody from 11/04/2010 to 18.12.2012"***

6. In **Samuel Kamau Macharia & Another V. KCB & 2 Others App. No. 2/2011**, the Supreme Court of Kenya made it clear that a Court of law can only exercise jurisdiction as conferred by the constitution or other written law and cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law, and that a court cannot expand its jurisdiction through judicial craft.

7. The jurisdiction of the High Court stems from Article 165(3) of the Constitution. It includes *unlimited original jurisdiction in criminal and civil matters; jurisdiction to enforce bill of rights; appellate jurisdiction; interpretative jurisdiction, supervisory jurisdiction and **any other jurisdiction, original or appellate, conferred on it by legislation***. An example of jurisdiction bestowed upon the High Court by a statute is the revision jurisdiction under Section 362 - 364 of the Criminal Procedure Code. Under Section 362, this court has the power to call 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. It is clear therefore that this court does not have jurisdiction to revise a judgment of a superior court or a court of its equal jurisdiction but that of subordinate court.

8. The trial court herein (Hon. Muchemi J) is a court of concurrent jurisdiction with this court. What the applicant is seeking therefore is for this court to review the decision of a court of concurrent jurisdiction. It is my view that in the circumstances herein, this court is bereft of any jurisdiction to review the said decision as doing so would be tantamount to sitting as an Appellate court on the judgment of Hon. F. Muchemi J. The law abhors that practice of a judge sitting to review a judgment or decision of another judge of concurrent jurisdiction as a case ought to be handled procedurally in the right forum. As a rule, superior courts cannot sit in review/appeal over decisions of their peers of equal and competent jurisdiction much less those courts higher than themselves.

9. It is my view that the applicant ought to have appealed against the judgment and/or sentence to the Court of Appeal as this court became *factus officio* once it (Muchemi J) delivered the judgment subject of the application herein. The Court of Appeal has the jurisdiction over the same in exercise of its appellate jurisdiction under Article 164(3) of the Constitution and Section 379(1) of the Criminal Procedure Code.

10. The applicant in this application has invited this court to consider his conduct through the application of Section 216 and 329 of the Criminal Procedure Code. However, Section 216 relates to mitigation before the subordinate courts. Section 329 on the other hand deals with mitigation in the High Court. As I have already noted, the applicant herein was offered an opportunity to mitigate before sentencing and the trial court considered the said mitigation and the fact that he had a sick child and based on that, the applicant was sentenced to the above-mentioned sentence.

11. In obiter, I note that the applicant further invited this court to review the sentence in conformity with the high court's decision in **Criminal Revision No. 4 of 2020 at Nyeri**. However, I have perused the said decision and which is reported as **Solomon Mwihugi Muthoni –vs- Republic [2019] eKLR** and the same is distinguishable from the instant case as in that case, the court (Ngaah Jairus J) decided the application before him in exercising his jurisdiction under Section 364 of the Criminal Procedure Code (reviewing a judgment or order from the subordinate court) and which is not the issue herein.

12. In view of the foregoing, this court does not have jurisdiction to entertain the instant petition. (See **the Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR**). The application is hereby dismissed.

13. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 11TH DAY OF MAY, 2021

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondent