



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**MISC. CRIMINAL APPLICATION NO.E023 OF 2021**

**LESIT, J.**

**JULIUS MUTEI MUTHAMA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an application for review of sentence from the decision of this court in High Court Criminal Case No.50 of 2002 delivered by Kimaru J. on 15<sup>th</sup> May 2019 on Re-sentencing pursuant to the Supreme Court decision in Francis Karioko Muruatetu & Another vs Republic [2017] eKLR)*

**JUDGMENT**

1. The Applicant, Julius Mutei Muthama, was charged with the offence of **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The Applicant was convicted and sentenced to death by this court on 19<sup>th</sup> June, 2014. His appeal to the Court of Appeal against conviction was dismissed. The Court of Appeal remitted the file back to the High Court for purposes of sentence re-hearing only.
2. The Applicant's application for Re-sentencing before this court was heard and determined by Kimaru, J. in High Court Criminal Case No.50 of 2002. In his ruling dated 15<sup>th</sup> May 2019, Kimaru J. allowed the Applicant's application and set aside the death sentence that was meted on him by this court. He sentenced the Applicant to serve ten (10) years imprisonment to be calculated from the date of the ruling, i.e. 15<sup>th</sup> May, 2019.
3. The Applicant has filed an application before this court seeking orders that the sentence of 10 years imprisonment imposed by this court (Kimaru, J.) ought to run from the date of his arrest (6<sup>th</sup> June, 2001) and not from 15<sup>th</sup> May 2019, which was the date of the ruling by Kimaru, J.
4. The Applicant cited the case of **Ahmad Abolfathi Mohammed & another vs Republic [2018] eKLR** in support of his contention that sentences ought to run from the date of arrest and not any other date. He urged that **Article 27(1)** of the **Constitution** provides for equal protection and benefit of the law to all persons.
5. The Applicant stated that he has been in custody for 18 years since his conviction by this court. He submitted that Kimaru, J. in his ruling on Re-sentence did not take into account this period. He urged that **Section 333(2)** of the **Criminal Procedure Code** provides that the period spent by an accused in lawful custody ought to be considered when determining sentence.
6. Learned Prosecution Counsel, Mr. Kiragu, opposed the Applicant's application. He stated that the application was founded on **Section 333(2)** of the **Criminal Procedure Code**. He stated that the Applicant exhausted all his appeal channels and that the file was remitted back to the High Court by the Court of Appeal for sentence re-hearing.
7. Learned Prosecution Counsel urged that this Court (Kimaru, J.) heard the Applicant's application for Re-sentencing, and in its ruling dated 15<sup>th</sup> May 2019, sentenced the Applicant to serve 10 years imprisonment.
8. Learned Prosecution Counsel urged that the Applicant cannot therefore come back to this court to ask for a reduction of his sentence. He urged this court to dismiss the Applicant's application for lack of merit.
9. I have considered the grounds of the instant application and the submissions by the Applicant and the State.

10. The Applicant seeks to review a decision by this court delivered by Kimaru, J. on 15<sup>th</sup> May, 2019 in High Court Criminal Case No.50 of 2002. As stated earlier, the ruling by Kimaru, J. was on Re-sentencing, pursuant to jurisdiction conferred to this court by virtue of the Supreme Court decision in **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR.**

11. The Applicant is urging this court to consider the time he has spent in custody pursuant to **Section 333(2)** of the **Criminal Procedure Code** and review the sentence meted by Kimaru, J. He urged that the Judge did not take into account the period of his incarceration as provided under **Section 333(2)** of the **Criminal Procedure Code**.

12. **Section 333(2)** of the **CPC** provides that:

**“Subject to the provisions of Section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.**

**Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”**

13. The Applicant in the present application urged that the sentence of 10 years by Kimaru, J. ought to run from the date he was arrested and arraigned before this court, and not from the date of the ruling as ordered by Kimaru, J. He stated that he has been in lawful custody for a period of 18 years and that the court ought to have considered this period in sentencing him.

14. A court of law can only exercise jurisdiction conferred upon it by the Constitution or other written law. The Supreme Court in the case of **Samuel Kamau Macharia & another vs Kenya Commercial Bank Ltd & another [2012] eKLR** held thus;

**“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”**

15. This court’s jurisdiction stems from **Article 165(3)** of the **Constitution** which provides that:

**3. Subject to clause (5), the High Court shall have:**

- a) unlimited original jurisdiction in criminal and civil matters;**
- b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;**
- c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;**
- d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of:-**
  - i. the question whether any law is inconsistent with or in contravention of this Constitution;**
  - ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;**
  - iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and**
  - iv. a question relating to conflict of laws under Article 191; and**
- e) any other jurisdiction, original or appellate, conferred on it by legislation.”**

16. In the present Application, the Applicant seeks to review the sentence of a court of concurrent jurisdiction which was meted upon an application for Re-sentencing pursuant to the **Muruatetu** decision.

17. I find that this court lacks jurisdiction to review its own orders on Re-sentencing. Doing so would amount to sitting on appeal over the decision delivered by Kimaru, J. The powers of revision donated to this court under **section 362** and **Section 364** of the **Criminal Procedure Code** cover orders of the lower courts. The powers of Re-sentencing are exercised by this court pursuant to the **Muruatetu** decision. A careful consideration of **sections 362** and **364** of **Criminal Procedure Code** can only lead to one conclusion that this court has no jurisdiction of revision over its own orders on sentence, outside the mandate given to it by the **Muruatetu** case (*supra*).

18. The Applicant having been heard by this court in exercise of its donated power on Re-sentencing, does not have a right of review or revision on the same sentence passed by this court, before this court. The application is not provided for under any law and is bad in law.

19. I find that this court lacks jurisdiction to entertain the Applicant’s application or to grant the orders sought by the Applicant herein.

20. The Applicant's application is incompetent and is accordingly hereby struck out.

21. Those are my orders.

**DATED AT NAIROBI THIS 11<sup>TH</sup> DAY OF MAY 2021**

**LESIT, J.**

**JUDGE**

**DELIVERED THROUGH TEAMS ON 11<sup>TH</sup> MAY, 2021.**

In the presence of:

Applicant in Person

Ms Kimani holding brief Chege for Respondent

**LESIT, J.**

**JUDGE**