



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NANYUKI

1. CRIMINAL PETITION NO 4 OF 2019

JAMES MWANGI GATIMU.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

2. CRIMINAL PETITION NO 8 OF 2020

DENNIS KANIARU WANGUI.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

(IN THE MATTER OF THE SENTENCES PASSED ON 5/10/2017

IN NANYUKI HC CRIMINAL CASE NO 36 OF 2016)

CONSOLIDATED RULING

1. The two Petitioners herein, **JAMES MWANGI GATIMU** and **DENNIS KANIARU WANGUI**, were convicted of **murder** contrary to **section 203** of the **Penal Code** by this court (Kasango, J) in **Nanyuki HC Criminal Case No 36 of 2016**. The court found that they were minors when they committed the offence; on 05/10/2017 it sentenced them to be detained at the pleasure of the **President of the Republic of Kenya**, with a recommendation that each of them should be detained for not less than fifteen (15) years. This was no doubt a sentence issued under **section 25(2) & (3)** of the Penal Code.

2. The Petitioners lodged appeals to the **Court of Appeal** vide notices of appeal filed in the original **High Court** file on or about 27/10/2017. Those appeals are pending in the **Court of Appeal** at Nyeri.

3. Both Petitioners have now come back to this court. **James Mwangi Gatimu** has challenged the constitutionality of his sentence in accordance with the holdings in **Nairobi HC Petition No 570 of 2015, A00 & 6 Others –vs- Attorney General & Another [2017] eKLR**. In a judgment dated 12/05/2017, **Mativo, J** gave two declarations as follows:

“(a)...that section 25(2) & (3) of the Penal Code is unconstitutional in that it violates the provisions of Article 53(1) (f)(i) & (ii) & (2), and Article 160(1) of the Constitution of Kenya, 2010 and international conventions governing the rights of children.

(b)...that to the extent that the second to the seventh petitioners herein were imprisoned for an indefinite and/or an undetermined period of time at the pleasure of the President, thereby vesting into the executive judicial powers to determine the duration of their sentences contrary to the constitutional provision of separation of powers, their imprisonment at the President’s pleasure is unlawful to the extent that it violates the concept of separation of powers and the principles of constitutionalism under the repealed constitution and the Constitution of Kenya, 2010.”

4. The learned Judge also directed the Attorney-General and Parliament

“...to move with speed to enact the necessary amendments to ensure that the provisions of section 25(2) & (3) of the Penal Code conform with the provisions of Article 53(1) (f)(i) & (ii) & (2), and Article 160(1) of the Constitution of Kenya, 2010.”

5. On his part **Dennis Kaniaru Wangui** has in effect applied for review of the sentence passed upon him. He cited the decision of the **Supreme Court of Kenya** in that court's **Petitions Nos 15 and 16 of 2016, Francis Kariuki Muruatetu & Another –vs- Republic**, where that apex court declared as unconstitutional the mandatory nature of the death sentence prescribed in **section 204** of the Penal Code for the offence of murder contrary to **section 203** of the same Code.

6. The Respondent has raised objection to the jurisdiction of this court to entertain these petitions. Learned prosecution counsel has submitted that both petitions are in essence applications for review of the sentences passed by this same court, and that the court has no jurisdiction in law to review its own orders, sentences, etc passed in exercise of its original criminal jurisdiction.

7. Let me say at the very outset that I respectfully agree with the two declarations above made by my learned brother, Mativo J, in respect to the unconstitutionality of section 25(2) & (3) of the Penal Code. However, to apply those declarations to the sentences passed upon the Petitioners herein by this court in **Nanyuki HC Criminal Case No 36 of 2016** (Kasango, J) would be an exercise in review of those sentences.

8. The power of criminal review of the High Court is provided for in **sections 362 and 364** of the **Criminal Procedure Code**, and extends only to -

“...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 the proceedings.”

This court simply does not have power to review its own findings, sentences or orders made or passed in exercise of its original criminal jurisdiction.

9. It is to be noted that in **Nairobi HC Petition No 570 of 2015** Mativo, J stated that

“...save for the first petitioner, all the other petitioners were charged and convicted in various courts in the country and sentenced to be detained at the President's pleasure.”

There is no indication or suggestion at all that any of those various courts was the **High Court**.

10. Consequently I must decline to hear the petitions herein which are essentially for review of sentences passed by this very court presided over by a different judge of co-ordinate jurisdiction. Even if I were the judge who passed the sentences upon the Petitioners, I would still not have jurisdiction to review them, not unless the matter has been referred back to this court by a higher court. The Petitioners' recourse is appeal to the **Court of Appeal**.

11. In the result the objection raised by the Respondent is upheld. Both petitions are hereby struck out. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 5TH DAY OF MAY 2021

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 6TH DAY OF MAY 2021