



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL REVISION E011/2021

GEORGE GATHURU NJOROGE.....PETITIONER

VERSUS

REPUBLIC.....PROSECUTOR

RULING

1. This file is before me for revision under Section 362 and 364 of the Criminal Procedure code.
2. The application seeks for orders under Section 333(2) of the Criminal Procedure Code which provides that the trial court while sentencing shall take into consideration the period spent in custody pending disposal of the trial.
3. The background facts are that the accused was convicted by Nyeri Resident Magistrate in Criminal case No. 694 of 1999 of the offence of robbery with violence on 13/10/1999 and sentenced to death. He appealed to the High court of Kenya Nyeri in HCCRA No. 408 and 409 of 1999. A two Judge bench dismissed the appeal on 01/12/1999. On appeal to the Court of Appeal in CRA No. 43 of 2001, the appeal was dismissed.
4. After the Supreme Court petition of **Francis Karioko Muruatetu & Another Petition No. 15 of 2017**, the petitioner approached the Principal Magistrate Court Nyeri in Criminal Petition No. 1211 of 2020 seeking for review of sentence in view of the Supreme court petition.
5. The Principal Magistrate heard and determined the said petition. He set aside the death sentence that had been commuted to life imprisonment and re-sentenced the petitioner to thirty-five(35) years imprisonment. The petitioner is currently serving the said sentence at GK prison Nyeri.
6. I proceed to look at the competency of this application given its background facts.
7. Firstly, it is imperative to mention that the jurisdiction of a court of law is donated by the constitution and the statute. It was held in the case of **Samuel Kamau Macharia Vs. KCB & 2 others, Civil application No. 2 of 2011**

“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.”

8. Following conviction by the trial court and being sentenced to death, the applicant appealed to the high court and subsequently to the Court of Appeal. His first and second appeals were dismissed.
9. The court of appeal is a higher court than this court. The applicant is before me for review of sentence by invoking the provisions of Section 333(2) of the Criminal Procedure Code which he alleges was overlooked by the trial court. The effect of the judgement of the Court of appeal delivered on 05/11/2004 was to confirm the sentence of the High court. The High Court had upheld the conviction and sentence by the trial court. In that regard, it is important to examine what the law provides in regard to review of sentences or orders in a criminal case.

Article 50(2) of the Constitution provides :-

“Every accused person has the right to a fair trial, which includes the right-

(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by the law.”

10. Article 165(6) of the constitution empowers the High Court to exercise supervisory jurisdiction over subordinate courts. The Criminal Procedure Code is the Statute that expounds on this jurisdiction. Section 362 of the Criminal Procedure provides:-

“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 subordinate court.”

Section 364 of the same code empowers the High court to exercise its revisionary powers***conferred to it as a court of appeal by Sections 354, 357 and 358 and may enhance sentence.***

11. In my considered view the Constitution is clear that a person can only apply for review of an order or sentence in a criminal case to a higher court. Section 362 of the Criminal Procedure code limits the revisionary powers of the High Court to orders of the subordinate court. This means that this court has no power to stretch its wings further than the law permits.

12. The applicant in this application obtained orders of re-sentencing from the principal magistrates court in CM Petition No. 1211 of 2020 on 19/03/2021 whereas the death sentence was set aside and the petitioner sentenced to serve thirty five(35)years imprisonment. The question that arises herein is whether the magistrate’s court had jurisdiction to review the sentence confirmed on second appeal by the Court of Appeal. The provisions of section 362 and 364 of the Criminal Procedure Code empowers this court to review the orders of the trial magistrate where a mistake, irregularity or illegality is found to have occurred or where such orders were given without jurisdiction. I would fail in my constitutional duties if I was to leave this mistake uncorrected.

13. I have perused the Supreme Court petition **No. 15 of 2017 Francis Muruatetu & Another** that the petitioner relied on before the Principal Magistrate’s court. The Supreme Court examined comparative jurisprudence and stated:-

“We agree with the reasoning of the courts in the authorities cited and the submissions of the 1st petitioner, the DPP and the amicus curiae. Comparative jurisprudence is persuasive and we see no need to deviate from the already established practice.....Remitting the matter back to the high court for the appropriate sentence seems to be the practice adopted where the mandatory death penalty has been declared unconstitutional. We therefore hold that the appropriate remedy for the petitioners in this case is to remit this matter to the High Court for sentencing.”

14. I understand the pronouncement of the Supreme Court to mean that petitions for resentencing be dealt with by the court that imposed the sentence. In the **Muruatetu** petition, the petitioners were charged and convicted of the offence of murder contrary to sections 203 as read with 204 of the Penal Code and handed death sentence. The trial court was the High court and those facts forms the basis of remitting the matter to the same court for resentencing.

15. The scenario in the matter originated from the magistrate’s court where the court found the petitioner guilty of the offence of robbery with violence contrary to Section 296(2) of the Penal Code and was sentenced to death. Following the Supreme court petition where the death sentence under S.204 of the Penal Code was declared unconstitutional, the same principle has been applied to cases of robbery with violence in regard to death sentence.

16. The issue that this court ought to determine is whether a petitioner whose death sentence or any other order has been confirmed by the Court of Appeal can approach the magistrate’s court for review of sentence under the **Muruatetu** petition, and whether such court has jurisdiction to review an order or sentence of the Court of Appeal.

17. Citing the principles laid down by the Supreme court and bearing in mind the provisions of Article 50(2)(q), it is my considered opinion that the magistrate does not possess such jurisdiction.

18. What about the High Court? Does the court have jurisdiction to review sentence confirmed by the Court of Appeal by invoking the provisions of Section 333(2) of the Criminal Procedure Code? In my considered view, the High court has no jurisdiction to entertain any petition under Section 333(2) where the court of Appeal has confirmed sentence. This is because the result of invoking Section 333(2) would mean reducing the sentence with the period the accused spent in custody in the event that this application before the High Court is successful.

19. I arrive at the conclusion that the Principal Magistrate had no jurisdiction to review the sentence confirmed by the Court of appeal and that similarly this court lacks the jurisdiction to hear and determine this application.

20. With the powers conferred upon this court by Article 165 of the Constitution and under Section 364 of the Criminal Procedure Code I hereby make the following orders:-

- a) That this petition is incompetent and is hereby struck out with no order as to costs.
- b) That the sentence of thirty five(35) years imprisonment as reviewed by the learned Principal Magistrate is hereby set aside.
- c) That the orders in this ruling to be served upon the Director of Public Prosecutions Nyeri and on the Officer in-charge Nyeri G.K Prison for their necessary action.

21. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 10TH DAY OF JUNE, 2021.

F. MUCHEMI

JUDGE

Ruling delivered through video -link on the 10th Day of June 2021 in the presence of the Petitioner and the prosecutor Mr. Ondimu.