



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: Hon. D. K. Kemei – J

MISCELLANEOUS CRIMINAL APPL. NO. E003 OF 2021

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL FREEDOM AND RIGHTS

UNDER ARTICLE 21(1), (3), 22(1), 23(1), 27(1), 47(1) AND 165(3) (b)(d) (11) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF COURT OF SECTION 333(2) OF THE CRIMINAL PROCEDURE CODE CAP 75

AND

IN THE MATTER OF SUPREME COURT DECISION IN PETITION NO. 15 OF 2015

AND

IN THE MATTER OF THE COURT OF APPEAL CRIMINAL APPEAL NO. 122 OF 2014 AT MACHAKOS HIGH COURT

FROM ORIGINAL CRIMINAL CASE NO. 25 OF 2013 AT KANGUNDO LAW COURT

BETWEEN

BONFACE MUTUA MUSAU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant, **Boniface Musau Mutua**, was charged with an offence of defilement of a child contrary to section **8(1)** as read with section **8 (3)** of the **Sexual Offences Act** wherein he was convicted and sentenced to serve thirty (30) years imprisonment. His appeal to the High Court against his conviction was upheld but his sentence was reduced to a term of 20 (years) which was to run from the date of conviction by the trial court. He later applied to the High Court vide High Court Revision Number **16 of 2016** under section **333(2)** of the **Criminal Procedure Code** for a review of his sentence.
2. His application before the High Court was held to have merit and the court held that the computation of twenty (20) years that he was sentenced to serve was to include the period he was in custody. The sentence of twenty (20) years to commence from the date of arrest namely **18/8/2013**.
3. The Applicant has again approached this court seeking orders that the sentence of 20 years imprisonment imposed by this court ought to be reviewed and that the court should take into account that he is a first offender and should have imposed a lesser sentence.
4. The Applicant relied on the case of **Francis Karioko Muruatetu v. Rep (2017)** and **R v. Otieno** in support of his contention that he was a first offender and that this court should have imposed a lesser sentence. 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 in light of the new development with the case of **Muruatetu vs. Rep (2017)** this honourable court should review his sentence and take into consideration the mitigating factors and grant reprieve.

6. Learned prosecution counsel, Mr. Mwongera, opposed the application. He submitted that the application was founded on section 333(2) of the Criminal Procedure Code. He submitted that the Applicant had appealed the decision of the trial court in **HCCRA 122 of 2014** whereby **Lady Justice P. Nyamweya** (as she then was) upheld his conviction but reduced his sentence to 20 years taking into consideration that he was a first offender and remorseful as he pleaded leniency. Counsel added that the applicant later through an application for revision approached this court for the review of his sentence in **HCCR Misc. 16/2016** under section **333(2) of the Criminal Procedure Code** which application was allowed to the extent that the sentence of 20 years was ordered to commence from the date of his arrest namely on **18/8/2013**.

7. Learned counsel urged that this court has already assisted the Applicant and further that the court is *Functus Officio* and that the Applicant should move to the Court of Appeal. It was urged that the Applicant cannot therefore come back to this court to ask for a reduction of his sentence. Counsel urged the court to dismiss the application for lack of merit.

8. I have considered the application and the oral submissions. The issue for determination is whether the application has merit.

9. The Applicant seeks for review of a decision by this court delivered on 18th December, 2019 in **High Court Criminal Revision No.16 of 2019** where the applicant's request for revision under section 333(2) of the Criminal Procedure Code was granted and that the sentence of 20 years was ordered to commence from the date of arrest namely 18/8/2013. The said review of sentence was pursuant to jurisdiction conferred to this court by virtue of Section 333(2) of the Criminal Procedure Code.

10. The Applicant seeks to review the decision by this court by virtue of the Supreme Court decision in **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR**. The Applicant herein seeks the court to consider reviewing his sentence and take into consideration the mitigating factors and grant reprieve.

11. 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.”

12. 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.”

13. In the present application, the applicant seeks for review of sentence which has already been reviewed and as such the court is already *functus officio*.

14. I find that this court lacks jurisdiction to review its own orders on Re-sentencing. The powers of revision donated to this court under section 362 and **Section 364** of the **Criminal Procedure Code** strictly 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*).

15. 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 on appeal and review. The application is not provided for under any law and is bad in law.

16. In the result, I find that this court lacks jurisdiction to entertain the applicant's application or to grant the orders sought. The same is dismissed.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 21ST DAY OF JULY, 2021

D. K. KEMEI

JUDGE

D. K. KEMEI

JUDGE