



REPUBLIC OF KENYA
HIGH COURT OF KENYA AT NAIROBI
MILIMANI CRIMINAL DIVISION OF THE HIGH COURT
MISCELLANEOUS APPLICATION NO. E180 OF 2021

(Probation application arising from the judgment of the High Court at Milimani, in Criminal Appeal No. 101 of 2016)

IN THE MATTER OF SECTION 3A OF THE CIVIL PROCEDURE ACT

AND

IN THE MATTER OF SECTIONS 4 TO 6 OF THE PROBATION OF OFFENDERS ACT

AND

IN THE MATTER OF CRIMINAL CASE NO. 1689 OF 2013 AT MILIMANI LAW COURTS

AND

IN THE MATTER OF HIGH COURT CRIMINAL CASE NO. 101 OF 2016 AT NAIROBI

BETWEEN

DAVID KIREKI ANYIMU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. By a notice of motion application dated; 24th May, 2021, and filed in court on; 4th June, 2021, the applicant is seeking for orders that, the Honorable Court be pleased to order his remaining imprisonment period of two (2) years and nine (9) months, be substituted with non-custodial sentence of a similar duration preferably, probation or in the alternative, reduce the sentence to the time served, pursuant to the provisions of; section 4(1), (a), (b), (2), (3) and (4) of the Probation Act.
2. The application is supported by an affidavit of the even date sworn by the applicant. He avers that, he has been in custody for a period of seven (7) years and three (3) months, from the year 2013, when he was arrested, for the offence of; robbery with violence contrary to section 296 (2) of the Penal Code.
3. That he was convicted and sentenced to suffer death in the year 2016. He appealed to the High Court vide; High Court Criminal Appeal no. 101 of 2016, against conviction and sentence, whereupon the High Court confirmed the conviction, but set aside the death sentence and substituted it with a custodial sentence of fifteen (15) years.
4. He avers that, he has served 97% of that sentence after benefiting from 1/3 rebate pursuant to; section 46 of the Prison's Act, hence the prayer that the remaining sentence be substituted with a probationary sentence; pursuant to section 5 (1) of the Probation of Offenders Act.
5. He further avers that, he is the only biological child of his elderly, sickly and widowed mother, who is at the virtue of losing her land to villagers and consequently disinherit him and his toddler siblings. Further, he is fully rehabilitated as evidenced by the recommendation letters from Prison Authority. That he has a chest problem, has undergone surgery at Kenyatta National Hospital (KNH), and experiences difficulty in breathing.

6. As such, being in prison while unwell, infringes on his fundamental rights under; article 25(a) of the Constitution of Kenya 2010. Finally, the Covid-19, pandemic has made prisons most vulnerable places.
7. However, the application was opposed by the Respondent, by orally arguing that, the court is “*functus officio*” in that, the court has already heard and determined the appeal relating to the subject matter herein to finality. In that case, the court lacks jurisdiction and therefore the application should be dismissed.
8. I have considered the application in the light of the materials before the court and I find that, first and foremost, the application was filed by the law firm of; Lawi Ongato Ochieng & Company Advocate but it was prosecuted by the applicant in person. Be that as it were, I note that, the application is anchored on the provisions of “section 3A of the Civil Procedure Act”. However, it is noteworthy that, the Civil Procedure Act, is not applicable to criminal cases generally.
9. The application, is further premised on; sections (4) to (6) of the Probation of Offenders Act. Notably, the application is not premised on any of the provisions of; the Criminal Procedure Code (Cap 75) of the Laws of Kenya, that “cloth” the court with jurisdiction to hear either appeals from the subordinate court or revision application. To that extent, the jurisdictions of the court is not properly invoked. The results thereof being that, the application is fatally incompetent.
10. Be that, as it may, considering the application on merit, I find that, it is a fact, the applicant was arraigned before the Chief Magistrate’s Court vide Criminal Case No. 1689 of 2013, charged jointly with another, with the offence of; robbery with violence contrary to section 296 (2) of the Penal Code. He was tried, found guilty, convicted and sentenced to death.
11. He lodged an appeal to the High Court, vide High Court Criminal Appeal No. 101 of 2016. The appeal was heard and determined whereby on; 15th June 2020, the death sentence was substituted with a custodial sentence of fifteen (15) years. That being the case, as properly argued by the Respondent, this court is *functus officio*.
12. The concept of; *functus officio* also known as the “principle of finality” states that, once a decision has been made subject to appeal to a superior court, that decision becomes final and conclusive. Thus, the same court that made the decision, cannot hear and determine any issues relating to that matter again. This court cannot therefore entertain this application further.
13. In the same vein, in view of this court being “*functus officio*” it lacks jurisdiction to hear this matter. Jurisdiction is the authority legally conferred to a legal entity to make legal decisions and judgments. Indeed, jurisdiction is everything. Without it, the court has no power to make one more step, as held in the case of; *Owners of the motor vehicle “Lillian S” vs. Caltex Oil (K) Ltd, 1989 eKLR*. Where a court has no jurisdiction it should down its tool, as all decisions made without jurisdiction are null and void.
14. In view of the aforesaid, I find that, the only recourse the applicant has is to appeal against the sentence imposed by the High Court (if he so wishes), to the Court of Appeal. It is in that court that, he will advance all the other arguments he has advanced of inter alia; violation of his Constitutional rights and/or the mitigation.
15. Further, the averments regarding the applicant’s remaining custodial sentence being served on probation may only be considered under the community Service Orders Act No. 10 of 1998, if it meets the parameters thereof.
16. Finally, based on the very many applications that I have dealt with recently in the Criminal Division of the High Court, I find that this application is an abuse of the court process. An abuse of the court process refers to the improper use of a civil or criminal legal procedure for unintended, malicious or perverse reason. It is the malicious and deliberate misuse of regularly issued civil or criminal court process that, is not justified by the underlying legal action. Abuse of process includes litigants who file applications in bad faith.
17. The application herein was filed by an advocate of the High Court, who is well versed with proper court processes and it is not clear why he could not appreciate the fact that, the court is *functus officio*, and thus this application amounts to an abuse of the due process of the law. That kind of conduct must be frowned upon and condemned.
18. All in all, the upshot of the aforesaid, is that, the application herein lacks merit and it is dismissed in its entirety.

It is so ordered.

DATED, DELIVERED VIRTUALLY AND SIGNED ON THIS 1ST DAY OF NOVEMBER, 2021.

GRACE L. NZIOKA

JUDGE

IN THE PRESENCE OF:

NO APPEARANCE FOR THE APPLICANT

MR. KIRAGU FOR THE RESPONDENT

MR. OMBUNA – COURT ASSISTANT

APPLICANT – PRESENT IN PERSON.