



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HIGH COURT CRIMINAL REVISION NO. 3 OF 2020

PAUL NDUNGU NJOROGE.....APPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

1. The subject ruling herein is a notice of motion application dated; 6th March 2020, wherein the applicant is seeking for orders that; the court be pleased to review the orders issued on; 5th March 2020, by the learned Magistrate, Hon. A. R. Kithinji, in Misc. Criminal Application No. 356 of 2019 and commute the applicant's sentence herein to the period already served and/or the court grants any further orders, as it may deem appropriate in the interest of justice.

2. The application is based on the grounds thereto, and an affidavit sworn by the applicant. Upon considering the application, the court ordered that, it be served for inter-parties hearing. On 21st July 2021, the court gave orders that, the application be dispensed of by filing of submissions. Each party was given time lines within which to file and serve their respective submissions. The Respondent filed grounds of opposition dated 29th October, 2021, which states that;

- a) *The court lacks jurisdiction to entertain the application;*
- b) *The applicant does not have new or compelling reasons warranting tis court to review the lower court's decision;*
- c) *The application lacks merit, is an abuse of the court process and should be dismissed.*

3. In addition, the Respondent filed submissions alongside the grounds of opposition and argued that the application herein is not tenable following the decision of the Supreme Court of Kenya in the case known as Muruatetu that re-sentencing is only allowed in respect to death sentence in murder offences. That the applicant herein was convicted of the offence of gang rape.

4. It suffices to note that, the applicant concurred with Respondent's submissions but the learned defence counsel, Mr. Swaka informed the court that, he was praying for the matter to be referred to the Constitutional and Human Rights Division, which is seized of jurisdiction to address the matter, as the applicant is desirous of continuing with it, as it is. The Respondent did not respond to the request to transfer the matter.

5. However, on 8th and 14th October, 2021, when the applicant's counsel was scheduled to address the court, he was not present. The applicant sought for more time to get a lawyer. Thereafter, Mr. Swaka who had joined the call, sought to have the matter postponed to enable him file a further affidavit, in relation to a pending Petition in the Constitutional and Human Rights Division.

6. The court allowed the applicant's request and further granted him seven (7) days to put in submissions and any other documents the defence wished the court to consider. The Respondent was also given a similar period of time. However, at the time of writing this decision, the applicant's submissions are not on record.

7. Having considered the entire matter, based on the materials before the court, I find that, the application herein has been overtaken by events due to the following reasons:

- a) *The decision of the Supreme Court of Kenya in Muruatetu's case rendered on; 6th July, 2021 clarified that, re-sentencing will only apply in respect to a death sentence pronounced in a murder trial, the subject matter herein was not a murder charge;*

b) As observed by the learned trial Magistrate who considered the re-sentencing application of the applicant, the applicant was sentenced to life imprisonment, which does not fall under the Muruatetu's case, that dealt with the death sentence; and

c) I further find that, this court is functus officio, having heard and determined the appeal that arose from the lower court;

d) Finally, the matter having been heard and determined by the Court of Appeal, renders this court without jurisdiction.

8. In conclusion, I find and hold that, this matter is not tenable in the light of the afore stated findings. In the given circumstances, I find the applicant has two options; to withdrawal this application and move the Constitution and Human Resource Division for determination of any issues he intends to raise or let the court mark this application as either lacking in merit, and/or overtaken by events or untenable and dismiss the same accordingly.

9. If, however, the applicant does not exercise the option to withdrawal the application, it shall be deemed to have been overtaken by events and therefore dismissed and the court file closed accordingly.

It is so ordered.

Dated, delivered and signed on this 1st day of November, 2021.

GRACE L. NZIOKA

JUDGE

In the presence of:

Ms. Kamau holding brief for Swaka for the applicant

Mr. Kiragu for the Respondent

Edwin Ombuna – Court Assistant

Ms. Kamau:

We seek to withdrawal the application dated 16/3/2021.

Mr. Kiragu:

I have no objection.

Court:

In the given circumstances, I allow the request by the applicant. I therefore mark the application as withdrawn and the file closed accordingly.

GRACE L. NZIOKA

JUDGE

1st November 2021