Uvyi v Republic (Criminal Miscellaneous Application 208 of 2018)
[2021] KEHC 315 (KLR) (6 December 2021) (Ruling)

Neutral citation: [2021] KEHC 315 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL MISCELLANEOUS APPLICATION 208 OF 2018

MW MUIGAI, J

DECEMBER 6, 2021

BETWEEN

MOSES MASESI MBINDA UVYI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Applicant herein together with another person were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars are that on the night of 12th and 13th November 1994 at Ngaani village, Mbooni Location in Makueni District of Eastern Province, they, jointly murdered Daniel Mwololo Musyimi.

2. In High Court Criminal Case No. 7 of 1997, the Applicant pleaded not guilty and the case proceeded to full hearing before this Court whereby at the close of the Prosecution case, on a case to answer, the Applicant chose to give sworn evidence. Judgment was delivered by Hon. Justice J.W. Mwera on 9th November 1999.

3. After hearing the evidence, this court acquitted the 1st Accused and found the Applicant guilty of the offence of murder and sentenced him to suffer the mandatory life sentence.

4. Dissatisfied by this judgment, the Applicant filed an appeal in the Court of Appeal in Criminal Appeal Number 122 of 2003. Upon re-evaluating the evidence and the ground of appeal presented to them, Hon. R.S.C Omolo, E.O. Okubasu and W.S Deverell JJA upheld the judgment and sentence of the High Court and dismissed the appeal.

Application On Re-sentencing

5. Aggrieved by the court sentence, vide the Petition and Notice of Motion filed on 13th November 2013 and supported by the Applicant's affidavit dated 13th June 2018, the Applicant sought review/revision

of the death sentence. According to the Applicant, he submitted that he was not accorded a fair trial when being sentenced and that the death penalty is unconstitutional as per the case of Francis Karioko Muruatetu and another, Supreme Court Petition number 12 of 2015.

6. The Applicant averred that this court failed to consider Article 50(2) (1) (2) (q) the *Constitution of Kenya, 2010* in sentencing. According to the Applicant, this court pursuant to Article 165(3) (a) has unlimited original jurisdiction in criminal and civil matters and can handle applications of this nature. He also placed reliance on Article 19(3), 20 (1) and (2), 28 and 29(1) (d) (f) of the Constitution of Kenya, 2010.

7. He also averred that mitigation should be part of the trial which was not considered in his trial and placed reliance on Section 216 and 329 of the *Criminal Procedure Code* to assert that this court can exercise its discretion as per the power of the High Court on revision. He averred that his application was within the law and should be considered.

Applicant's Submissions

8. The Applicant's written submissions what he titled as mitigation were filed on 6th October 2021 in which he opined that he had exhausted all appeals and has petitioned for resentencing on the reliance of Francis Karioko Muruatetu and another, Supreme Court Petition number 15 & 16 of 2015. He submitted that none of the courts that handled his matter considered his mitigation contrary to the provisions of Section 216 CPC and 333 (2) of the Criminal Procedure Code on considering the period in custody during the hearing of the case until conviction was not factored /taken into account during the sentencing.

9. Thus, he sought for the death sentence to be set aside and a lenient and favorable sentence to be imposed. He also asked that the court considers the time he has served from the time he was arrested. He submitted that he has been in custody since 1996, he has reformed, he is of good character and has no bad record in prison.

10. In addition, he deposed that he was a first offender and was remorseful of the offence he committed. He also gave an assurance to the court, his family and the society that he had learnt his lesson the hard way and would not re-offend. Lastly, he submitted that he has graduated in the Prisons journey, completed all the Discover Bible School lessons in the voice of prophesy and has a recommendation from SDA Chaplain office as well as the officer in charge.

Prosecution Submissions

11. In opposition, the Prosecution Counsel, Mr. Martin Mwongera in his submissions filed on 21st July 2021, averred that the application was not procedural and was an abuse of the heirachy of courts. He deposed that the court was functus officio and barred from proceeding with this re- sentencing application since it heard and substantively adjudicated the murder case, it can only grant review orders. Reliance was placed on the case of *Telkom Kenya Limited vs John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) [2014] eKLR* where Hon.Githinji, Karanja & Kiage JJA observed functus officio as;

> "an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long as the latter part of the 19th century."

12. The Prosecution also cited the case of R*aila Odinga & 2 others vs Independent Electoral & Boundaries Commission & 3 others [2013]* where the Court stated;

> " a court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded and the court functus when its judgement or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court of that right is available."

Determination

13. The Court considered the application, affidavit in support of the petition and parties' respective written submissions. The question for determination is whether this is a case that warrants the exercise of this court to revise the sentence imposed on the Applicant by this court.

Jurisdiction Of The Court

14. The Applicant opined that this court is clothed with jurisdiction under Article165 of the Constitution of Kenya whereas the Prosecution is of the opinion that this court is functus officio. It is therefore important for this court to determine the issue of the Court's jurisdiction which will inform whether it can handle the re sentencing issue.

15. In the case of Muchemi J. in *George Gathuru Njoroge vs. Republic [2021] eKLR* where the Court considered Section 362 and 364 of CPC where the High Court is empowered to review the orders of the Trial Magistrate's Court where a mistake, irregularity or illegality is found to have occurred or where such orders were given without jurisdiction. It follows therefore that these provisions are applicable to review of the Magistrate's Court orders.

16. The Supreme Court in 2015 in *Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2017] eKLR* determined the legal question whether or not mandatory death penalty sentence was /is constitutional or not. The Supreme Court found that the nature of death sentence as provided for under Section 204 of the Penal Code is/was hereby declared unconstitutional. Thereafter, Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR the Supreme Court dealt with the lack of harmony in revised sentences by the Courts, where it gave the following directions;

    Having considered all the foregoing, to obviate further delay and avoid confusion, we now issue these guidelines to assist the Courts below us as follows:

    The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under Sections 203 and 204 of the *Penal Code*;

    i. the Judiciary Sentencing Policy Guidelines to be revised in tandem with the new jurisprudence enunciated in Muruatetu;

    ii. All offenders who have been subject to the mandatory death penalty and desire to be heard on sentence will be entitled to re-sentencing hearing.

    iii. Where an appeal is pending before the Court of Appeal, the High Court will entertain an application for re-sentencing upon being satisfied that the appeal has been withdrawn.

iv. In re-sentencing hearing, the court must record the prosecution's and the appellant's submissions under Section 329 of the Criminal Procedure Code, as well as those of the victims before deciding on the suitable sentence.

v. An application for re-sentencing arising from a trial before the High Court can only be entertained by the High Court, which has jurisdiction to do so and not the subordinate court.

vi. In re-hearing sentence for the charge of murder, both aggravating and mitigating factors such as the following, will guide the court;

a. Age of the offender;

b. Being a first offender;

c. Whether the offender pleaded guilty;

d. Character and record of the offender;

e. Commission of the offence in response to gender-based violence;

f. The manner in which the offence was committed on the victim;

g. The physical and psychological effect of the offence on the victim's family;

h. Remorsefulness of the offender;

i. The possibility of reform and social re-adaptation of the offender;

j. Any other factor that the Court considers relevant.

vii. Where the appellant has lodged an appeal against sentence alone, the appellate court will proceed to receive submissions on re-sentencing.

viii. These guidelines will be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals. They will also apply to sentences imposed under Section 204 of the Penal Code before the decision in Muruatetu.

17. It is thus settled that this court has requisite jurisdiction to handle the case before it as the Applicant was charged with the offence of murder under Section 204 of the Penal Code. The Applicant is subject to the mandatory death penalty and desires to be heard on sentence and should be entitled to re-resentencing hearing.

18. However, the jurisdiction will only be exercised where there is a pending appeal before the Court of Appeal and if there is, then the appeal is withdrawn from Court of Appeal and the resentencing hearing is conducted by the High Court as provided by Guideline no IV of Muruatetu case 2 supra.

19. In this case, the Applicant was convicted and sentenced in judgment delivered on 9th November 1999 by the High Court. The Applicant lodged an appeal in the Court of Appeal which upheld conviction

and sentence by Judgment of 18th November 2005. This is confirmed by the court record and the Applicant who in his submissions when he says,

> " I have now exhausted all appeals and I opted to petition for resentencing"

20. Therefore, although by the Muruatetu 1& 2 cases supra, the mandatory death penalty was/is declared unconstitutional and an aggrieved party is entitled to Resentencing hearing, this court lacks requisite jurisdiction to hear and determine any matter heard and determined on appeal the Court of Appeal. The hierarchy of Courts requires that once the matter is heard and determined on appeal by Court of Appeal from orders by the High Court, the aggrieved party may pursue a 2nd Appeal on conviction before the Court of Appeal or review of the Court of Appeal judgment of 18th November 2005 on the issue of Resentencing based on current jurisprudence on mandatory death penalty by the Supreme Court in Muruatetu cases supra.

21. In the case of *Joseph Maburu alias Ayub vs. Republic [2019] eKLR* where Kiarie Waweru Kiarie J. stated that:-

> " Sentencing is a judicial exercise. Once a judge or a judicial officer has pronounced a sentence, he/she becomes functus officio. If the sentence is illegal or inappropriate the only court which can address it is the appellate one. Black's Law Dictionary Tenth (10th) Edition describes defines sentence as:
>
> The judgment that a court formally pronounces after finding a criminal defendant guilty; the punishment imposed on a criminal wrongdoer.
>
> Remitting a matter to the trial court which had become functus officio after sentencing flies in the face of the doctrine of functus officio. It amounts to asking the trial court to clothe itself with the jurisdiction of an appellate court. This is an illegality."

22. The Supreme Court in Muruatetu case supra also stated that;

> " We therefore reiterate that, this Court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute."

23. By virtue of Article 50 (2) (q), Article 164(3) & 165 COK 2010 which spell out the jurisdiction of the High Court and the right of the convicted person to appeal to or apply for review by a higher Court as prescribed by law, although the Applicant has the right to seek re sentencing on the death penalty sentence it is not within the High Court to deal with the same in light of the appeal filed in, heard and determined by the Court of Appeal whose decision remains a valid, legal and regular order of the Court that binds the High Court.

24. In the upshot, this Court lacks jurisdiction to review the sentence. The Chamber Summons is an abuse of the court process. It lacks merit and is hereby dismissed. The Applicant is at liberty to lodge a 2nd appeal on conviction or review under Section 379 of the Penal Code.

It is so ordered.

DELIVERED SIGNED & DATED IN OPEN COURT VIRTUALLY ON 6TH DECEMBER 2021.

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

Moses Masesi Mbinda - Applicant – present (virtual)

Geoffrey – Court Assistant