



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL REVISION NO. 33 OF 2019

SOSPETER MUCHANGI NDWIGA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

A. Introduction

1. This is for the undated application filed on the 7/11/2019 in which the applicant seeks revision on his fifteen (15) year sentence to half the period or in the alternative a non-custodial following the decision of the Supreme Court in the case of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR**.

2. The applicant further relied on the case of **Josphat Murimi Muthuke v Republic** where it was held that the **Muruatetu** petition applies to sexual offences as well. In support of his application the applicant submitted that he had since gained a number trades since his incarceration.

3. In rejoinder, Ms. Mati for the respondent stated that she was opposed to the application as it was not covered by the Muruatetu case which dealt with murder and robbery with violence whereas the applicant was convicted and sentenced to fifteen (15) year imprisonment for the offence of defilement contrary to Section 8(1) of the Sexual Offences Act.

4. Ms. Mati further submitted that the applicant's sentence could be ordered to run from the date of arrest as he was in custody during the course of the trial.

B. Analysis & Determination

5. The powers of the High court in revision are contained in Section 362 through to 366 of the Criminal Procedure Code (cap.75). Section 362 specifically provides as follows: -

“362. 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 such subordinate court”.

6. What the High Court can do under its revision jurisdiction is stated under section 364 of the Criminal Procedure Code Cap 75It provides interalia that the High Court in its revision jurisdiction cannot reverse or alter an order of acquittal. Secondly, it cannot make an order that is to the prejudice of the accused person unless he has had an opportunity of being heard either personally or by an advocate. Thirdly, when an appeal arises from such sentence finding or order of the magistrate's court and no appeal is brought, revision proceedings cannot be sustained at the insistence of the party who could have appealed.

7. In my view, the revisionary jurisdiction of the High Court should only be invoked where there are glaring acts or omissions but should not be a substitute for an appeal. In other words parties should not argue an appeal under the guise of a revision. It is for this reason that the decision whether or not to hear the parties or their advocates is discretionary save for where the orders intended to be made will prejudice the accused person. As was stated by **Waweru, J** in **Republic vs. Samuel Gathuo Kamau [2016] eKLR**, where the Learned Judge observed that: -

“Needless to say, that supervisory jurisdiction is exercised as may be provided by law – by way of appeal, revision, etc. it does not include on any perceived power to make a decision on behalf of a subordinate court which that court ought to make. In the case of appeals the supervisory power is exercised in respect to conviction, sentence, acquittal (section 347, 348 and 348A of the Criminal Procedure Code). As for revision, the supervisory jurisdiction is exercised in respect to findings, sentences, orders and

regularity of any proceedings. See Article 165(7) of the Constitution and Section 362 and 364 of the Criminal Procedure Code.”

8. The applicant was charged and convicted for the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the Sexual Offences Act and sentenced to serve fifteen (15) years imprisonment. He subsequently appealed vide Embu High Court Criminal Appeal 49 of 2015 but the appeal was dismissed for lack of merit.

9. The provisions of section 362 as read with section 364 of the Criminal Procedure Code are clear that revision jurisdiction is by no means an appeal by the aggrieved party to the High Court in criminal cases where such orders are being sought under section 364 on revision the court should steer clear from trespassing into the realm of appellate jurisdiction.

10. The applicant seeks revision on his 15 year sentence to half of the same or in the alternative a non-custodial following the decision of the Supreme Court in the case of **Francis Kariuki Muruatetu & Another v Republic [2017] eKLR**. The applicant further relied on the case of **Josphat Murimi Muthike v Republic** where he alleged it was held that the *Muruatetu* case applies to sexual offences.

11. It would appear that the Applicant has grounded his Application on the Muruatetu doctrine. This was the decision of the Supreme Court in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR**. In the *Muruatetu Case*, the Supreme Court outlawed mandatory death penalty for murder as unconstitutional and struck down section 204 of the Penal Code to the extent that it prescribed mandatory death sentence upon conviction for murder.

12. I find no relevance of the **Muratetu** case in this application for the reason that the applicant was not sentenced to death. He was sentenced to fifteen (15) years imprisonment. Neither do I find any relevance of the **Joseph Murimi Muthike** case.

13. The applicant having chosen to file an appeal which was heard and determined by a court of equal jurisdiction with this court, is barred by law to file this revision. Judgment in the appeal was delivered on 4/05/2016 dismissing his appeal. The appeal court dealt with the whole judgment including the legality and severity of the sentence. This court has no business dealing with the issues again for it would be tantamount to sitting on appeal on matters determined by a court of equal jurisdiction.

14. I find no merit in this application and I dismiss it accordingly.

15. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 7TH DAY OF APRIL, 2020.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for Respondent

Petitioner through video link