



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL REVISION NO. 111 OF 2020

NAHASON MUGO IRERI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

A. Introduction

1. This application dated 3/03/2020 seeks for review of sentence in accordance with Article 50(p) of the Constitution as well as Section 362 and 364 of the Criminal Procedure Code.
2. It was his case that he was initially charged in Embu Criminal Case No. 1 of 2016 at PM's Embu Court for the offence of incest contrary to section 20(1) and committing an indecent act contrary to Section 11(1) of Sexual Offences Act No. 3 of 2006 upon which he was convicted and sentenced to thirty (30) years imprisonment. He then appealed to the High Court in Embu HCCA No. 50 of 2016 and that the high Court set aside the sentence and substituted the same with twenty (20) years imprisonment.
3. During the hearing of the application, both parties made oral submissions in support of their rival positions and wherein the applicant reiterated the contents of his application. On her part, Ms. Mati for the respondent submitted that the court lacks jurisdiction to entertain the instant application as it handled the appeal and reduced the sentence from 30 years to 20 years. In a rejoinder, the applicant prayed for forgiveness and leniency by the court.

B. Analysis of law & Determination

4. I have considered the application by the applicant as well as the oral submissions by the parties herein and it is my opinion that the main issue which ought to be decided is whether this court has jurisdiction. If so, the court will proceed to determine the merits of this application.
5. I take notice of the submissions by the Respondent to the effect that the court lacks jurisdiction to entertain the instant application as it handled the appeal and reduced the sentence from 30 years to 20 years. As such, that being a jurisdictional issue, it needs to be dealt with at the preliminary stage as it is trite law that jurisdiction is everything and without which a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. (See the owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR).
6. I have perused the court file and I note that indeed the applicant herein appealed against the decision by the trial court in Embu HCCRA No. 50 of 2016 and which appeal was heard and judgment delivered on 18/10/2018 where the sentence of 30 years initially meted upon the applicant was set aside and a new sentence of twenty (20) years imprisonment imposed. It is this sentence which the applicant seeks revision thereof. The appeal was heard by Hon. Justice Chitembwe a judge of the High Court. Basically the appeal was heard by a court of concurrent jurisdiction with this court.
7. The applicant did not exhaust the avenues of appeal. He did not file a second appeal in the Court of Appeal. Rather he filed this application seeking for review of sentence. This court's jurisdiction is derived from various statutes and Article 165 of the Constitution. In Samuel Kamau Macharia & Another V. KCB & 2 Others App. No. 2/2011, the Supreme Court of Kenya made it clear that a court cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law, and that a court cannot expand its jurisdiction through judicial craft.
8. In my view this court and the court which heard the appeal being courts of concurrent jurisdiction.
9. It is trite law that an applicant ought to apply for revision to the High Court under Section 362 and 364 of the Criminal Procedure Code in the High Court against a decision of the lower court or to appeal against the decision in the same court.

10. An appellant who has appealed to the High court and the appeal has been determined cannot come back for revision or review in the same court. If this was to be allowed, a lot of confusion would be created.

11. The applicant having chosen to go on appeal to the High Court and in the event that he is not satisfied with the decision ought to go on a second appeal to the Court of Appeal. That is the right forum for the applicant herein.

12. **Article 50(2)(p) of the Constitution** under which this application is brought provides as follows: -

to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing;

13. In my view and considering the facts of this application, I find no relevance of the said provision to this application. Neither did the applicant explain it.

14. It is my considered opinion that this court lacks jurisdiction to review the sentence of twenty years imposed by a court of equal jurisdiction.

15. The application is therefore misconceived and incompetent.

16. It is hereby struck out.

17. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 2ND DAY OF JULY 2020.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for the Respondent

Applicant through Video Link