REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISCELLANEOUS CRIMINAL APPLICATION NUMBER 226 OF 2016.

HAKI GEORGE NGUZO.....APPLICANT.

VERSUS

REPUBLIC .....RESPONDENT.

RULING.

1. Haki George Nguzo, hereafter the Applicant, brought the present application by way of Chamber Summons filed 14th June, 2016 seeking orders that this court grants leave for directions and advice on the applicability of an issue of family reconciliation pursuant to Article 159(2)(c) of the Constitution. The application was supported by an affidavit sworn by himself in which he deposed that he was the accused person in **Kibera Chief Magistrate's Criminal Case No. 16 of 2014** in which he was convicted and sentenced for committing an offence of defilement. He alluded to existence of new developments in the matter as his family, including the complainant were willing pursuant to Article 159(2)(c) of the Constitution to swear an affidavit in support of a proposed reconciliation. He sought leave of the court to initiate the process and advice as to the applicability of the process to the matter. He sought refuge in Article 50(1) of the Constitution which provides that every person had the right to have any dispute resolved by the application of law and decided by a fair and public hearing before an independent and impartial tribunal or body.

2. The application was canvassed before me on 13th June, 2018 by way of oral submissions. The Applicant was in person whilst Ms. Atina acted for the Respondent.

3. The Applicant submitted that after the conviction he preferred an appeal to the High Court, being Criminal Appeal No. 55 of 2015 which appeal was dismissed. He submitted that the complainant had since forgiven him because the person who actually committed the offence was not charged. He submitted that he was innocent and a victim of circumstances. He thus sought forgiveness.

4. Ms. Atina opposed the application. She pointed to the fact that the Applicant had conceded that he was convicted by the trial court and his appeal to the High Court had been dismissed. She submitted that this court was therefore *functus oficio* in the matter. She urged the Applicant to prefer a second appeal to the Court of Appeal. Further, that the issues canvassed in the application were already canvassed before both the trial and High Court. It was her view that this court lacked the jurisdiction to entertain the application and urged that it be dismissed.

5. In reply, the Applicant submitted that it was important for the court to promote reconciliation thus, urging that the application was properly before the court.

DETERMINATION.

Jurisdiction of the court.

6. The first issue for determination is whether this court has jurisdiction to entertain the application. This falls in the face of the Respondent's submission that the court was *functus officio* after it dismissed the appeal arising from the Applicant's conviction. Miss Atina submitted that the matters forming the crux of the present application had been deliberated both before the trial court and during the hearing of the appeal. The Applicant on the other hand was of the view that by dint of Article 50(1) of the Constitution he deserved his day in court.

7. It is now settled law that jurisdiction is the cornerstone of any judicial proceedings. Where a court undertakes any proceedings, notwithstanding that the proceedings were well conducted, if it lacked jurisdiction, the proceedings are amenable to being set aside. In the renowned case of **Owners of the Motor Vessel "Lillian S" *v.* Caltex Oil (Kenya) Ltd [1989] KLR 1**, Nyarangi J.A held as follows;

> ***"I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without***

it, 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."

8. No doubt jurisdiction of a court flows from the Constitution or a Statute or both. A court must not confer on itself jurisdiction where none exists; but must be bold enough to adjudicate upon a matter where jurisdiction is conferred upon it.

9. I have read the judgment of my learned brother Kimaru, J. in Criminal Appeal 55 of 2015. It is clear that the issue at the heart of the present application was not canvassed. Further, while this court has previously held, See: **Geoffrey Ndungu Njunge *v.* Republic[2018] eKLR,** that an appellate court is *functus officio* in reconciliation proceedings as they do not constitute new and material evidence that would determine the guilt or otherwise of an accused, the prayer in the instant application seeks advice and leave to initiate the process; a novel and distinct issue which while contingent on the Applicant's guilt is clearly distinct from the issue of his guilt.

10. Further, the Applicant has approached this court to have his right to a fair hearing upheld as set out under Article 50(1) of the Constitution. In light of the novel nature of the order sought I find that the court cannot be deemed to be *functus oficio.* The additional rationale is that the High Court is vested with original jurisdiction in both criminal and civil matters as provided under Article 165(3)(a) of the Constitution.

Merit of the application.

11. The application is hinged on the provisions of Article 159(2)(c) of the Constitution which states:

"(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles:

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution shall be promoted, subject to clause (3)."

12. The provision is subject to clause (3) which fetters the manner of application of clause (2). The latter provides that;

"Traditional dispute resolution mechanisms shall not be used in a way that

(a)contravenes the bill of right;

(b)is repugnant to justice and morality or results in outcomes that are repugnant to justice and morality;

(c) or is inconsistence with this Constitution or any written law.

13. It is clear that clause (3) applies only to traditional dispute resolution mechanisms. Be that as it may, my view is that the remedies set out in Article 159(2)(c) of the Constitution are not available to the Applicant as judicial authority has already been exercised after the Applicant's conviction and dismissal of the first appeal by courts with competent jurisdiction.

14. It is important to point out that the court being alive to the provisions of Article 50(2)(q) of the Constitution (right of appeal to a higher court), requested the Applicant to prefer a second appeal. He adamantly declined, prompting the court to hear him. I then reiterate that judicial authority was competently exercised by the courts that heard him. The words of Trevelyan J. in **Somo *v.* Republic[1972] EA 476**, although pronounced in an application for bail pending appeal, are apt in summarizing the position the Applicant currently finds himself. He held that:

"It seems to me that when these applications are considered it must never be forgotten that the presumption is that the applicant was convicted, he was properly convicted."

The presumption that the exercise of judicial authority was proper and that the Applicant was properly convicted limits the applicability of the principle enunciated in the Constitution at Article 159(2)(c).

15. At this juncture, it is my view that the only recourse available is for the Applicant to present a request before the **Power of Mercy Committee** constituted pursuant to Article 133(1) of the Constitution and the Power of Mercy Act, 2011. He must nevertheless have regard to Section 19 of the Act which bars applications to the Committee where a judicial process is still ongoing. He shall have an opportunity to mitigate the reconciliation process pursuant to Section 22 of the Act. He is cautioned that he must provide proof before the Committee that there are no pending proceedings relating to the matter before a court of law. He can then canvass what he thinks constitute mitigating factors that may necessitate an early release from prison.

16. In the result, I find that the application lacks merit and the same is accordingly dismissed with no orders as to costs.

Dated and Delivered at Nairobi This 3rd October, 2018.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of;

1. *Applicant in person.*

2. *Miss Atina for the Respondent*.