Musyoka v Republic (Criminal Miscellaneous Application E092 of 2024)
[2025] KEHC 14449 (KLR) (24 September 2025) (Ruling)

Neutral citation: [2025] KEHC 14449 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL MISCELLANEOUS APPLICATION E092 OF 2024

NIO ADAGI, J

SEPTEMBER 24, 2025

BETWEEN

GEOFFREY MUTETI MUSYOKA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Applicant was charged in Chief Magistrate Court at Mavoko in Criminal Case No. 964 of 2012 of robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code.

2. The Applicant pleaded not guilty and the matter was set for full trial. The prosecution called six (6) witnesses to prove its case and the Applicant was convicted and sentenced to death on 17th July 2014 by the trial court.

3. The Applicant being dissatisfied with the conviction and sentence filed a first Appeal to the High Court at Machakos in Criminal Appeal No.142 of 2014. The High Court being a first appellate court, evaluated the evidence and thereafter dismissed the appeal in its entirety as the said appeal lacked merit. The conviction and sentence of the trial court were upheld on 8th November 2017.

4. There is no record on whether the Applicant filed a second Appeal to the Court of Appeal.

5. The Applicant has now filed an undated Notice of Motion application herein seeking that:-

    i. this Court be pleased to take into consideration that the Applicant is remorseful and seek forgiveness from the victims, the family of the victim, the court and the society at large.

    ii. this Court be pleased to take onto consideration that the Applicant is a first offender and had never been previously charged before any court in Kenya.

iii. this Court be pleased to take into consideration that the Applicant has engaged in rehabilitative programs while in prison which have refined him and improved his overall character.

iv. this Court be pleased to take into consideration the time spent in custody under Section 333(2) of the Criminal Procedure Code.

iv. this Court be pleased to hand the applicant lenient sentence taking account life expectancy and the recent development of the law.

iv. this Court be pleased to take into account any other mitigating factors.

6. The Respondent is opposed to the instant application and submits that the High Court at Machakos in Criminal Appeal No.142 of 2014 fully analysed the proceedings of the trial court and rightfully concluded that the prosecution proved its case beyond reasonable doubt thus rightfully convicting the Applicant. That the High Court considered the grounds of appeal raised by the Applicant in the appeal and concluded that the trial court rightfully convicted the Applicant and therefore dismissed the appeal and upheld the conviction and sentence.

7. The Applicant relies on the Muruatetu II Case in his submissions and argues that the death sentence was declared unconstitutional by the Supreme Court of Kenya. On this argument by the Applicant, this court wishes to inform the Applicant that the Supreme Court of Kenya clarified in Muruatetu II that the application before them and the ruling related to murder cases only under Section 203 and Section 204 of the Penal Code. The ruling declared the mandatory nature of the death sentence in murder cases as unconstitutional. Thus, the rulings in both Muruatetu I and Muruatetu II do not relate to robbery with violence offences or other offences.

8. The sentences in Section 296(2) of the Penal Code have not been declared unconstitutional in any court of law, neither has any case as regarding robbery with violence is entitled to resentencing. Further the death sentence has not been declared unconstitutional in any court of law within Kenya. The death sentence that was meted upon the Applicant is a proper and valid sentence within the jurisdiction of the Republic of Kenya.

9. The High Court at Machakos in Criminal Appeal No.142 of 2014 and this Court are of the same jurisdiction and therefore this Court cannot purport to overturn the judgment and findings of the court of similar jurisdiction.

10. Further, the Applicant is not entitled to an application of sentence review as he had not exhausted all his avenues of appeal in the matter. There is no indication that the Applicant had filed a 2nd appeal at the Court of Appeal.

11. Further, the Applicant is also not entitled to an application of resentencing as the sentence meted upon him was legal, proper, valid and in accordance with the penalty under the provisions of Section 296(2) of the Penal Code. The decision of the court trial court was not improper, erroneous, mistaken or was it illegal to warrant interference by this court.

12. In William Mwangale Ongoma v Republic [2020] KEHC 1446 (KLR) the learned judge held that:

> "…. A court in revision is not concerned with the merits of the decision of the court but rather on the impropriety, mistake, illegality of the order, sentence or judgment..... This court's powers of revision are limited to satisfying itself as to the correctness, legality or propriety of any findings, sentence, or order recorded or passed and as to the regularity of any proceeding of any such subordinate court and in exercising supervisory jurisdiction under Article 165(6) of *the Constitution* the court does not exercise appellate jurisdiction

and therefore cannot review or re-weigh evidence upon which the determination of the lower court was based and can only upset an order which it considers erroneous, without jurisdiction and constitutes gross violation of the fair administration of justice....."

13. The sentence issued to the Applicant was proper and within the law under circumstances.

14. According to this court, the Applicant did not exhaust his right of appeal in the Court of Appeal and Supreme Court. A reading of Section 362 and 364 of the Criminal Procedure Code, the High Court can only revise the decision of the Magistrate's Court and not of a court of similar, equal, competent and concurrent jurisdiction to the High Court.

15. To review the Applicant's sentence, as urged would be tantamount to sitting on appeal against a sentence of a court of concurrent jurisdiction and that is not permissible under the law.

16. The Applicant cannot come back to this court for review because this court having the same jurisdiction with the court that heard and determined his appeal being the High Court is functus officio. If he has any grievances, he can only move the Court of Appeal then the Supreme Court if he so wishes.

17. Alternatively, the Applicant may be best advised to petition for the President's Power of Mercy under Article 133 of *the Constitution* and the *Power of Mercy Act*. This Advisory Committee is established to advise the President in exercise of that function and has power to consider the grounds raised by the Applicant – see section 22 of the *Power of Mercy Act*. Section 20 (5) of the Act obligates the Cabinet Secretary and Committee to make available to correctional facilities the forms necessary for filing the petitions hence it is an option open to the Applicant.

18. For the above reasons the Applicant's application for review is found to be beyond the jurisdiction of this court and is declined.

19. File closed.

RULING WRITTEN, SIGNED & DATED AT MACHAKOS THIS 24TH SEPTEMBER 2025.

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 24TH SEPTEMBER 2025.

In the presence of

In person..... for Applicant

Ms. Agatha..... for Respondent

Milly grace..... Court Assistant