Keval v Republic (Criminal Review E1213 of 2024)
[2025] KEHC 680 (KLR) (Crim) (30 January 2025) (Ruling)

Neutral citation: [2025] KEHC 680 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL REVIEW E1213 OF 2024

AM MUTETI, J

JANUARY 30, 2025

BETWEEN

OMAR WAITHAKA KEVAL ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The applicant by way of chamber summons dated 20th June 2024 has come to this court seeking to have the sentence imposed upon him reviewed to a non-custodial sentence. He has moved the court under Section 332 of the *Criminal Procedure Code* as well as Section 35 (1) of the *Penal Code*.

2. The applicant contends that he was arrested on 2nd of January 2012 and after a full trial he was convicted and sentenced on 10th June 2019 by the learned Honorable Lady Justice Mutuku and sentenced to serve 15 Years imprisonment for the offence of murder contrary to Section 203 as read with 204 of the *Penal Code*.

3. The applicant further states that at some stage his bond was cancelled and he spend Nine (9) months in remand custody which period he states was not considered at the time of sentencing.

4. The applicant informed this court that he appealed to the Court of Appeal and his appeal was heard and determined with the result that the appeal was dismissed and he was ordered to continue serving the 15 years imprisonment term.

5. He says that at the Court of Appeal he did not raise the issue of the Nine Months period he spent before sentence thus his plea to have the sentence reviewed.

6. Mr Muindi counsel for the state posed the application and in his submission he argued that since the court of Appeal had pronounced itself on the mater of sentence this court has no jurisdiction to review

the decision of the Court of Appeal. According to Mr. Muindi the application by the applicant is one that is fit for Summary dismissal.

7. In the case of *Owners of the Motor Vessels "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR the court of appeal held that :-

> "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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority: "By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given" See Words and Phrases Legally defined – Volume 3: I – N Page 113 It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. I can see no grounds why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado."

8. It is now settled law that where the issue of jurisdiction is raised the court ought to immediately determine that otherwise any other further proceedings undertaken by the court would be a nullity. The state having taken up the issue, this court must determine the question whether the High court can purport to review the decision of the Court of Appeal even where a party alleges that the issue that has brought them before the High court was never raised before the court of Appeal even though that issue would have been properly canvassed before the Court of Appeal.

9. It is the view of this court that notwithstanding the fact that the applicant may not have raised the question of the nine (9) months spend in custody for conviction during the hearing in the Court of Appeal, this court cannot review the decision of the Court of Appeal on the matter of sentence.

10. The proper course for the applicant to take would be to file the instant application before the Court of Appeal and urge the court to review its decision on sentence otherwise the invitation extended to this court to interfere with the decision of the Court of Appeal goes against the principle of *stare decisis*.

11. The Court of Appeal decisions bind the High Court thus any attempt by the High Court to overturn a decision of the Court of Appeal would be tantamount to executing a jurisprudential coup against the Court of Appeal which action can only result in judicial disharmony in decision making. The

High Court must at all times turn down such invitation and advise parties to proceed and pursue their intended course in the proper forum.

12. Sir Charles Newbold, P in *Dodhia v National & Grindlays Bank Limited and another* [1970] EA 195, pronounced himself thus on the issue of observing the principle of *stare decisis*:-

> " A system of law requires considerable degree of certainty and uniformity and such certainty and uniformity would not exist if the courts were free to arrive at a decision without regard to any previous decision of its own. But there is a great difference between a final court of appeal and a subordinate court of appeal. If it is considered that a decision of a subordinate court of appeal was wrong it would always be open to have it tested and if necessary rectified in the final court of appeal. Thus, on the face of it, there is a need for greater flexibility in a final court of appeal than there is any other court in the judicial hierarchy. Further, the need for such flexibility is the greater and not the less in a developing country, as there is a greater likelihood of rapid changes in the customs, habits and needs of its people, which changes should be reflected in the decisions of the final court of appeal. It should, moreover, be borne in mind that too strict an adherence to the principle of *stare decisis* would, in fact, defeat the object of creating certainty, as a final court of appeal faced by a decision which was unsuited to the present needs of the community would seek to distinguish it. The result of distinguishing a decision when there was no real difference results in uncertainty, an uncertainty which would not exist if it were clearly stated that the old decision was no longer the law. It must also be remembered that the Privy Council, when it was the final court of appeal for Kenya, Tanzania and Uganda, never considered itself bound by its previous decisions. It would seem a retrograde step for the court, now that it has taken over the functions of a final court of appeal for these countries, to discard the flexibility previously possessed by the final court of appeal and instead adopt a position of rigidity."

13. The principle of *stare decisis* was expounded in the same case by Duffus, V.P. who stated that: "The adherence to the principle of judicial precedent or *stare decisis* is of utmost importance in the administration of justice in the Courts in East Africa and thus to the conduct of the everyday affairs of its inhabitants, it provides a degree of certainty as to what is the law of the country and is a basis on which individuals can regulate their behaviour and transactions as between themselves and also with the State. There can be no doubt that the principle of judicial precedent must be strictly adhered to by the High Courts of each of the States and that these courts must regard themselves as bound by the decision of the Court of Appeal on any question of law, just as in the former days the Court of Appeal was bound by a decision of the Privy Council, or in England as the Court of Appeal or the High Courts are bound by the decisions of the House of Lords, and of course, similarly the magistrates courts or any other inferior court in each State are bound on questions of law by the decisions of the Court of Appeal and subject to these decisions also to the decisions of the High Court in the particular State."

14. This court though fully cognizant of the provisions of Section 333(2) of the *Criminal Procedure Code*, it is not prepared to reopen the issue of sentence since nothing prevents the applicant from proceeding to the court of appeal to canvass the issue.

15. The facts of this case militate against a non- custodial sentence and even if this court had jurisdiction to deal with the issue of sentence, there would be absolutely no reason for this court to apply the provisions of Section 35(1) of the *Penal Code* especially so, coming at a time when innocent lives of our women and girls continue to be extinguished by the minute by some breed of blood thirsty men in our society.

16. The application is hereby struck out.

17. It is so ordered. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF JANUARY 2025.

A.M. MUTETI

JUDGE

In the presence of:

Kiptoo: Court Assistant

Applicant in person

Chebii for the Respondent