Moyare v Republic (Criminal Revision E76 of 2024)
[2025] KEHC 600 (KLR) (30 January 2025) (Ruling)

Neutral citation: [2025] KEHC 600 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL REVISION E76 OF 2024

AK NDUNG'U, J

JANUARY 30, 2025

BETWEEN

MALI MALI OLE MOYARE ..... APPLICANT

AND

REPUBLIC OF KENYA ..... RESPONDENT

RULING

1. The Applicant moved this court through a notice of motion dated 22nd March 2024 seeking the following orders;

    i. That, may the honourable court be pleased to review his sentence as perabove referred provisions of the law and allow him to bring further mitigation in support of his application in the interest of justice.

    ii. That, may the honourable court be pleased to hear his prayers since it is within the rule of law under Article 50(2)(q) and 165 (3)(6) of the *Constitution* whereby the honourable court has unlimited jurisdiction in both civil and criminal matters.

    iii. That he was charged with the offence of robbery with violence contrary to Section 296(2) of the *P.C* and sentenced to death.

    iv. That, the application is grounded upon annexed affidavit of 1. Mali Mali Ole Moiyare. And others grounds to be adduced at hearing of this application. (sic).

2. In response, the Respondent raised a preliminary objection premised on the following grounds:-

    1. That the Application is misplaced, ill-advised and incompetent since it is unsupported in law.

    2. That this Court lacks the jurisdiction to entertain, hear/or determined the Notice of Motion application.

3. That the Application is an abuse of the court process and should accordingly be dismissed.

3. The preliminary objection was canvassed through brief oral submissions. Ms. Kimani for the Odpp submitted that the court has no jurisdiction to entertain the application since the applicant moves this court to review an order of a court of concurrent jurisdiction and of the Court of Appeal which courts have already pronounced themselves on the matter.

4. Counsel notes that the Applicant was convicted in CMCR No. 1977 of 2006 for robbery with violence and sentenced to death. An appeal to the High Court vide HCCRA 304 of 2007 was dismissed and conviction and sentence upheld. He approached the Court of Appeal in CRA. No. 59 of 2014 which appeal was dismissed.

5. In response, the Applicant states that he has only asked for re-sentencing. He states that what he seeks is a review of the sentence.

6. It is not disputed that the Applicant was sentenced at the trial court, had his appeal heard and determined by this Court and a further appeal to the Court of Appeal was dismissed. The question for determination is whether this court has jurisdiction to entertain the application.

7. The law on jurisdiction was stated by the Supreme Court in *Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others*, Application No. 2 of 2011 thus:

> "A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law..."

8. The pertinent question therefore, is whether this court has power to review the decision of a court of concurrent jurisdiction or of the Court of Appeal, a higher court than itself.

9. Oftentimes, many an applicant, and the Applicant falls under this category, have misapprehended the re-sentencing jurisdiction granted to courts following the Muruatetu decision of the supreme court.

10. The Sentencing guidelines 2022 at Paragraph 4.8.18 provides that"

> "4. 8.18 Resentencing cases shall be handled by the 'Sentencing Court' – e.g., if the last court that sentenced the convict was the Court of Appeal, then the re-sentencing hearing shall also be handled at the Court of Appeal and not a lower court. This applies mutatis mutandis ''

11. The Court of Appeal is the last court which sentenced the Applicant. It is thus the court with the requisite Jurisdiction to re -sentence the Applicant.

12. In my understanding, the re-sentencing jurisdiction created by the Muruatetu decision is a narrow one and must be tethered to its rightful place. Anything to the contrary is a sure recipe for anarchy and disorder in the criminal jurisdiction of our courts. Indeed, evidence abounds that a certain degree of uncertainty and confusion in matters sentencing has so far been experienced. There has also be what in my view is an avalanche of applications that have unnecessarily inundated our courts arising from the misapprehension of the law alluded to above.

13. They say in equity that equity of redemption is "like an unruly dog, which, if not securely chained to its own kennel, is prone to wander into places where it ought not to be." In the same vein, I hold the view that the re-sentencing regime triggered by the developments in the law from the *Muruatetu* decision must be securely chained to the specific jurisdiction that is to revisit sentences where a convict did not

mitigate at trial and/or where the trial court's sentence was clearly based on the mandatory nature of the sentence with the court not exercising usual discretion in sentencing.

14. It must be stated firmly that re-sentencing applications are not about what a convict has become at prison. It is not about how reformed and corrected a convict has become, it is not about the training received during time served, It is not about ill health and it is not about a good record of character as may be recommended by the holding prison. These are matters within the purview of the Power of Mercy Committee and remission of sentence provisions.

15. I find it opportune to amplify the existence and operations of the Power of Mercy Committee albeit for the consumption of potential applicants who would wish to seek Pardon, reduction of or commutation of sentence.

16. The procedure through which to place the case before the president to exercise his constitutional mandate is informed by the guidelines laid out in the constitution and the *Prerogative of Mercy Act* 2011. Thus the power of mercy for convicted persons is expressly provided for under Article 133 of the *Constitution* thus;

    (1). On the petition of any person, the President may exercise a power of mercy in accordance with the advice of the Advisory Committee established under clause (2), by –

        (a). granting a free or conditional pardon to a person convicted of an offence;

        (b). postponing the carrying out of a punishment, either for a specified or indefinite period;

        (c). substituting a less severe form of punishment; or

        (d). remitting all or part of a punishment.

    (2). There shall be an Advisory Committee on the Power of Mercy, comprising –

        (a). the Attorney General;

        (b). the Cabinet Secretary responsible for correctional services and

        (c). at least five other members as prescribed by an Act of Parliament, none of whom may be a State Officer or in public service.

    (3). Parliament shall enact legislation to provide for-

        (a). the tenure of the members of the Advisory Committee;

        (b). the procedure of the Advisory Committee; and

        (c). criteria that shall be applied by the Advisory Committee in formulating its advice.

    (4). The Advisory Committee may take into account the views of the victims of the offence in respect of which it is considering making recommendations to the President.

17. Looking at the affidavit in support of the application herein, the Applicant is clear that he is not challenging the conviction. In his own words he states;

> " I pray this court to allow me to bring further mitigation in support of my application and review my sentence further downward while considering rehabilitation factors and period served in custody.....That I have been in custody for 18 years. That I am fully rehabilitated and reformed my character and record are good (sic) and recommendable"

18. The grounds raised herein do not trigger the re-sentencing jurisdiction. They are more leaning towards an application for the exercise of the power of mercy. This is a jurisdiction alien to this court and which is housed in another constitutional arm of Government.

19. By his prayers, the applicant seeks to have this court sit on appeal of decisions of both a court of concurrent jurisdiction and the Court of Appeal. In my opinion, there is no law which bestows this court with jurisdiction to sit on appeal over a sentence by a court of concurrent jurisdiction and/or a sentence by the court of appeal.

20. By reviewing the said sentence, this court would be arrogating itself the appellate jurisdiction to entertain an appeal from a court of concurrent jurisdiction or the absurd scenario of entertaining an appeal from the decision of the Court of Appeal, a court higher in the hierarchy of courts.

21. The law abhors the practice of a judge sitting to review a judgment or decision of another judge of concurrent jurisdiction. Good governance demands that cases be handled procedurally in the right forum. This is because of the rule of the thumb that superior courts cannot sit in review/appeal over decisions of their peers of equal and competent jurisdiction much less those of courts higher than themselves. (See *Daniel Otieno Oracha v Republic* [2019] eKLR).

22. In my view, the only time this court can review its own decision or that of a court of concurrent jurisdiction is in exercise of the resentencing jurisdiction pursuant to *Francis Karioko Muruatetu & another v Republic* [2017] eKLR and only where the court did not exercise discretion during sentencing. Such review must, as per the re-sentencing guidelines, be at the last court that passed the sentence, in this case, the Court of Appeal.

23. From the foregoing, the preliminary objection raised by the DPP has merit and succeeds. The application herein is dismissed in its entirety.

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

A.K. NDUNG'U

JUDGE