Mukhwana v Republic (Criminal Petition E007 of 2024)
[2025] KEHC 5322 (KLR) (29 April 2025) (Ruling)

Neutral citation: [2025] KEHC 5322 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL PETITION E007 OF 2024

RN NYAKUNDI, J

APRIL 29, 2025

IN THE MATTER OF ENFORCEMENT OF THE BILL OF RIGHTS AS UNDER ARTICLE 22(1) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF FUNDAMENTAL RIGHTS AND FREEDOMS AS UNDER ARTICLE 27, 28, 29 AND 48 OF THE CONSTITUTION OF KENYA 2010

BETWEEN

MESHACK WEKESA MUKHWANA ..... PETITIONER

AND

REPUBLIC ..... RESPONDENT

RULING

1. What is pending before me for determination is an undated Notice of Motion Application in which the Petitioner is seeking the following orders:

    a. That the Petitioner is seeking for sentence review in accordance to Article 27(1)(4), 28, 22(1), 25(c), 50(2)(p)(q), 51(1)(2) of the *Constitution* of Kenya 2010 and section 362 & 364 of the *Criminal Procedure Code*, Cap 75 Laws of Kenya.

    b. Spent

    c. That the Applicant will be seeking a declaration by the court that his application has merits and qualifies to be heard.

2. The Application is based on the mitigating grounds of the Petition among others where the Petitioner avers as follows:

    a. That, I am a first offender and thus beg for leniency.

    b. That I am remorseful, repentant and reformed since I have learnt incarceration in prison to take responsibility of my own actions.

    c. That the sentence meted upon me was too harsh considering my mitigating factors and circumstances.

    d. That more grounds to be adduced at the hearing thereof and determination of this petition.

3. The Application is supported by the annexed affidavit dated 3rd June 2024 sworn by Meshack Wekesa Mukhwana in which he avers as follows:

    a. That I was charged with the offence of defilement contrary to section 8(1)(2) of the *Sexual Offences Act* No. 3 of 2006 and sentenced to Life imprisonment.

    b. That, I appealed vide Criminal Appeal No. 68 of 2018 where by life imprisonment was substituted with 30 years' imprisonment.

    c. That the sentence meted upon me is harsh and excessive against my mitigation.

    d. That, I am now approaching this Honourable Court to kindly review my 30 years' sentence to a lesser and more lenient sentence.

    e. That I have no other application in Court of Appeal, hence this application.

    f. That I will abide by laws and rules for non-custodial sentences.

    g. That this Honourable Court has competent, unlimited jurisdiction to hear and determine this application under the provisions of Article 165(3)(b) of the *Constitution* of Kenya 2010.

    h. That I am remorseful, repentant, reformed and rehabilitated as I have learned hard lessons while in custody and now beg for leniency.

    i. That I do beg that I accorded to benefit with the provision of Article 50(2)(q) of the *Constitution* of Kenya 2010.

    j. That it is my humble prayer that I be granted a fair opportunity to argue my petition.

4. The Petition is opposed by the Respondent vide its written submissions dated 15th October 2024. The Respondent submits that the Petitioner herein was convicted and sentenced for the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006 and his sentence was commuted to 30 years in place of an earlier life sentence on the 26/4/2019.

5. The Respondent also submitted that by the recent Supreme Court decision in SC Petition No E018 of 2023, R Vs Joshua Gichuki Mwangi, they humbly submit that this Honourable Court restores the lawful sentence and conviction to life imprisonment and dismisses the appeal.

Analysis and Determination

6. The reading of the record shows that the applicant's only appeal was to the High Court. He had a right to move to court of appeal but it seems he elected to file yet another application on revision before the same court with concurrent jurisdiction like the one which entertained his first appeal. The

complexity of this application is on the question of jurisdiction. This is a critical issue which must first receive conceptualization by the court. It is therefore necessary to place the question on jurisdiction in perspective. In Halsbury's Laws of England (4th Edition) Vol. 9 at page 350 thus defines "Jurisdiction" as

> ... the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.

7. In the same context "John Beecroft Sauners in his treatise words and phrases legally Defined Vol. 3 at Page 113 reiterates the latter definition of the term "jurisdiction" as follows:

> " By jurisdiction is meant the authority which a court has to decide matter 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 like means. If no restriction or limits 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 both these characteristics. Where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."
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> (See also the Owners of Motor Vessel Lilian "S" v Caltex Oil Kenya Ltd. (1989) KLR1 that the jurisdiction is everything without it a court cannot make a move. Lack of jurisdiction thus renders a court's decision void as opposed to it being merely voidable. When an act is void, it is a nullity ab ignition.

8. The question therefore as distinctively presented by the applicant is whether such a judgement of a court of concurrent jurisdiction can be interfered with on the grounds stated in the notice of motion and annexed affidavit. In my considered view the criminal proceedings on appeal ascertained that the facts which were the basis of that proceedings in the trial court were correct save for the issue of sentence. The foundation of it on appeal was found to be punitive, harsh, and excessive prompting the session judge to vary and substitute the life imprisonment sentence to a terminable term of 30 years in prison. Referring to the facts in the current motion there are no essential elements to invoke the jurisdiction of this court underpinned in Article 50(6) (a) & (b) of the *Constitution*.

9. In pari materia in construing this application I am persuaded to import the provisions of Section 80 of the *civil Procedure Act* which expressly states as follows: That any person who considers himself aggrieved:

   a. By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred or;

   b. By a decree or order from which no appeal is allowed by this Act May apply for a review of judgment to the court, which passed the degree or made the order, and the court may make such order thereon as it thinks fit.

10. In Article 50 (6) (b) of the *Constitution* review jurisdiction for a new trial before the High Court must meet the criterion of new and compelling evidence which has become available. So it would not be far-fetched to apply the principles from the realm of Civil Law in the case of Turbo Highway Eldoret

Limited-vs-synergy Industrial Credit Limited (2016) eKLR in citing the case of Rose Kaiza –vs- Angelo Mpanjiza (2009) eKLR Sewe J held:

> "applications on this ground must be treated with great caution and as required by r 4(2)(b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made."

11. Testing the application against the background of all other evidence on record in order to ascertain existence of new compelling evidence to warrant a new trial on sentence that if not acted upon would adversely affect the rights and fundamental freedoms of the Applicant I find none at the moment. The argument being advanced by the Applicant is that the mandatory sentence of life imprisonment which was substituted with 30 years' imprisonment in Criminal Appeal No. 68 of 2018 in the High Court at Eldoret in which this petition emanates is harsh and excessive. The record bears me witness that the applicant's sentence was reduced to 30 years'. I hold the view that the applicant having appealed to the court of concurrent jurisdiction like the one I preside over, such issues on sentence were comprehensively dealt with on the merits. That is why I am persuaded to invoke the doctrine of res-judicata as a predominant doctrine of law to apply to the instant application.

12. Although, the doctrine of res-judicata generally is never applied in criminal cases but fundamentally, it is time courts supplant it in specific cases. Why do I say so? Of course any defendant to a criminal case who has exhausted his right of appeal and where questions of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties. I am persuaded and convinced as I do here that the principle is as applicable to the decisions of criminal courts as to those of civil jurisdiction.

13. From a comparative jurisprudence perspective on this same subject matter on the validity of res-judicata the court in Hoystead v Commissioner of Taxation (1925) AC 155, made the following observations:

> In the opinion of their Lordships it is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle. Thirdly, the same principle— namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been

traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken. The same principle of setting parties' rights to rest applies and estoppel occurs."

14. Some of the criminal cases being filed by various convicts across the country and the rules upon which they are founded should fall on the way side on res-judicata principle for the court to issue estoppel against re-litigation by the same convict on the same subject matter which has been considered previously and a final decision reached by an appropriate forum. This is the case here.

15. How should courts go about application of the doctrine of res-judicata? It is to look at the record and parties involved and determine the former criminal suit. Further the nature of the proceedings in the former trial duly examined to ascertain what particular issues were actually canvassed therein and adjudicated by a duly competent court or tribunal as established in Article 50 (1) of the *Constitution*. Thereafter, the respective contentions of the parties the analysis, findings, and opinion on the merits of that court. It will be noted criminal trials in the spirit of the law are not be adjudicated ad infinitum. It appears due to the issuance of trending jurisprudence in criminal law more specifically on mandatory minimum sentences, which is quite distinct in law convicts are having a field day to agitate for fresh trials in the various courts in Kenya. It appears conclusively that the doctrine of exhaustion in our legal system correctly so seems to have taken a back seat.

16. As illustrative of the various cases, that find their admission for a new trial before this court lack the necessary locus standi and subject matter jurisdiction. Given again the nature of our registries not yet fully digitalized the participation by the various convicts filing avalanche of applications for either revision, review, resentencing or reduction of sentence is a matter for courts to take judicial notice. The participation in the scheme under this defined jurisdictions may sometimes be called a scheme to defraud or conspiracy likely to occasion a mistrial or an injustice to the fair administration of justice. It is manifest therefore that something must be done to restore fidelity and integrity to the criminal justice system to bar the convicts to procure orders likely to nuance our legal system negatively.

17. I believe instances where the doctrine of re-judicata and exhaustion if applied will hook and line the legality, propriety, regularity, and justness of the criminal proceedings. The test fixed by the statute is that the former acquittal which Mutatis Mutandis applies to the former conviction and sentence. "There is a certain resemblance between the doctrines of res judicata and stare decisis, both are rules of public policy intended to maintain stability in human relations by giving repose to litigation, and both operate to prevent the constant reconsideration of settled question, but they operate in somewhat different fields and with different degrees of authority. The jurisdiction of this court is provided for under Article 165 and pursuant to that article, this court has unlimited original jurisdiction in criminal and civil matters; jurisdiction to enforce bill of rights; appellate jurisdiction; jurisdiction to interpret the *Constitution* and supervisory jurisdiction over subordinate courts and any other jurisdiction, original or appellate, conferred on it by legislation.

18. Notably, Article 50(2)(p) as read with 50(2)(q) of the Constitutions provides this court with jurisdiction to review a sentence as follows;

> (2) Every accused person has the right to a fair trial, which includes the right—(p)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; and (q)if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

19. The upshot of the foregoing is that where a lesser punishment has changed between the time of sentencing and appeal, a convict can appeal against the sentence or seek a review. Unfortunately, for the applicant that is not the case. The applicant had already appealed against the sentence and conviction. This same court only with a different session judge, considered the decision of the trial court and set aside the life sentence imposed by the trial court and substituted it with 30 years'. It is unfortunate that the application does not state the statutory provisions under which the applicant has approached this court. However, as this court had already determined the appeal on conviction and sentence, it cannot review the sentence once again as it would be tantamount to sitting on appeal of its own decision. The court can only exercise revision of its decision if there is no appeal that has been filed.

20. Section 364(5) of the Criminal Procedure code provides as follows;

> (5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.

21. As the applicant had already appealed the conviction and sentence, this court is bereft of jurisdiction to entertain the present application. Conceding that the doctrine of res judicata is available in some criminal proceedings, the problem remains for the courts to determine the extent to which it may be applied, for the simple reason the cases and authorities cited in reference to criminal law are not in harmony as to the proper place of this plea as a bar in a criminal action. In the instant case, given the factual situation, as much as life and liberty of the convict, hangs in the balance for reason of the long custodial sentence, or those new issues have been determined on the merits. The basic rule on revisionary jurisdiction under Section 362 & 364 of the criminal procedure code are far from being proved by the applicant. Similarly on review jurisdiction for a new trial provided for under Article 50 (6) (a) & (b) of the *Constitution* has also no place in this notice of motion. In conclusion the finality statement of the policy, behind res judicata was articulated in Re Walsh's Estate 80 N.J.E 565, 570 and the maxim is very clear that res judicata is not a mere rule of procedure, but a rule of justice unlimited in operation, which must be enforced whenever its enforcement is necessary for the protection of rights and the perseveration of the repose of society, based on the grounds that there should be an end to litigation, and that a person should not be twice vexed for the same cause. (See also Accredo AG & 3 Others v Steffano Uccelli & Another (2019) eKLR. Independent Electoral & Boundaries Commission vs MainaKlai & 5 Others (2017) eKLR.

22. Carrying out sentences is crucial to the functioning of the legal system and is not necessarily a merciful jurisdiction upon which judges exercise power in particular cases against their fellow citizens. In all those circumstances I call upon by the *Constitution* to be upright and impartial in adjudicating over all case types scheduled before our respective forums.

23. Consequently, from the above observations, this petition is dismissed for want of jurisdiction.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 29TH APRIL 2025

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R. NYAKUNDI

JUDGE