**Akiru v Republic (Criminal Miscellaneous Application E121 of 2023) [2024] KEHC 594 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 594 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT LODWAR**

**CRIMINAL MISCELLANEOUS APPLICATION E121 OF 2023**

**RN NYAKUNDI, J**

**JANUARY 31, 2024**

**BETWEEN**

**MARY AKIRU ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being revision of sentence from the original conviction on sentence in the Resident Magistrate Court at Kakuma Criminal case No. E106 of 2022 by Hon. C.A Mayamba dated 5th July, 2022)***

**RULING**

1. The applicant approached the court under certificate of urgency dated 20th July, 2023 expressed to be brought under section 379 (4), 356, & 357 of the *C.P.C* and articles 47, 48 and 50 (1) (2) of the *Constitution of Kenya* 2010. The certificate was accompanied with a notice of motion grounded as follows;

    1. That I was sentenced to serve seven (7) years in prison by the court of Kakuma for the case of manslaughter

    2. That I was innocent and confused at the time for the case that have convicted.

    3. That this Hon. Court be pleased to determine my petition for re-sentencing or non-custodial sentence under section 35(1) of the *CPC*.

    4. That I petitioner grounded upon me annexed affidavit of MARY AKIRU and other ground adduced at the hearing of this petition.

2. In disclosing constitutional issues the petitioner is required to identify with a reasonable degree of precision on the alleged violations or threats to the fundamental rights and freedoms protected and guaranteed by the prosecution.

**Decision**

3. First and foremost this court is being asked to address the concerns raised in the notice of Motion seeking a remedy under the review jurisdiction of this court as provided for in Article 50(6) (a) & (b) of the *Constitution* which reads as follows;

> 50
>
> (6) A person who is convicted of a Criminal Offence may petition the High Court for a new trial if –
>
> a. The person's appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for the appeal; and
>
> b. New and compelling evidence has become available"

4. This jurisdiction is conferred upon the high court to exercise discretion for purposes of a new trial on the orders emanating from the primary court. This provision allows a petitioner or applicant to repair not only structural lacunae exposed by the decisions in the impugned courts but also address the concerns within the scope of article 50 (6) (a) & (b) of the *Constitution* which conceptualizes the phrase *New and compelling evidence has become available.* Article 20(3) & (4) of the *Constitution* entitles the court to be guided by the interpretation model which states that;

> In applying a provision of the Bill of Rights, a court shall –
>
> a. Develop the law to the extent that it does not give effect to a right or fundamental freedom; and
>
> b. Adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

5. In interpreting the Bill of Rights, a court, tribunal or other authority shall promote

   a. The values that underlie an open and democratic society based on human dignity, equally, equity and freedom; and

   b. The spirit, purport and objects of the Bill of Rights.

6. In the judgment of the court below, various aspects of the mitigating grounds of the petition were clearly captured by the learned trial magistrate. This were issues to do with the personal circumstances cumulatively touching on the survivorship of her children with the deceased. In addition the Applicant is physically and psychologically traumatised due to the sufferings of the innocent children without a guardian or parental support. The statements sound like some information which can persuade this court to exercise jurisdiction provided in Article 50 (6) (a) & (b) of the *Constitution*. However not withstanding that position taken by the applicant to agitate for her release indeed the record provides otherwise. On assessment of the evidence this was a serious crime in violation of Article 26 of the *Constitution* on the right to life. My strong view is that the crime deserved a proportionate and substantial period of a custodial sentence may be of a higher factorial than the one imposed by the trial court. Without any hesitation or doubt different interpretation of the use of the words regret or remorse commonly invoked by convicted prisoners can import various approaches to sentencing. It is the genuineness and sincerity of that mitigation which is sometimes remains questionable for no man

has the barometer to read the mind of a human being. In this respect, my take is almost similar to what Ponnan JA in *S v Matyityi* [2011] (1) SACR 40 (SCA) where he held as follows;

> "There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for him or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; whether he or she does indeed have a true appreciation of the consequences of those action".

7. It is also accepted that the inherent powers on sentencing remain vested within the realm of the trial court. On appeal or a review the principles in *Barbaro v The Queen* [2014] HCA are of significant as observed by the court in the following extract;

> "The conclusion that a sentence passed at first instance should be set aside as manifestly excessive or manifestly inadequate says no more or less than that some substantial wrong has in fact occurred' in fixing that sentence. For the reasons which follow, the essentially negative proposition that a sentence is so wrong that there must have been some misapplication of principle in fixing it cannot safely be transformed into any positive statement of the upper and lower limits within which a sentence could properly have been imposed.
>
> Despite the frequency with which reference is made in reasons for judgment disposing of sentencing appeals to an 'available range' of sentences, stating the bounds of an 'available range' of sentences is apt to mislead. The conclusion that an error has (or has not) been made neither permits nor requires setting the bounds of the range of sentences within which the sentence should (or could) have fallen. If a sentence passed at first instance is set aside as manifestly excessive or manifestly inadequate, the sentencing discretion must be re-exercised and a different sentence fixed. Fixing that different sentence neither permits nor requires the re-sentencing court to determine the bounds of the range within which the sentence should fall."

8. These are important points implicit and peculiar to the application filed by the Applicant. The vital point to note is that discretion to pass sentence is conferred upon the court of first instance. A common feature of applications of this nature have confronted other superior courts in which a criteria on the conditions precedent to be fulfilled by the Applicant before granting a remedy in terms of Article 50 (6) (a) & (b) from the *Constitution*. That is the position taken by the Supreme Court in the case of *Tom Martins Kibisu v Republic*, [2014]eKLR in which the court held as follows;

   a. "Article 50 is an extensive constitutional provision that guarantees the right in a fair hearing and, as part of that right, it offers to persons convicted of certain criminal offences another opportunity to petition the High Court for a fresh trial. Such a trial entails a re-constitution of the High Court forum, to admit the charges and conduct a re-hearing, based on the new evidence. The window of opportunity for such a new trial is subject to two conditions.

(emphasis mine) First, a person must have exhausted the course of appeal, to the highest Court with jurisdiction to ty the matter. Secondly, there must be 'new and compelling evidence'

b. We are in agreement with the Court of Appeal that under Article 50 (6), "new evidence" means 'evidence which was not available at the time of trial and which, despite exercise of due diligence, could not have been availed at the trial"; and "compelling evidence" implies "evidence that would have been admissible at the trial of high probative value and capable of belief, and which, if adduced at the trial would probably have led to a different verdict" A court considering whether evidence is new and compelling for a given case, must ascertain that it is, prima facie, material to, or capable of affecting or varying the subject charges, the criminal trial process, the conviction entered, or the sentence passed against an accused person".

9. It is no doubt because of these decisions and dicta the applicant has not demonstrated existence of new compelling evidence in support of resentencing against the sentence imposed by the trial court. There is an attractive simplicity in the grounds advanced by the applicant but the question has to whether on being weighed within the parameters of Article 50 (6) (a) & (b) of the *Constitution* the answer is in the negative. The impugned judgment on sentence is in substance and procedure valid, legal, just, regular, and fair and a kind within the constitutional and statutory powers of the court to pass against the applicant. The questions that arise in the application may be classified as in the sense here not relevant equally on matters of fact for this court to reopen the proceedings to adjudicate on sentence. I am compelled to state that the doctrine of *res-judicata* applies to the decision being challenged by the applicant. It is trite that if any judicial tribunal or court in the exercise of its jurisdiction delivers a judgment which is in its nature final and conclusive the judgment is res-judicata in any subsequent proceedings unless on exercise of the right of an appeal to a superior court or review in the same forum. This means in effect that the application as pleaded fails the test of review jurisdiction and the cause of action being really the same as in the subsequent proceedings by way of estoppel the competence of this court is moot. The issue of facts of sentence had been judicially determined in a final manner against the applicant and the same issue could only be raised on appeal. That is not the position here in so far as the application by the applicant is concerned. Consequently I find no merit and the same is dismissed under section 382 of criminal procedure code.

**DATED AND SIGNED AT LODWAR THIS 31ST JANUARY, 2024**

**.....**

**R. NYAKUNDI**

**JUDGE**

And in the presence of;

Mr. Kakoi for the state

Applicant in person