Wekesa v Republic (Miscellaneous Criminal Application 22 of 2020) [2024] KEHC 4072 (KLR) (26 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4072 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

MISCELLANEOUS CRIMINAL APPLICATION 22 OF 2020

JRA WANANDA, J

APRIL 26, 2024

BETWEEN

STEPHEN MAKOKHA WEKESA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. Before this Court is the Notice of Motion dated 12/02/2020 whereof the Applicant seeks re-sentence and/or review of the death sentence imposed upon him by the Magistrate's Court. The Application is made pursuant to the now famous Supreme Court decision in the case of *Francis Karioko Muruatetu & Another vs Republic* [2017] eKLR (commonly referred to as Muruatetu 1) which declared mandatory minimum or maximum sentences unconstitutional.

2. It appears that while the said Application was still pending, the Applicant filed a second Application dated 27/07/2023 in this same file. This second Application is based on the fact that on 3/08/2009, His Excellency the President of the Republic of Kenya, Hon. Mwai Kibaki commuted all death sentences in Kenya to life sentences. In the new Application, the Applicant's argument is that the Court of Appeal had since declared the life imprisonment as unconstitutional.

3. The background of the matter is that the Applicant, together with others, were charged in Eldoret Chief Magistrates' Court Case No. 1633 of 2000 with two counts of the offence of robbery with violence contrary to Section 296(2) of the *Penal Code*. The Court convicted them and on 15/10/2012, sentenced the Applicant to death.

4. The Appellant then challenged the conviction and sentence in Eldoret High Court Criminal Appeal No. 167"A" of 2022. The High Court dismissed the Appeal in its entirety vide the 2-Judge bench Judgement delivered on 19/01/2012 (A. Mshila and J.R. Karanja JJ).

5. Undeterred, the Appellant further challenged the decision vide Eldoret Court of Appeal Criminal Appeal No. E111 of 2022 both against conviction and on sentence. However, by the Judgment delivered on 30/06/2023, the Court of Appeal also dismissed the appeal in its entirety and upheld the death sentence.

6. As aforesaid, the Application is dated 12/02/2020 and was filed before this Court on 13/02/2020. This means that the 1st Application was filed herein even prior to the Appeal filed before the Court of Appeal. Since clearly the two matters were pending side by side before the two Courts, that action is nothing but an abuse of the Court process and should be strongly discouraged.

7. Be that as it may, the Applicant pleads that the sentence is too harsh, that he is a 1st offender, repentant and rehabilitated. He also cited Section 333(2) of the *Criminal Procedure Code* which directs that the period spent by a convict in custody before sentence be considered in the computation of the period to be spent in prison.

8. The Respondent did not file a formal response to the Application but in her Submissions presented orally, Prosecution Counsel Ms. Okok, opposed the Application. She submitted that in the Appeal before the Court of Appeal, that Court dealt with the effect of the Muruatetu decision on the Applicant's conviction, considered the circumstances and still confirmed the death sentence. It was her submission therefore that the Court of Appeal having pronounced itself, this High Court cannot revisit the same issue and that in the circumstances, the instant Application should be dismissed.

Determination

9. The issue for determination herein is "whether this Court should review the death sentence imposed by the trial Magistrate's Court."

10. It is not in doubt that the Applicant was convicted and sentenced by the Magistrate's Court. He appealed to this High Court against both conviction and sentence and thereafter to the Court of Appeal where conviction and death sentence for the offence of robbery with violence was affirmed.

> " 51. The appellant's last ground of appeal was that the sentence meted upon him was unconstitutional. However, as stated earlier, he did not expound nor submit on it. In opposition the respondent submitted that the sentence was neither excessive nor unconstitutional.
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> 52. We are alive to the fact that mandatory minimum or maximum sentence is a subject of contention in our Courts today. We are also aware that *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions)* commonly known as Muruatetu II was very categorical that not all cadre of minimum or maximum sentences were pronounced unconstitutional by *Francis Karioko Muruatetu & another v Republic [2017] eKLR (Muruatetu1)* but only sentence in respect to murder.
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> 53. We considered the level of violence visited upon the complainants who were held hostage for a protracted period. We also note that the learned Magistrate considered the appellant's mitigation and sentenced him as provided by law. Subsequently, the appellate court upheld it. We agree with the decisions of the two courts below on sentence.

54. In the end we find that the conviction was safe and the sentence was constitutional. As such, we will not interfere with the holding of the two courts below. Consequently, we dismiss this appeal in its entirety."

11. From the foregoing, Prosecution Counsel Ms. Okok is definitely right in her argument that in its Judgment delivered on 30/06/2023 in the said Eldoret Court of Appeal Criminal Appeal No. E111 of 2022, the Court of Appeal dealt with the effect of the Muruatetu decision on the Applicant's conviction, considered the circumstances and still confirmed the death sentence.

12. What the Applicant is therefore inviting this Court to do is to interfere with the sentence already affirmed by the Court of Appeal, a higher Court, an action which is untenable in law.A High Court Judge cannot sit on appeal over a decision of another Judge of equal jurisdiction, much less a decision of the Court of Appeal. As the Applicant exercised his right of appeal to the Court of Appeal on the issue of sentence and upon which the Court of Appeal pronounced itself, this Court is now functus officio.

13. I note that in the second Application referred to hereinabove, the Applicant appears to justify the present Applications by blaming his previous Advocate for what he terms "poor representation" and for failing to "submit on crucial ground of appeal on sentence which costed him dearly". With due respect, "poor representation" by Counsel is not and cannot be a ground for purporting to return to the High Court with a prayer technically asking the High Court to sit on appeal on a decision of the Court of Appeal.

14. I echo the words of Kiarie Waeru Kiarie J made in the case of *Joseph Maburu alias Ayub vs Republic* [2019] eKLR, in which he stated the following:

> " Sentencing is a judicial exercise. Once a Judge or a judicial officer has pronounced a sentence, he/she becomes functus officio. If the sentence is illegal or inappropriate the only court which can address it is the appellate one. *Black's Law Dictionary Tenth (10th) Edition* describes defines sentence as: The Judgement that a court formally pronounces after finding a criminal Defendant guilty; the punishment imposed on a criminal wrongdoer. Remitting a matter to the trial court which had become *functus officio* after sentencing flies in the face of the doctrine of *functus officio*. It amounts to asking the trial court to clothe itself with the jurisdiction of an appellate court. This is an illegality."

15. The upshot of the foregoing is that this Court lacks the jurisdiction to entertain the present Application. In the premises, the Application is dismissed.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 26TH DAY OF APRIL 2024

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WANANDA J.R. ANURO

JUDGE