Mbaka v Republic (Criminal Revision E030 of 2023)
[2024] KEHC 6694 (KLR) (24 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6694 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL REVISION E030 OF 2023

LW GITARI, J

MAY 24, 2024

BETWEEN

GREGORY MUTUMA MBAKA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. Before me for determination is the notice of motion dated 7th February, 2023 brought pursuant to section 362 and 364 of the *Criminal Procedure Code* and all other enabling provisions of the Law by the appellant mainly seeking for orders that:

    i. That, this honourable court be pleased to hear and determine this application of Review of sentence under the stated provisions of Law or any other provisions of law it may deem fit and order his sentence e to run from the date of his first sentence.

    ii. Thatthis court be pleased to admit and give any other orders that deem just in the circumstances of this application.

    iii. Thatthe application herein be heard at first instance.

2. The application is supported by the affidavit sworn by Gregory Mutuma Mbaka, the appellant and is predicated on the grounds that he was charged and convicted for the offence of robbery with violence c/sec 296 (2) of the *Penal Code*. That *vide* Criminal case no.1998 of 2002, aggrieved and dissatisfied by the outcome he lodged his first appeal at the High Court of Kenya at Meru where the appeal was dismissed *vide* criminal appeal Nao.82 of 2004.

3. The Applicant avers that he further lodged a second appeal at Kenya Court of Appeal at Nyeri but also the death sentence was upheld vide criminal appeal no.318 of 2006.That later due to the developments in law in the Muruatetu case he lodged a sentence rehearing& resentencing petition at Meru High

Court vide HCCR Petition No.14 of 2016 whereby Hon. Justice A.O Ngijo preferred a sentence of twenty years (20) imprisonment to start afresh as from 31st May 2018.

4. The Applicant further avers that on 31st May 2018 he had served 19 years in custody and he invited the court to factor in the period he had spent in custody and review/reduce his sentence downwards. That he had served a consecutive sentence of approximately 21 years behind bars and now approach the court to review his sentence or the date in which his sentence should commerce that he can benefit from the constitutional provisions of a least severe sentence.

5. The Applicant states that he was arrested aged 27 but now he is 48 years. That he was not married at the time of arrest and he begged the court to give him a second chance in his life. That he is remorseful and prays for his sentence to be reviewed. That his parents are deceased and the unfortunate demise occurred while he was in custody leaving him an orphan. That he is a first offender and he promised never to indulge in such criminal activities. That he urged the court to give him orders that deem just in the circumstances of this application.

6. In opposing the application, the respondent filed grounds of opposition dated 6th June 2023 wherein he states that the applicant's suit and motion as filed is res judicata since the applicant has already been represented by a competent court of concurrent jurisdiction. That the applicant's application amounts to an abuse of the court process, lacks merit and pray that it be dismissed.

7. The court directed on 28th April,2023 for the parties to file submissions which were duly filed. The Applicant filed his submissions in person which are undated while the respondent filed his submissions dated 6th June, 2023.

8. In the Applicant's submission he submitted that he was arrested on 10th August 2002 and charged for the offence of robbery vide Criminal case No. 1998 of 2002 and sentenced to death on the 24th day of June 2004 that aggrieved and dissatisfied by the outcome he lodged his first appeal at the High court of Kenya at Meru where the appeal was partially successful vide Criminal appeal No.82 of 2004.

9. The Applicant submitted that he further lodged a second appeal at Kenya court of Appeal at Nyeri but also the death sentence was upheld in count 5 vide Criminal Appeal No.318 of 2006.

10. It is the Applicant's submission that after exhausting all my appeal avenues later a development in law emerged in the Muruatetu case wherein he lodged a sentence rehearing & resentencing petition at Meru High Court vide HCCR Petition No.14 of 2016 whereby Hon. Justice A. Ongijo preferred a sentence of twenty (20) years imprisonment to start afresh as from 31st May 2018.

11. The Applicant submitted that he has served a better part of the sentence and now approaches the court requesting for a review of the date when the sentence should commence. That the sentence of 20 years was pronounced to him on the 31st day of May 2018 and the court was categorical that the sentence should run from the same day.

12. The Applicant further submitted that he had served 19 years and he prayed for the court to invoke section 333(2) of the *CPC* and factor in the period he had spent in custody and review the sentence downwards.

13. It is the Applicant's submission that the pronouncements of the court decision deprived him the opportunity to benefit from the computation of remission of sentence for the period. That he had earlier served but the court substituted it for him to start a fresh sentence of 20 years. That he had no advantage of bail or bond and he has served a consecutive sentence of approximately 25 years behind bars and he has rehabilitated and reformed and he regrets the pain he caused others and he promised never to indulge in crime again and he pleaded for a second chance in his life.

14. In the respondent's submission it is submitted that the applicant has not annexed the trial courts and court of appeal record of proceedings. That the applicant's appeal on conviction and sentence to the Court of Appeal was dismissed.

15. The respondent submitted that following the Muruatetu decision, the applicant lodged a resentence hearing vide Petition no.14 of 2016 and was resentenced to serve 20 years imprisonment with effect from 31st May,2018.

16. The respondent's submitted that for a party to raise the doctrine of res judicata successfully, one must satisfy five essential elements: -

    i. The suit or issue raised was directly and substantially in issue in the former suit.

    ii. That the former suit was between the same party or parties under whom they or any of them claim.

    iii. That those parties were litigating under the same title.

    iv. That the issue is question was heard and finally determined in the former suit.

    v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.

17. The respondent submitted that from the material placed before the court, they noted that prior to filing the current suit and application, the applicant had filed Petition No.14 of 2016 and a decision was duly rendered with the applicant having been resentenced to serve 20 years with effect from 31st May,2018.That *Francis Karioko Muruateti and another vs Republic* (2017) judgement was delivered on 14th December,2017 after which the applicant filed Petition No.14 of 2016 which was heard and finally determined by a competent court of concurrent jurisdiction. That for all the foregoing the applicants notice of motion application dated 7th February lacks merit and he prayed it be dismissed accordingly.

18. I have considered the application and the response. The issues for determination are:

    i. Whether the court has the jurisdiction to deal with the matter

    ii. Whether the instant matter is *res judicata*.

    iii. Whether the Applicant is entitled to the orders sought.

Whether the instant matter is resjudicata.

19. The respondent has pleaded that the instant matter is *res judicata* on the basis that the applicant's appeal on conviction and sentence to the Court of Appeal was dismissed. That following the Muruatetu decision, the applicant lodged a resentence hearing vide petition no.14 of 2016 and was resentenced to serve 20 years imprisonment with effect from 31st May 2018.

20. The jurisdiction of the High Court is provided for under article 165 of *Constitution* of Kenya 2010 and it includes unlimited original jurisdiction in criminal and civil matters; jurisdiction to enforce bill of rights; appellate jurisdiction; interpretative jurisdiction; any other jurisdiction, original or appellate conferred on it by legislation and supervisory jurisdiction. The supervisory jurisdiction in criminal matters is expounded under Section 362-364 of the Criminal Procedure Code. Under the said sections, this court has jurisdiction to call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such

subordinate court. It is therefore clear that this court cannot and does not have jurisdiction to review the decision of a court of concurrent jurisdiction. Once this court delivered its judgment (though differently constituted), it became factus officio over the matter herein.

21. The law abhors that practice of a judge sitting to review a judgment or decision of another judge of concurrent jurisdiction. This is because the rule of the thumb is that superior courts cannot sit in review/appeal over decisions of their peers of equal and competent jurisdiction much less those courts higher than themselves. The court which ought to deal with an issue arising out of the decision of this court is the Court of Appeal as it is the one with jurisdiction under Article 164(3) of the *Constitution* and Section 379(1) of the *Criminal Procedure Code*. This is in appreciating the provisions of Article 50(2)(q) of *Constitution* of Kenya 2010 which guarantees the right of a person if convicted, to appeal to, or apply for review by, a higher court as prescribed by the law. (See *Daniel Otieno Oracha –vs- Republic* [2019] eKLR).

22. As such, this court does not have jurisdiction over the revision application herein. The right forum would be the Court of Appeal.

23. However, there is a new jurisprudence which was developed by the Supreme Court in *Muruatetu's case* (*supra*), and wherein the Supreme Court found that the mandatory death sentence under Section 204 of the *Penal Code* is unconstitutional as it takes away the discretion of the court while sentencing. The Supreme Court gave this court (being the trial court in murder charges) a special jurisdiction to hear a party on resentencing where an accused person was sentenced under the mandatory Section 204 of the *Penal Code*. (See paragraphs 110 and 111 of the said decision).

24. Unlike in *Muruatetu's case* where the court directed that the pending cases be taken for resentencing, the Court of Appeal in *William Okungu Kittiny's* case (*supra*) did not make an order or even give directions as to how the convicts already serving their sentence ought to be treated or how their resentencing ought to proceed. It is my view that the Court of Appeal was only applying the Muruatetu's decision as it is since it was the new law at the time. The court was proper in applying the said dictum as it was exercising appellate jurisdiction and applied the law as it had developed.

25. Further, the court in the said case was handling an appeal from a decision of Chemitei J in Constitutional Petition No. 2 of 2011 where the Learned Judge disallowed the petition seeking resentencing hearing. It was thus an appeal from a constitutional petition seeking resentencing and which was after they had exhausted all the chances of appeal having appealed up to the Court of Appeal. As such the Court of Appeal was exercising its appellate jurisdiction and in rendering the said decision, it appreciated that the decision by the Supreme Court had already been rendered.

26. The Court of Appeal did not direct as to how prisoners serving sentences and having been sentenced prior to its decision ought to be treated.

27. It is trite that laws do not act retrospectively. The Supreme Court in *Mary Wambui Munene –v- Peter Gichuki King'ara & 2 others* [2014] eKLR in setting out exemption to this general rule cited with approval the case of *A –vs- The Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 4 IR 88 where it was held that;-

> "Judicial decisions which set a precedent in law do have retrospective effect. First of all the case which decides the point applies it retrospectively in the case being decided because obviously the wrong being remedied occurred before the case was brought. A decision in principle applies retrospectively to all persons who, prior to the decision, suffered the same or similar wrong, whether as a result of the application of an invalid statute or otherwise, provided of course they are entitled to bring proceedings seeking the remedy in accordance with the

ordinary rules of law such as a statute of limitations. It will also apply to cases pending before the courts. That is to say that a judicial decision may be relied upon in matters or cases not yet finally determined. But the retrospective effect of a judicial decision is excluded from cases already finally determined. This is the common law position".

28. (See also *Republic –vs- Karisa Chengo & 2 others* [2017] eKLR paragraph 102 -104).

29. The Court of Appeal's decision was not ordered to apply retrospectively as opposed to the Supreme Court's decision in *Muruatetu*. In my view, there is no legal basis of resentencing in robbery with violence so as to apply the principles in Muruatetu decision. The decision by the Court of Appeal where the Learned Judges applied the reasoning in Muruatetu in robbery with violence were decisions made by the Court in rendering a decision on appeal and since at that time (of rendering the appeal) the law had changed, they had no alternative but to apply the said reasoning as it was binding on them. The same cannot apply retrospectively and thus enabling those who had been sentenced before the same was rendered to apply for revision of their sentence basing their argument on the pronouncements made in the said decision.

30. In *John Kagunda Kariuki –vs- Republic* [2019] eKLR Justice Joel Ngugi (Prof) in appreciating the application of Muruatetu's case in sexual offences and its implications on the court's powers to exercise discretion in sentencing, proceeded to hold that;-

> " 8. However, unlike the decision in Muruatetu and other cases where the death penalty was imposed, the decision Dismas Wafula Kilwake does not operate retroactively. This was a decision given the ordinary common law mode which does not entitle all other people who could have benefitted from the new development in decisional law to approach the High Court afresh for review of the sentences imposed. Instead, the principles announced in the case will apply to future cases. In other words, persons whose appeals have already been heard by the High Court are not entitled to file fresh applications for re-sentencing in accordance with the new decisional law. To reach a different conclusion would lead to an ungovernable situation where all previously sentenced prisoners would seek review of their sentences.....
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> 10. In the present case, the Applicant's appeal has already been heard by the High Court. He cannot return to the High Court for a review of the sentence imposed. He is at liberty to make an argument for reduced sentence at the Court of Appeal....".

31. In the same breath, the decision of the Court of Appeal in in *William Okungu Kittiny's case* (*supra*) cannot be applied retrospectively but in future cases. Otherwise, it would bring out an ungovernable situation where all previously sentenced prisoners would seek review of their sentences. It would be wise of him to pursue the said appeal at the Court of Appeal.

32. I think I have said enough to prove that the application herein is wrongly before this court. This court does not have jurisdiction over the matter. It is trite that where a court is bereft of jurisdiction, it should down its tools the moment it holds the opinion that it is without jurisdiction. (See the *owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR).

33. Considering all the above, this court is bereft of jurisdiction to issue the orders sought by the applicant and ought to down its tools.

34. The respondent herein raised the issue of *res judicata* which I address as hereunder:

35. The law pertaining to the doctrine of res- judicata is in Section 7 of the *Civil Procedure Act* which provides as follows-;

> "7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

36. There is no doubt that the principle applies to application with the same force. There is no dispute that the parties are the same in all these proceedings. In both the earlier appeal and application and the present one, the appellant is mainly seeking review of the sentence under the stated provisions of Law.

37. These issues are similar in all forms and this court has already determined them in the earlier decision. The statutory provision under Section 7 of the *Civil Procedure Act* is clear and bars a court from hearing a suit or issue if the same was substantially in issue in a former suit or application between the same parties, if the issue was determined in the former application after a hearing. By virtue of Section 7 of the *Civil Procedure Act*, it is clear to me that orders of review of sentence sought in this application is barred by the doctrine of res-judicata.

38. In the case of *Attorney General & another Vs ET* [2012] eKLR it was held as follows-;

> "The courts must always be vigilant to guard litigants against evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court.
>
> The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in form of a new cause of action which has been resolved by a court of competent jurisdiction. In this case of *Omondi Vs NBK & Others* (2001) EA 177 the court held that "parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit" In that case, the court quoted Kuloba J (as he then was) in the case of *Njanju Vs Wambugu & another* Nairobi HCC NO. 2340 OF 1991 (unreported) where he stated; "If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case cosmetic lift in every occasion he comes to court, then I do not see the use of the doctrine of res judicata …."

39. By reason of the forgoing, I find that the application herein seeking orders of review of sentence is an abuse of the court process as it raises issues which had been substantially litigated and adjudicated upon by this court or which ought to have been raised in the earlier application and the same is rejected.

40. In the result, the notice of motion application dated 7th February 2023 is dismissed for want of jurisdiction.

41. Orders accordingly

DATED SIGNED AND DELIVERED AT MERU THIS 24TH DAY OF MAY 2024.

In the presence of

Court Assistant –

L. W. GITARI

JUDGE