REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL MISC. APPLICATION CASE NO. 394 OF 2017

FRANCIS KARIOKO MURUATETU.....APPLICANT

WILSON THIRIMBU MWANGI.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....REPUBLIC

RULING

This matter now comes up for 2 applications. First, is the application of **FRANCIS KARIOKO MURUWATETU** (1st applicant and Original 1st applicant/appellant), undated and filed on 28.7.2020. The 2nd application is one by **WILSON THIRIBU MWANGI** (3rd applicant and original 3rd applicant/Appellant), filed herein on 24.3.2020. These 2 applications, though brought under different sections of the law, i.e the Probation Offender's Act, Cap 64, and Articles 27, 50(2)(p) and 165(3) of the constitution, seek the same prayers. The prayers in the 2 applications are that this court be pleased to review the orders of the High Court resentencing the applicants to definite prison terms with a view to reducing the said sentences meted out as against the 2 applicants Mr. Mutitu, appeared for the 1st applicant while Mr. Ngatia, Senior Counsel, appeared for the 3rd applicant (Wilson Thiribu Mwangi).

Apparently, the other original applicants/Appellants, Nos 2, 4, 5, 6 and 7 have not filed any further pleadings herein, neither have they participated in these proceedings.

Ms. Akunja, appearing for the state/Respondent opposed there 2 applications.

Mr. Ngatia first submitted that the application filed that the application filed on 21.3.2020 seeks review of the orders of resentencing. That the applicant was first sentenced to death on 4.3.2003 and his appeal to the Court of Appeal was dismissed in a judgment of 20.5.2011. That with the others, the applicant proceeded to the Supreme Court on the issue of constituonality of the mandatory death sentence. The Supreme Court went on to hold the same to be unconstitutional and a resentencing was ordered.

That he applicant, with the others, appeared before the Hon. Lady Justice Ngenye Macharia for resentencing proceedings. And on 16.12.2019, the applicant was resentenced to a definite imprisonment term of 5 years.

It was the submissions of learned counsel that if the applicant was to carry out this sentence, it would go beyond his lifespan since he is now 54 years old. That in sentencing, it is necessary to consider the age of the offender. Further, that longerity of the sentence would render rehabilitation superfluous.

It was further submitted that the applicant has since acquired various skills and has reformed, winning many accolades. He pleaded for a 2nd chance as he is not a threat to society. Counsel maintained that this court has the jurisdiction to review the sentence since the Hon. Justice Ngenye Macharia has since moved to a different division of the High Court. That since this court has the same jurisdiction as the Hon. Justice Ngenye Macharia, there is no impediment in this court revising the sentence.

Counsel relied on several authorities including: -

- ***Republic versus (C.A) (1966) 1 S.C Republic 500, a Canadian case in which it was held that the sentencing Judge should be mindful of the age of the offender, and that a sentencing judge should generally refrain from imposing a fixed term sentence which so greatly exceeds an offender's expected remaining lifespan.***

- ***Republic versus Manybears, 2009 ABCA 82, also a Canadian case, that the possibility of rehabilitation must not be overlooked.***

- ***Republic Versus Johnson, 2012 ONCA 339, also a Canadian case, that total sentences should not be so long as to crush***

optimism about eventual re-integration.

- Peter Mungai Njoroge versus Republic (2020)eKLR, that everyone deserves a second chance.

- Mohamed Iddi Omar Versus Republic (2019)eKLR, whether the appellants plea that he would not be a danger to society if released was considered.

While adding that the applicant's wife had over time passed on and he needed to be with his children, counsel pleaded that the 50 year imprisonment term be reviewed and reduced to the period already served or any such lesser period as the court may adjudicate.

On behalf of 1st applicant, Francis Karioko Murvateti, Mr. Mutitu, submitted that the 1st applicant only has about 2½ years left to complete his sentence and that he is of ill-health. He associated himself with the submissions made on behalf of the 3rd applicant. That 1st applicant was re-sentenced to 35 years on 16.12.2019 and he has chosen to apply for revision rather than appeal to the Court of Appeal.

It was further submitted that the 1st applicant, now 66 years old, has reformed and ought to be placed on probation.

In opposing the applications of the 2 applicants Miss Akunja, appearing for the republic submitted that this matter had been canvassed before the Hon. Ngenye, and the applicants given the opportunity to mitigate. That the issues of their ages and health were duly considered, and their sentences reduced from life imprisonment to fixed imprisonment terms. And that for 1st applicant the court even gave him a rebate of 5 years in view of his advanced age.

Lastly, counsel also submitted that there has been no change of circumstances herein as to warrant a revision of the sentences.

I have considered the submissions made herein on behalf of the 2 applicants (1st and 2nd applicants), and also that of the Respondent (the Republic). In considering there applications, it is important to consider and look back at the circumstances of this case from the beginning upto and ending with these 2 applications. And the history of this case is fairly agreed on by both sides. That the 2 applicants, and others were first tried for the offence of murder in High Court Criminal case Number 40 of 2000. They were therein sentenced to death on 12.3.2003.

Aggrieved with the sentences passed, they appealed to the Court of Appeal in Court of Appeal Criminal Appeal No. 51 of 2004. On 20.5.2011, their appeals were dismissed. It is then that they proceeded to the Supreme Court of Kenya in Petition Numbers 15 and 16 of 2017, successfully challenging the constitutionality of the mandatory death sentence as contained in section 204 of the Penal Code. The Supreme Court Judgment came up on 14.12.2017. In the said Judgment of the Supreme Court (at order number (b)), the Supreme Court ordered that;

"This matter is hereby remitted to the High Court for re-hearing on sentence only, on a priority basis, and in conforming with this judgment".

This matter pursuant to the above matter came back to this court (High Court) for sentencing herein. The re-sentencing hearing was done by the Hon. Lady Justice Ngenye Macharia. The applicants were accordingly accorded the opportunity to present their respective mitigations. They went further to present their submissions on the resentencing. In a ruling delivered on 16.12.2019, the honourable Justice Ngenye Macharia set aside the death sentences and replaced the same with definite imprisonment terms. For the 1st and 3rd applicants, the court ordered for sentences of 35 and 50 years imprisonment respectively. The said ruling of the honorable Judge, was a considered 22 page ruling, which has been agreed considered the mitigating factors raised by the applicants and also the submissions made by the parties on the same.

The applicants have now moved to court seeking review or revisions of the sentences meted out against them by the High Court during the re-sentence hearing ordered by the Supreme Court of Kenya. Their applications are grounded basically on the following grounds: -

a) That the sentences are inordinately long

b) That they have reformed and deserve to be released back to the community

c) Ill health.

The Respondent has opposed these applications mainly on the ground that the issues raised in these applications had been raised by the applicants during the resentencing hearing and the Honourable Judge had dully considered the same in the ruling delivered on 16.12.2019.

The issue therefore that comes out is whether this court has the jurisdiction to consider the present revision applications. Being an issued of jurisdiction of the court, it is imperative that the court deals with this issue before it can delve into the merits or otherwise of the applications.

In the celebrated case of Owners of the Motor vessel "Lillian S" versus Caltex Oil (Kenya) Limited (1989)eKLR, the Court of Appeal held;

"Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".

The court went on to hold thus;

> ***"Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given".***

The applications of the applicant (as expressed by 3rd applicant), is brought under Article 165(3) of the constitution. These are the general powers of the High Court. It is the opinion of this court in conducting the re-sentencing hearing herein, the High Court derived its powers under this article of constitution. There is however, no provision in this article that would confer upon the High Court any jurisdiction or powers to re-hear a matter it has already heard and pronounced itself on. Even counsel for the applicant's other than submitting that this court possesses that power, has not pointed out any provision in the constitution or any other written law.

Secondly, the powers of the High Court on revision at both sections 362 and 364 of the criminal Procedure code relates to revision of orders or sentences of the subordinate courts. The Criminal Procedure Code under these provisions on revision does not give any revision powers to the High Court over its own orders or sentence.

Third, this court has considered the finding of the Supreme Court in the applicants' own Petition No. 15/2015, (2017)eKLR, at paragraph 110. The Supreme Court held;

> ***"Remitting the matter. Back to the High Court for the appropriate sentence seems to be the practice adopted where the mandatory death penalty has been declared unconstitutional. We therefore hold that the appropriate remedy for the petitioners in this case is to remit this matter to the High Court for sentencing".***

This was the 3rd holding and order of the Supreme Court. The High Court has duly complied and conducted the re-hearing of the sentence. Again, it is not worthy that the Supreme Court did not in its finding confer upon the High Court any powers to re-hear on a sentence passed after a sentence re-hearing.

Fourth, I have considered the proceedings before the High Court during the sentence re-hearing on 23.10.2019. All the applicants had the opportunity to present their various factors of mitigations. Some were also contained in their filed set of submissions. The factors raised were the same as raised in the present applications including matters of their ages, periods they had served, their health conditions and their remorsefulness. The Honorable Judge duly considered all these factors raised in the very detailed and considered ruling delivered on 16.12.2019. The applicants have raised exactly the same factors for consideration in the present applications. It is for the reasons that I find it favour of the respondent as submitted in opposing these applications that this court does not have jurisdiction to issue the orders prayed for by the applicants. The review or revision order prayed for by the 1st and 3rd applicants are accordingly denied. The 2 applications filed on 28.7.2020 and 24.3.2020 respectively are dismissed wholly.

HON. JUSTICE D. OGEMBO OGOLA

27th November 2020

Court:

Ruling read out in court (on-line) in the presence of the 1st/3rd applicants, Ms. Nyagah for Mr. Ngatia for 3rd applicant, Mr. Robert Mutitu for 1st applicant and Mr. Chebii for the state.

HON. JUSTICE D. OGEMBO OGOLA

27th November 2020