



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.96 OF 2018**

**LYDIAH WAMAITHA WAMBUI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The ruling herein relates to an undated notice of motion application filed on 9<sup>th</sup> December 2020. The Applicant who appears in person, has not cited any provisions of the law, on which the application is based on. However, from the grounds thereof, the Applicant is seeking for an order that, the court considers releasing her, to serve the remainder of her custodial sentence out of custody.

2. The background facts of the case in a nutshell are that, the Applicant was charged vide, Makadara Chief Magistrate's Criminal Case Number; 170 of 2015, in two counts with the offences of; robbery with violence contrary to section 296(2) of the Penal Code and; being in possession of ammunition without a firearm certificate contrary to section 42 (2)(a) of the Firearms Act. The particulars of each charge are as per the charge sheet.

3. She pleaded not guilty to both counts. The case was heard fully and she was convicted on the charge of; robbery with violence and sentenced to death. She was acquitted on the charge of being in possession of ammunition without a firearm certificate. Subsequently, she appealed to the High Court vide Criminal Appeal No. 96 of 2018. The appeal was heard and determined, whereupon the conviction was upheld but the sentence was reduced to a custodial period of five (5) years.

4. She states in the application that; she is a first offender. Further, the court should consider the number of years she has already served in prison, "vis- a - vis the expectation of the society" and the public policy that she has reformed following the reform programs she has undertaken in prison.

5. Finally, she argued that "long prison sentence is probably not necessary, unless given the emulation that the offender, may be a danger to the society. That, she is able, willing to adhere to, or abide by any such reasonable terms and conditions as the court shall impose

6. She reiterated the aforesaid facts in the affidavit she has sworn in support of the application and averred that, she was initially sentenced to suffer death, whereupon she appealed and the sentence was reduced to five (5) years imprisonment, with effect from 2<sup>nd</sup> April 2019. She reiterated that, she has served part of that sentence in custody and wish to serve the remaining out of custody.

7. However, the Respondent opposed the application vide grounds of opposition dated 29<sup>th</sup> January 2021, and filed on the same date. The grounds states as follows;

*a) That, the court is functus officio;*

*b) That, there is no jurisdiction to review upon a review;*

*c) That, litigation ought to come to an end;*

*d) That, an Applicant cannot choose the sentence to be passed on her, as this is the province of the presiding judge;*

*e) That, the application lacks merit and is an abuse of court process and should accordingly be dismissed.*

8. The Respondent also filed submissions dated 18<sup>th</sup> March 2021, in which it submitted that, the Applicant has already exercised her right to review of sentence following the judgment delivered by the High Court on appeal against conviction and sentence. Therefore, if this court were to re-hear the same, it will amount to sitting on appeal over its judgment. The court is thus, *functus officio*. The case of; Jeremiah Mwita Ranage vs Republic (2020) eKLR, was relied on.

9. The Respondent further submitted that, the application has been brought under the provisions of, section 364 of the Criminal Procedure Code, but the provisions, grants the High Court power to review proceedings of the subordinate court, but not its own order(s). That, if the Applicant is aggrieved by the decision of; Honourable Justice L. Kimaru, she should appeal against it.

10. Similarly, the Applicant relies on the provisions of; section 333(2) of the Criminal Procedure code, however, in delivering the judgment, Honourable Justice L. Kimaru, considered the period she was in custody while pronouncing the sentence of; five (5) years.

11. I have considered the application, the affidavit in support, grounds of opposition and the Respondent's submissions. Its noteworthy that, the Applicant did not file any submissions. Be that as it were; I note that, it is not clear under what provisions the law, the Applicant has premised her this subject application.

12. However, assuming she is relying on the provisions of; 362 to 364 of the Criminal Procedure Code, the question that arises is; has she satisfied the conditions thereunder. These provisions states as follows: -

**Section 362 “The High Court may 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”**

**363 (1) A subordinate court of the first class may call for and examine the record of any criminal proceedings of a subordinate court of a lower class than it and established within its local limits of jurisdiction, for the purpose of satisfying itself as to the legality, correctness or propriety of any finding, sentence or order recorded or passed, and as to the regularity of the proceedings.**

**(2) If a subordinate court acting under subsection (1) considers that a finding, sentence or order of the court of lower class is illegal or improper, or that the proceedings were irregular, it shall forward the record with its remarks thereon to the High Court**

**Section 364 in the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may: -**

a) In the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357, and 358, and may enhance the sentence;

b) In the case of any other order other than an order of acquittal, alter or reverse the order.

c) In proceedings under section 203 or 296(2) of the Penal Code, the Prevention of Terrorism Act, the Narcotic Drugs and Psychotropic Substances(Control) Act, the Prevention of Organized Crimes Act, the Proceeds of Crime and Anti-Money Laundering Act, the Sexual Offences Act and the Counter-Trafficking in Persons Act, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing pending the application for review.

2. No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence: provided that this sub section shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

3. Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

4. Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

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

13. However, these provisions relate to supervisory power of the High Court under Article 165 (6) and (7) of the Constitution over proceedings in the subordinate court, The provisions states: -

**“(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising judicial or quasi-judicial function but not over a superior court.**

**(7) For the purposes of clause 6, the High Court may call for the record of any proceedings before the subordinate court or person, body authority referred in clause (6) and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”**

14. In view of the fact that, the order to be reviewed was issued by the High Court, these provisions do not apply. I therefore concur with the Respondent submissions then, that this court has no jurisdiction to review the sentence herein imposed by a court of same jurisdiction or itself.

15. Be that as it were, if the Applicant is relying on the provisions of; section 333(2) which states

*“Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.*

*Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody”*

16. I find that, these provisions were considered, when Honourable Justice L. Kimaru stated in his judgment as follows:

*“With regard to sentence, following the recent decision of the Supreme Court in Francis Karioko Muruatetu & Another Vs Republic (2017), this court has discretion to re-sentence the Appellant on the basis of severity of the offence. In the present appeal, the Appellant’s role was limited to firing the gun. Luckily, no one was injured. This court has considered the Appellant’s mitigation. The Appellant is remorseful. In the premises, this court set aside the death sentence meted by the trial court. The same is substituted by an order of this court sentencing the Appellant to serve (5) years imprisonment with effect from the date of this judgment. This court has taken into account the period that the Appellant was in pre-trial custody and the period she has been in prison since her conviction. It is so ordered.”*

17. Finally, it is noteworthy that, a court cannot review its own sentence after pronouncing the same. It becomes *functus officio* and the only recourse for the aggrieved party is to lodge an appeal. In that case, the High Court having passed the five (5) years sentence, it is *functus officio* and cannot review it. In that regard, I concur with the Respondent’s submissions, that, the only recourse the Applicant has is to appeal against the sentence to the Court of Appeal.

18. The upshot of this matter is that, the court lacks jurisdiction to entertain this application of review of the sentence and strikes it out accordingly.

19. It is so ordered.

**Dated, delivered virtually and signed on this 12<sup>th</sup> day of April 2021.**

**GRACE L. NZIOKA**

**JUDGE**

**In the presence of:**

**Applicant present in person**

**Ms Kimaru for the Respondent**

**Edwin Ombuna - Court Assistant**