REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION & ECONOMICS CRIME DIVISION

CORAM: MUMBI NGUGI J

ACEC MISC NO E010 OF 2021

CEPHAS KAMANDE MWAURA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant was charged and convicted of the offence of fraudulent acquisition of public property contrary to section 45(1) (a) as read with section 48 of the Anti-corruption and Economic Crimes Act (ACECA) in Nairobi Anti-Corruption Case No. 44 of 2010 - Republic v Cephas Kamande Mwaura & Another. He was sentenced to two years' imprisonment under section 48(1) (a) and a fine of Kshs. 37,200,000 and in default, imprisonment for one year under section 48(1)(b) of ACECA in the judgment of the court dated 23rd March 2018.

2. Dissatisfied with both his conviction and sentence, the applicant appealed to this court. In its judgment on the matter, the court (Ong'udi J) noted that the applicant was given a purely custodial sentence without the option of a fine. In reaching the decision to revise the sentence imposed by the trial court, the court noted that the applicant had been sentenced to serve two years' imprisonment without the option of a fine, yet section 48(1) (a) of ACECA provides for three modes of punishment, one of them being payment of a fine of upto Kshs one million. The trial court had not given any reasons why it opted for the prison term notwithstanding the fact that the applicant was a first offender.

3. The High Court took the view that any refusal by the trial court to fine the applicant should have been explained so that the appellate court could be satisfied that the trial court exercised its discretion judiciously. The trial court had not given reasons why it preferred a custodial sentence to a fine, which should have been the first port of call rather than a custodial sentence unless it is demonstrated that the applicant was a habitual or serial criminal. The High Court therefore set aside the sentence imposed by the trial court and substituted it with a fine of Kshs. 1 million and in default imprisonment for one year.

4. The applicant was still dissatisfied with the decision of the High Court and he therefore preferred an appeal to the Court of Appeal being Criminal Appeal No 89 of 2018 (Boniface Okerosi Misera & another v Republic [2021] eKLR). His appeal was, however, unsuccessful, and his conviction and sentence as revised by the High Court was affirmed.

5. The applicant has now lodged the present application filed together with a petition, both of which are dated 29th March 2021, in which he challenges the sentence imposed on him and asserts that it violates his constitutional rights. Expressed to be brought under the provisions of sections 329 and 333 of the Criminal Procedure Code (CPC), Articles 1(3), 2(4), 50(6), 159(c) of the Constitution,

international conventions, good practice and all other enabling legal provisions, the application seeks the following orders:

i. ***Spent***

ii. ***The Court be pleased to exercise its discretion in accord with the Francis Muruatetu principles and reduce the sentence of two months to community service and/or to reduce the sentence to the period served.***

iii. ***The Honourable Court be pleased to issue any such further orders, directions it may deem fit in the context of the Supreme Court ruling on re-sentencing.***

6. The application is supported by an affidavit sworn on 29th March 2021 by the applicant and is based on the grounds set out on the face of the application. The applicant deposes that he is aged 62 years, an old person within the meaning of Article 57 of the Constitution. He suffers from diabetes as shown by the bundle of documents annexed to his affidavit as annexure 'CKM 1'. He is also hypertensive and highly susceptible to opportunistic diseases which situation has been exacerbated by the Covid 19 pandemic.

7. The applicant argues that the court has discretion to re-sentence him to a non-custodial sentence of community service for 6 months or to reduce his sentence to the period served. He further deposes that he has served three quarters of the sentence with only two months remaining. He had been on cash bail until the Court of Appeal confirmed the High Court sentence. He is very remorseful and has acquired useful skills while in prison and has been reformed and rehabilitated through the prison training system.

8. The applicant confirms in his affidavit that he was convicted by the Chief Magistrate in Nairobi Anti-Corruption Case No. 44 of 2010. Further, that both the High Court and the Court of Appeal confirmed the conviction and sentence in Nairobi High Court Anti-Corruption Court Appeal Nos. 5 & 6 of 2018 (Consolidated) and Anti-Corruption Appeal No. 89 of 2018 respectively. However, he challenges his sentence which he terms as harsh, unjust and unfair in a democratic society for infringing upon his rights to legitimate expectation envisaged by the preamble and Articles 10, and 24(1), (2) and (3) of the Constitution. He contends that his implied rights, which are not expressly provided for in the Bill of Rights but are recognised by international law, treaties and conventions by dint of Article 19(1) (2) and (3) of the Constitution, have also been violated.

9. The applicant cites Article 20 as read with Article 27 of the Constitution to contend that his right to the protection and full benefit of the law has been compromised. He further contends that Article 21(1), (2) and (3) were not just paper aspirations but a reflection of Kenyans' hopes, dreams and aspirations which it is the court's mandate to bring into reality. He asserts that these are integral rights under Articles 19(1) and 22(1) to (4) and form the basic framework underpinning Kenya's social, political and cultural development.

10. The applicant lists the constitutional remedies under Article 23 which he asserts he is entitled to. He contends that his rights to fair trial under Article 25(a) and (c); integrity and dignity under Articles 28 and 29; and his social, cultural and economic rights under Article 43 have all been contravened. Notably, the applicant's position is that he has been denied a fair and speedy trial resulting in violation of his right to fair administrative action provided for in Article 47. It is also his contention that his right to family under Article 45 has been infringed or threatened as his livelihood is compromised thereby violating his family's social security. His rights as an older person under article 57 have also been violated.

11. Aside from his allegation that his constitutional rights have been violated, the applicant bases his case on the Supreme Court decision in **Francis Karioko Muruatetu & another v Republic [2017] eKLR** (the **Muruatetu** case). He asserts that the Supreme Court had in that case held that the mandatory death sentence was unconstitutional and that the High Court has discretion to reduce the impugned sentence to an appropriate one. It is his contention that the said case has developed new and emerging jurisprudence that a case can be re-opened in exceptional circumstances for purposes of a re-trial, new evidence and re-sentencing. Further, that Article 50(6) of the Constitution empowers the High Court to re-open a criminal case for the purpose, *inter alia*, *of* re-sentencing. He argues that he was sentenced while still a young man and he deserves a second chance in life, He accordingly argues that it is in the interests of justice that his case be re-opened for purposes of re-sentencing.

12. In his submissions on behalf of the applicant at the hearing of this application on 14th April 2021, Learned Counsel, Mr. Okerosi, reiterated that the applicant has approached the court seeking re-sentencing on the principles set in the **Muruatetu** case. Mr Okerosi submitted that the applicant is not challenging his conviction and sentence of two months' imprisonment, out of which he had served one month and had one month remaining. Learned Counsel submitted that the applicant is a reformed man; that he is 62

years old, sickly and diabetic; and that if he continues to remain in prison, he risks losing his life.

13. Learned Counsel further submitted that the applicant has a metal implanted in his leg which, when exposed to cold temperatures, makes his leg swell to the extent that he cannot walk.

14. Counsel reiterated that the applicant was sentenced to serve 2 years' imprisonment. He had appealed to the High Court and was given the option of paying a fine of Kshs. 1 million and one year's imprisonment in default. He had appealed to the Court of Appeal which convicted him to serve the remaining two months. He urged the court to allow the applicant to serve a non-custodial sentence which orders the court has discretion to make.

The Response

15. The respondent filed Grounds of Opposition dated 13th March 2021 in which it argues that the application lacks merit as the applicant is serving a lawful sentence; he has not demonstrated circumstances upon which the court can conclude that it is in the interest of justice to have his sentence reviewed; and that the objective of the sentence would not be attained if the application is allowed.

16. Through Learned Counsel, Ms Ndombi, the respondent argued that on the principles in the **Muruatetu** case, the main purpose for punishment was deterrence, retribution and accountability for one's actions. In this case, the applicant was convicted for fraudulent acquisition of public land out of which Kshs. 4.3 million was lost by the government. It was the respondent's submission that this case did not qualify under the principle established in the **Muruatetu** case that deals with mandatory sentences.

17. That decision, according to the respondent, does not take away lawful sentences but gives the court discretion in sentencing, reliance for this submission being placed on the case of **Simon Kipkirui Kimori vs R (2019) eKLR**. Ms Ndombi submitted that this case was a public interest case in which a large sum of money was lost.

18. With regard to the applicant's contention that his rights had been violated**,** the respondent submitted that he had not demonstrated how such violation has occurred, nor had he demonstrated that his sentence was excessive. He had also not demonstrated how he had been discriminated against. As for the arguments based on his medical condition, it was the respondent's submission that his medical conditions did not entitle him to the orders that he was seeking, noting that the documents annexed to his affidavit showed referrals by the Prison authorities to the Kenyatta National Hospital.

Analysis and Determination

19. The sole issue that arises in this matter is whether this court has jurisdiction to vary the applicant's sentence, or to re-sentence him, as he prays. The basis of his application is the powers that he argues have been vested in this court as a result of the decision of the Supreme Court in the **Muruatetu** case. He has also premised his application on alleged violation of his constitutional rights.

20. In its decision in **Bernard Kimani Gacheru v Republic [2002] eKLR**, the Court of Appeal stated that:

"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.

The position was stated succinctly by the Court of Appeal for East Africa in the case of OGOLA s/o OWOURA VS REGINUM (1954) 21 270 as follows:-

"The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge

unless, as was said in James V R., (1950) 18 E.A.C.A 147:

"It is evident that the Judge has acted upon some wrong principle or overlooked some material factor."

To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: R. V Shershewky, (1912) C.C.A. 28 T.L.R. 364."

21. The applicant in this case had been tried and convicted. On appeal, the High Court had addressed itself to the question whether the trial court had properly exercised its discretion with respect to the sentence imposed on the applicant. It had set aside the sentence imposed by the trial court as it was not satisfied, in the absence of reasons for the imposition of a custodial sentence, that the trial court had exercised its discretion properly. The Court of Appeal had considered the applicant's appeal and had upheld the decision of the High Court.

The applicant has relied on the decision of the Supreme Court in the **Muruatetu** case. However, neither in his pleadings nor in submissions by his Counsel at the hearing of this application was he able to explain how his application could conceivably fit within the rubric of the principles in the **Muruatetu** case. It bears emphasizing that the petitioners' case in **Muruatetu** was that the mandatory nature of the death penalty prescribed by section 204 of the Penal Code was unconstitutional. In accepting the contention by the petitioners with respect to the unconstitutional nature of the mandatory death sentence, the Supreme Court noted that given the finality of the death penalty, its mandatory nature violated a convicted person's right to a fair trial; limited the judge's discretion in sentencing; rendered mitigation inconsequential and limited the convict's right to review or appeal of the sentence by a higher court as prescribed by law.

22. I take the view that on a proper analysis of the reasoning of the Supreme Court in the **Muruatetu** case, the decision and the sentencing guidelines prescribed by the Supreme Court in relation to the offence of murder have no application or relation to a matter such as is presently before me. This is evident from the orders that the court issued in allowing the petition before it.

23. In its final orders, the Supreme Court made it clear that the issue of re-sentencing pursuant to its holding of unconstitutionality of the death sentence related only to cases of murder under section 204 of the Penal Code. The third order extended the application of the principles and guidelines in the decision to "…***cases similar to that of the petitioners herein'***, such cases including robbery with violence which also carried the mandatory death penalty.

24. The first order issued by the Supreme Court was that:

"a) The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of the Constitution.

25. In its third order, the Supreme Court specifically directed the Director of Public Prosecutions, the Attorney General and other relevant agencies to

"c)…prepare a detailed professional review in the context of this Judgment and Order made with a view to setting up a framework to deal with sentence re-hearing cases similar to that of the petitioners herein. (Emphasis added)

26. In my view and based on the analysis above, the **Muruatetu** decision has no application to the circumstances of the applicant in this matter. The sentence imposed on him was not a mandatory sentence. The court that imposed the sentence had discretion, within the parameters of the sentence prescribed by ACECA, to impose either a fine or a custodial sentence. The High Court had reviewed and set aside the custodial sentence imposed on the applicant and given him the option of a fine. The Court of Appeal had upheld the decision of the High Court. There is no basis for this court to issue the orders that the applicant is seeking. Indeed, to do so would be to effectively sit on appeal on the decision of a court of concurrent jurisdiction, to say nothing of the decision of a court superior, in the hierarchy of courts, to this court.

27. The appellant has attempted to obtain a favourable finding by alleging a violation of his constitutional rights, perhaps in the hope that should the **Muruatetu** argument fail, the court might consider his matter from a human rights perspective. Unfortunately, however, other than listing the rights that he no doubt is guaranteed by the Constitution, the applicant made no attempt to

demonstrate how they have been violated.

28. More importantly, however, nowhere in the judgments of the courts through which he passed did he allege violation of his rights, particularly violation of his right to a fair trial. He could have made the same arguments that he makes in this matter before the High Court that heard his appeal, or the Court of Appeal, but did not. This court cannot enter into an inquiry of the alleged violation of his constitutional rights at this stage.

29. In the circumstances, I find that the application is totally lacking in merit. It is hereby dismissed and the petition struck out.

DATED SIGNED AND DELIVERED ELECTRONICALLY THIS 5TH DAY OF MAY 2021

MUMBI NGUGI

JUDGE