



**Muasya v Republic (Miscellaneous Criminal Application
E3 of 2021) [2023] KEHC 21454 (KLR) (31 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21454 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS CRIMINAL APPLICATION E3 OF 2021**

FROO OLEL, J

JULY 31, 2023

BETWEEN

PATRICK NZIOKA MUASYA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. What is before this court is an application (undated) but filed in court on 23rd August 2021 wherein the applicant is seeking re sentencing. He had been charged before Machakos chief magistrate court with the offence of robbery with violence and was sentenced to death on 27th February 2013. The applicant filed and appeal to the high court and court of appeal both of which were dismissed. The applicant thereafter made an application for resentencing before the high court and the court directed that the matter of resentencing be referred back to the trial court where mitigation could be considered and procedurally recorded.
2. The chief Magistrate court sitting at Machakos took the evidence with regard to mitigation and re sentenced the applicant to serve 40 years imprisonment on 17th December 2018. The applicant again appealed to the high court vide his Machakos High court criminal Appeal No 143 of 2018 to reconsider the sentence imposed and upon consideration of the same the applicants sentence was further reduced to 30 years on 14th October 2019.
3. The applicant has again moved this court seeking a review of his sentence on the basis that the 30 years imposed by the High court was excessive and harsh. The pre-sentence report filed by the probation officer was inconsistent, unbelievable, not factual and marred by impartiality and the said report mislead the court as there was no death or grievous harm occasioned to the victims to warrant such a harsh sentence.



4. The applicant therefore begged the court to allow him to be reheard afresh on mitigation and proceed to grant him a more lenient sentence that is proportional to the circumstances of the offence he was charged with.
5. The respondent opposed this application and filed their grounds of opposition dated 9th December 2021. They stated that the application does not meet the legal requisite for the orders sought and the applicant had not demonstrated in which manner the court erred and/or which principles the court did not consider. The applicant also did not challenge the pre-sentence report at the high court and thus could not be heard to do so now.

Analysis And Determination

Nature and scope of resentencing

6. Re-sentencing is neither a hearing de novo nor an appeal. It is a proceeding undertaken within the court's power to review sentence. The court will ordinarily check the legality or propriety or appropriateness of the sentence. The relevant considerations in the proceeding inter alia, are the penalty law, mitigating or aggravating factors, and the objects of punishments. In re-sentencing proceedings, conviction is not in issue.

Sentence

7. As fully explained above the applicant has had the full benefit of the legal system and used it to fully ventilate all his issues. He had filed an appeal at the High court and court of Appeal, both of which were dismissed. He filed the first application for re sentencing and was referred back to the Magistrate court, which upon considering his mitigation resented him to 40 years imprisonment.
8. The applicant was not satisfied by the said re sentence filed Machakos high court criminal Appeal No 143 of 2018, which appeal was heard on merit and the said court fully considered the re sentencing proceedings and reduced the sentence to thirty (30) years imprisonment. The applicant did not appeal as against this judgment but has opted to file this application.
9. This court has no jurisdiction to again sit on review of the judgment issued by the high court, which is a court of equal status. The applicant's only option would have been to appeal as against the said decision to reduce his sentence to thirty (30) years. The applicant has had his full share of his bite to the legal cherry and without doubt any more attempts to bite the same must be frowned upon.

Disposition

10. Having considered the facts herein I do find and hold that this application is res judicata, the applicant having made similar application before the high court and the same having been heard and determined on merit. He cannot therefore again seek to be re heard on the same issues
11. I do therefor dismiss this application as completely unmerited.
12. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 31ST DAY OF JULY, 2023.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 31st day of July, 2023.



In the presence of;

Appellant

..... for ODPP

..... Court Assistant

