

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISCELLANEOUS CRIMINAL APPLICATION NO. 81 OF 2019

GIDEON OPICHA SICHENGA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. This matter was placed before me for the purpose of giving directions, in view of the recent decision by the Supreme Court in *Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Ndung'u & Lenaola SSJJ), with respect to mandatory sentences, where it was clarified that the decision, in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ), had arisen from proceedings relating to murder, under section 204 of the Penal Code, Cap 63, Laws of Kenya, and the position stated in the said decision was intended to apply only to mandatory sentences with respect to murder cases.

2. The Motion herein, undated, filed herein on 11th November 2019, is not founded on the decision, in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ), for the applicant seeks judicial review of his sentence, where he had been convicted of simple robbery by the Maseno Senior Resident Magistrate's Court, and was sentenced to serve an undisclosed term of imprisonment. He does not disclose whether he appealed or not. He seeks judicial review on grounds that he has served a substantial portion of the sentence, and asks to be put on probation for the rest of the sentence.

3. The sort of review that the applicant seeks is not available through court intervention, but rather through administrative means. Under the Prisons Act, Cap 90, Laws of Kenya, there is provision of parole or remission. The Constitution also provides for exercise of mercy by way of Presidential clemency, under Article 133 of the Constitution. Primarily, a court can only exercise jurisdiction, with respect to sentencing, within the confines of the Criminal Procedure Code, Cap 75, Laws of Kenya, upon conviction and through revision, and appeal. It can also deal with sentencing, upon a constitutional petition, where it is established that there was some constitutional violation. However, once a person has been properly convicted and sentenced, whether remission or parole or review of sentence should be done, outside a sentencing hearing, appeal or through a proper constitutional petition, are administrative matters that ought to be dealt with through the Ministry of Interior, which is responsible for prisons and correctional institutions. The court can only intervene where there is allegation of abuse of process by the Ministry or the relevant agencies within the Ministry. The court intervenes only where there is a problem with the way the administrative organs, responsible for correctional services, are executing their mandate with respect to individual convicts. The mere fact that the sentence was imposed by a court of law does not mean that the court will have a role, thereafter, to review the sentence midway during the course of its execution.

4. Secondly, judicial review is founded on some improper use of power, so that even where sought under the constitutional provisions, the applicant should be pointing at some abuse of authority or misapplication of the law. The applicant herein has not done so. His application is not founded on any abuse of power or discretion, or violation or contravention of any constitutional provisions. He says he has served a substantial part of his sentence, and he is now a reformed man, and he is practically mitigating, in the hope that his sentence would be reduced, so that he serves probation for the remainder of his term. Judicial review is not available for such. If he feels that he has sufficiently reformed, then he is better of approaching the prison authorities, so that they can activate the administrative procedures for either parole, remission, power of mercy, among other administrative measures, to deal with the matter. The file herein shall be closed.

5. The Deputy Registrar shall cause copies of this ruling to be availed to the applicant and the office of Director of Public Prosecutions, Kakamega.

PREPARED, DATED AND SIGNED AT KAKAMEGA THIS 14TH DAY OF JANUARY 2022

W MUSYOKA

JUDGE