



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISCELLANEOUS CRIMINAL APPLICATION NO E010 OF 2021

DAVID OMBIMA Alias SWEETIE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Applicant herein was tried and convicted for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. He was sentenced to death.
2. Being dissatisfied with the said decision, he lodged an Appeal in the High Court being **HCCRA No 60 of 2009** which was dismissed in its entirety. He then appealed at the Court of Appeal in **HCCRA No 167 of 2010**. However, this Appeal was also dismissed in its entirety. Subsequently, in 2009, his death sentence was commuted to life sentence by the President.
3. On 19th January 2021, the Petitioner filed the present application for review of the sentence. The said application was supported by his Affidavit in which he relied on the case of **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR** where he stated the court held that the death penalty was unconstitutional. He also placed reliance on the cases of **Douglas Muthaura Ntoribi vs Republic Misc App No 9 of 2015** (eKLR citation not given) at Meru High Court and **Kisumu John Nyanga Gacheru vs Republic Cr Case No 31 of 2016** (eKLR citation not given) .
4. In his application, he had sought that his sentence commence from the date of his arrest by considering the twelve (12) years he had already served or that the further twelve (12) years be granted 1/3 of the remission (**sic**), a fact that he emphasised in his Written Submissions.
5. He submitted that he had left behind his elderly mother with nieces and nephews who were orphans and had dropped out of school since they were completely dependent on him.
6. He further pleaded with this court to consider that he was currently forty-four (44) years old which was a productive age with the necessity of providing the basic needs to the family as well as to the society and nation building. He urged the court to consider granting him an opportunity of shaping up his future which would otherwise be ruined by the long incarceration. He asserted that he was a first offender and very remorseful for having engaged in a criminal activity.
7. He submitted that while he was in prison, he had maintained high level of discipline and had undergone several spiritual and vocational trainings such as Emmaus, Prisoners Journey and attained Diploma and Certificate. He added that he had acquired Grade III in Carpentry and Joinery. It was his submission that having gained the skills, he was able to get a legal earning and ready to be integrated back into the society. He urged this court to consider the provision of Section 333(2) of the Criminal Procedure Code
8. The State opposed his application for review of sentence for the reason that his sentence had already appealed to the High Court and Court of Appeal and further that his death sentence had been reviewed to life sentence thus rendering his application an abuse of the court process.
9. It added that on 6th July 2021, the Supreme Court gave fresh directions in interpreting the case of **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR** which only related to murder cases and that it did not invalidate the mandatory death sentence or minimum sentences in the Penal Code, the Sexual Offences Act or any other Statute. It was categorical that the aforesaid case did not apply to robbery with violence cases and thus urged this court to dismiss his present application.

LEGAL ANALYSIS

10. On 6th July 2021, the Supreme Court gave guidelines in the case of **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR** to the effect that the said decision and those guidelines apply only in respect to sentences of murder under Sections 203 and 204 of the Penal Code.

11. It was emphatic that the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) was not applicable to capital offences other than murder, such as treason under Section 40 (3), robbery with violence under Section 296 (2) and attempted robbery with violence under Section 297 (2) of the Penal Code. It pointed out that the petitioners in the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) had approached the court for specific reliefs.

12. It clarified that with regard to the mandatory death sentence in capital offences other than murder, such as treason under Section 40 (3), robbery with violence under Section 296 (2) and attempted robbery with violence under Section 297 (2) of the Penal Code and directed that a challenge on the constitutional validity of the mandatory death penalty be heard and determined in the High Court and then by the Court of Appeal, if necessary, whereafter a similar outcome as that in the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) may be reached.

13. Notably, the fact that the Petitioner was remorseful and had undergone various rehabilitation programs could not assist him for the reason that he had been charged and convicted of the offence of robbery with violence and not murder and as the Supreme Court decreed in its guidelines on 6th July 2021, the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) was inapplicable herein. The Court of Appeal had also rendered its decision in this matter. Due to the hierarchical nature of courts, the High Court could not purport to review, vary and/or set aside the decision of a superior court.

14. Notably, Article 164(3)(a) of the Constitution of Kenya, 2010 provides as follows:-

“The Court of Appeal has jurisdiction to hear appeals from the High Court.”

15. As the decision of the Court of Appeal was binding on this court, the Applicant’s prayer that this court reviews his sentence and grants him 1/3 remission was not one that this court could grant.

16. Having said so, this court also noted from his submissions that Ochieng J heard and determined his **Petition No 9 of 2019**. This court did not have the benefit of seeing this file. It appears that the learned judge may have reviewed the applicant’s sentence as he had sought to rely on the provisions of Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

17. As this court was of equal and competent jurisdiction of Ochieng J and could not sit in review of his decision, it was prudent that he handles the applicability or otherwise of Section 333(2) of the Criminal Procedure Code in the circumstances of the case herein.

DISPOSITION

18. For the foregoing reasons, it is hereby directed that this file be placed before Ochieng J on 15th March 2022 for his further orders and/or directions on the Appeal.

19. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF FEBRUARY, 2022

J. KAMAU

JUDGE