



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

PETITION NO 34 OF 2020

MAURICE ODHIAMBO OGANYO.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Petitioner 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, which sentence was later commuted to life by the President.
2. Being dissatisfied with the said decision, he lodged an Appeal in the High Court. It was not clear to this court if he appealed to the Court of Appeal as this court was not furnished with previous records. Notably, in his Petition that was filed on 9th June 2020, he averred that the subsequent **superior courts** (emphasis court) did not consider his mitigation factors.
3. On the other hand, in his Affidavit in support of the Notice of Motion application that was also filed on the same date of 9th June 2020, he stated that his conviction and death sentence was upheld by the High Court at Kisumu and that he opted not to appeal to the Court of Appeal. He added that he had no pending appeal before the Court of Appeal and he had no intention of exhausting the same.
4. His Written Submissions were filed on 14th September 2021 while those of the State were filed on 14th July 2021.
5. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

LEGAL ANALYSIS

6. In his said Petition and Notice of Motion application, the Petitioner sought a review of the sentence for the reason that **Petition No 15 of 2015 Francis Karioko Muruatetu & Another vs Republic** had declared the death sentence unconstitutional. He had averred that the court has powers to impose a lesser sentence in conformity with the aforesaid case and in this regard, he was seeking an appropriate sentence that was just, fair and recognised human dignity.
7. In his Affidavit, he further averred that he had been in jail for nineteen (19) years and having been arrested without bond, he was invoking the provisions of Section 333(2) of the Criminal Procedure Code. In respect of this Section 333(2) of the Criminal Procedure Code, he relied on the case of **Ahamed Abolfadhi Mohammed vs Republic [2018] eKLR** where the Court of Appeal held that the sentence of imprisonment ought to run from the date of arrest. He also urged this court to consider imposing on him a non-custodial sentence.
8. He pleaded with this court to consider that he had left behind his elderly mother with nieces and nephews who were completely dependent on him. He added that he had so far spent nineteen (19) years in custody and was now forty-nine (49) years of age. 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.
9. He pointed out that he had a severe stomach problem and had undergone a surgery and needed a referral abroad. It was his submission that while he was in prison, he had maintained high level of discipline and had undergone various spiritual programs in The way to happiness/ Drugs and Addicts Free Zone and Arts, Design and Painting. It was his submission that having gained the skills, he had become a crusader of good moral in society and was able to get a legal earning from entrepreneurship and therefore ready to be integrated back into the society.
10. The State opposed his Petition for review of sentence for the reason that the July 2021 directions from the Supreme Court did not apply to robbery with violence cases.
11. Further, the State argued that under Section 362 and 364 of the Criminal Procedure Code the High Court could only exercise revisionary

jurisdiction over the sentence and/or proceedings of a 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 the subordinate court in issue and which was not the case herein. Despite confirming that the Petitioner had indeed reformed, it urged this court to dismiss the Petition herein.

12. 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.

13. 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.

14. 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 the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) may be reached.

15. 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. His prayer that the court reviews his sentence thus fell by the wayside.

DISPOSITION

16. For the foregoing reasons, the upshot of this court's decision was that the Petitioner's Petition for review of sentence that was lodged on 9th June 2020 was not merited and the same be and is hereby dismissed.

17. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF FEBRUARY 2022

J. KAMAU

JUDGE