



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAROK
MISC CRIMINAL APPLICATION NO. E034 OF 2021
(CORAM: F.M. GIKONYO J.)

(Revision from Original Conviction/Sentence in Criminal Case No. 136 Of 2013 Of the chief Magistrate's Court at Narok, HCCRA 89 of 2015 at Naivasha and re-sentencing in Hcmisc.Cr.Pet No. E005 of 2021 at Narok)

KAMULAK SHUMA....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

BACKGROUND

1. The Applicant moved this court vide an undated application filed on 8th October 2021 seeking for orders of review under Article 50 (2) (q) of the Constitution. The application is premised on Article 22(d), 23(3) (f), 27, 29(f), 50(2) (q), 159 (1) (2) (a) (d), 165 (1), (3)(a), 259 and schedule (Articles 262 (7) (1) of the Constitution.
2. The applicant was convicted for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code and was sentenced to death. He filed **appeal**; Naivasha **HCCRA 89 of 2016 which appeal was dismissed**. The appellate court upheld the death sentence **on the ground** it is authorized by law.
3. The Applicant then moved this court vide an undated petition and application forwarded vide letter dated 28/10/2020 seeking for orders of a rehearing and resentencing pursuant to the Supreme Court decision in the matter of **Francis Karioko Muruatetu & Another –vs- Republic [2017] eKLR**.
4. On 11th March 2021, this court did set aside the life sentence imposed on the Applicant through commutation by the President and substituted it with a Prison term of 35 years. Being guided by the provisions of Section 333 (2) of the Criminal Procedure Code the sentence was to run from the date when the Applicant was first arraigned in the trial **Court in Narok SRM Cr. Case No. 136 Of 2013**.
5. On 07/12/2021 parties agreed to canvass this application by way of filing written submissions. From the record only the respondent filed.
6. On 7/12/2021 the Appellant orally submitted to this court that upon re- sentencing he was sentenced to 35 years' imprisonment.

Respondent's submission

7. Mr. Karanja, the prosecution counsel, submitted for the state that the application filed by the applicant is an abuse of the court process. Once the appellant filed his appeal and the same was determined, he cannot file a review in the same court seeking to review the findings of the same court when it is exercising its appellate jurisdiction.
8. The prosecution submitted that the applicant cannot re-litigate matters already heard and determined by the High court but should seek redress in the court of appeal under section 361 of the CPC. This court is functus officio having reviewed the sentence from life to 35 years. The respondent relied on the case of **Manchester Outfitters (Suiting Division) Ltd (Now Known As King Wollen Mills Ltd) 7 Another V Standard Chartered Financial Services Ltd & 2 Others [2019] eKLR, Rai 2 case and Outa case**.
9. The prosecution submitted that the current application for review does not disclose any new matters nor does it indicate that there was

error on the face of the record nor does it meet the conditions set out in *Manchester case (supra)*.

10. The prosecution urged this court to dismiss the application to pursue redress at the proper forum.

ANALYSIS AND DETERMINATION

11. I have considered the application herein and the written submissions by the respondent before the court. It is my considered view that the issue which I need to decide on is whether the same is merited.

12. As I have earlier observed, the application seeks review of the sentence currently being served by the applicant. However, the applicant in the instant application benefitted from resentencing by this court on 11/3/2021 and the sentence was reduced to 35 years' imprisonment.

13. I have called and perused the court records in Narok **HC MISC.CR.PET NO. E005 of 2021**. (Reported as *Kamulak Shuma v Republic [2021] eKLR*). I have confirmed that this court (Gikonyo J) vide the judgment delivered on 11/3/2021 did resentence the applicant herein to 35 years' imprisonment- this is the applicant herein is currently serving and wants to be revised into a non-custodial sentence.

14. According to the Supreme Court, "...a review upon a review is completely alien to the Supreme Act and the Rules made thereunder" (*Peter Ngoge vs. Josphine Awino & others [2021] eKLR and Menginya Salim Murgani v Kenya Revenue Authority [2014] eKLR*). By parity of reasoning, it is, therefore, my considered view that, unless faced with egregiously wrong decision, a court does not have jurisdiction to review its earlier order of review. Doing so would be tantamount to sitting on appeal on own judgment.

15. In the premises aforesaid, the a herein lacks a foot on which to stand, and it is hereby dismissed. The applicant may seek relief in the Court of Appeal or through the committee on power of mercy.

16. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 27TH DAY OF APRIL, 2022

F.M. GIKONYO

JUDGE

In the presence of:

1. Mr. Karanja for DPP

2. The appellant

3. Mr. Kasaso -Court Assistant