



REPUBLIC OF KENYA



**Ngui v Republic (Criminal Revision E039 of 2022)
[2022] KEHC 10580 (KLR) (Crim) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 10580 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL REVISION E039 OF 2022**

CW GITHUA, J

JULY 27, 2022

BETWEEN

JOSEPH KIMANTHI NGUI ALIAS GARANG APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant, Joseph Kimanthi Ngui alias Garang, was charged jointly with another in Kibera Chief Magistrate's Court Criminal Case No. 4447 of 2016 with the offence of robbery with violence contrary to Section 295 as read with Section 296 (2) of the [Penal Code](#).
2. The particulars supporting the charge were that on 3rd November 2016, at Kibera Laini Saba within Nairobi County, jointly with one Kelvin Mwangi and another not before the court and while armed with dangerous weapons namely homemade pistols, the applicant robbed Edward Mundia of his bag containing one laptop make Mac Book Apple, a laptop charger, external hard drive 320 GB, one Blu body spray, one pair of black rubber shoes, one pair of jean trousers, one black shirt, one green t-shirt, two vests, a pair of sunglasses, a mobile phone charger, one wallet containing two ATM cards issued by KCB and Co-operative Bank, a National Identity Card No. xxxxxxxx, a Nakumatt shopping card, one Uchumi shopping card, a mobile phone make HTC and cash KShs.5,000, all valued at KShs.327,700, and at the time of such robbery threatened to use actual violence to the said Edward Mundia.
3. After a full trial, the applicant was convicted and sentenced to serve ten (10) years imprisonment. He has now approached this court through an undated chamber summons filed on 14th March 2022 seeking review of his sentence to factor in the time he had spent in lawful custody during the trial.
4. In his supporting affidavit, the applicant avers that the period of four years and one month he spent in remand custody should be deducted from his sentence. He deposed that he was a first offender and



was remorseful for his actions. He further deposed that he is suffering from various illnesses including chronic asthma, fistula and emoroids and that he had undergone positive rehabilitation while in prison. For the above reasons, he urged this court to review his sentence.

5. Having considered the application, I find that it invokes the revisional jurisdiction of this court donated by Section 362 as read with Section 364 of the *Criminal Procedure Code* and under Section 365, this court is not obligated to hear any party before determining such applications.

Under Section 362 of the Criminal Procedure Code this court is empowered to:

“... call for and examine the record of any criminal proceedings before any 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 any such subordinate court.”

6. Since the application seeks sentence review, it is important to note that as a general rule, sentencing rests on the discretion of the trial court. Therefore, this court when exercising its supervisory jurisdiction which includes its revisional jurisdiction can only interfere with a sentence passed by a trial court if it was satisfied that the sentence was either illegal or was passed without the court considering relevant factors or considering extraneous factors or that the sentence was manifestly harsh or excessive. See: *Macharia V Republic*, [2003] KLR 115.
7. In this case, the applicant has alleged that the learned trial magistrate did not take into account the period of four years and one month he had spent in remand custody prior to his sentence. I have perused the trial court record and has noted that in her pre-sentence notes, the learned trial magistrate considered not only the applicant’s mitigation but also the fact that he had been in remand custody since his arrest in November 2016. The trial court further considered the nature and circumstances of the offence in respect of which he had been convicted.
8. In sentencing the applicant to ten years’ imprisonment instead of the death sentence prescribed by the law, the trial court was evidently guided by the Supreme Court decision in *Francis Karioko Muruatetu & Another v Republic*, [2017] eKLR, which outlawed the mandatory nature of the death sentence for the offence of murder but which by analogy the courts applied to all other offences for which the law prescribed a death sentence or minimum mandatory sentences like those prescribed by the Sexual Offences Act.
9. Although the Supreme Court has since clarified in *Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 Others (Amicus (Curiae))*, [2021] eKLR that its decision in the Muruatetu decision applied to the death sentence provided for in murder cases only, this clarification was made a few months after the applicant was sentenced in this case. As the aforesaid directions cannot apply retrospectively, I am unable to interfere with the sentence imposed by the trial court.
10. Since as noted earlier the learned trial magistrate noted the period the applicant was in lawful custody prior to the date he was sentenced which the court must have taken into account in imposing a sentence of 10 years imprisonment for an offence which carried the death penalty, I am satisfied that the applicant’s application lacks merit and it is hereby dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JULY 2022.

C. W. GITHUA

JUDGE



In the presence of:

Applicant present in person

Ms Oduor for the respondent

Ms Karwitha: Court Assistant

