



**John & another v Republic (Criminal Miscellaneous Application  
E045 of 2021) [2022] KEHC 13542 (KLR) (28 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13542 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
CRIMINAL MISCELLANEOUS APPLICATION E045 OF 2021**

**RL KORIR, J**

**SEPTEMBER 28, 2022**

**BETWEEN**

**EMMANUEL CHACHA JOHN ..... 1<sup>ST</sup> APPLICANT**

**MOSES KIDIABA MIKWEBA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicants, Emmanuel Chacha John and Moses Kidiaba Mikweba were charged with trafficking in narcotic drugs contrary to section 4 (a) of the *Narcotic and Psychotropic Substance (Control) Act* No 4 of 1994. They were arraigned before Hon BK Kiptoo(SRM) at Sotik principal magistrates' court.
2. At the end of the trial, the applicants were convicted and sentenced to a fine of one million Kenyan shillings each and in default they serve life imprisonment.
3. That after being aggrieved with the conviction and the sentence, they lodged an appeal to this court via Criminal Appeal No 15 and 16 of 2019. This court set aside the sentence of a fine of one million Kenyan shillings and a default sentence of life imprisonment and substituted it with a fine of three hundred thousand Kenyan shillings and in default to serve a term of 7 years imprisonment. In setting aside the sentence, this court in its' judgment dated January 28, 2021 stated thus:-
  - (41) Considering the circumstances of this case, the mitigation on record as well as thier submissions, I find that the sentence, though lawful, was harsh and excessive. There was no evidence that the appellants were repeat offenders and the quantity of drugs was not so large as to warrant the maximum penalty.
  - (42) I set aside the sentence of a fine of one million shillings (Ksh 1,000,000/=) and the default sentence of life imprisonment and substitute therefor a fine of three hundred thousand



shillings(Kshs 300,000/=) and in default of the fine a term of 7 years imprisonment from the date of conviction and sentence.

4. The applicants filed an application on June 10, 2021 in which they sought to have a lesser sentence than the one this court granted. It was their case that the fine of three hundred thousand or in default a jail term of 7 years was excessive. That they were too poor to raise such an amount and that they had young families.
5. The applicants submitted that the application was brought under article 50(2) of the *Constitution*. That their rights to a fair trial were violated as the time they spent in remand was not factored in the sentence.
6. It is clear that the applicants want to have a second bite at the cherry by seeking for further reduction of sentence by the same court. It is to be noted that the court, at paragraph 43 of its judgment, affirmed the applicants' right of appeal to the court of appeal.
7. In the case of *Suleiman Shabbal v Independent Electoral and Boundaries Commission & 3 others* (2014) eKLR, while explaining the relief of resentencing, the Court of Appeal observed that:

“ it is an established principle of law that the relief sought ought to be granted cautiously and sparingly, most judiciously and ensuring the supremacy of the constitution is not eroded.”
8. Article 50 (2) (p) and (q) of the *Constitution* states that the accused person has a right :

“(p) p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.”
9. This court is deprived of any further jurisdiction to interfere with its earlier judicial discretion. In the case of *James Masomo Mbatia v Republic* (2019) eKLR, Kemei J held:

“The right to resentencing under the above provisions are a principle of fair trial and also are subject to the law and more specifically the supreme law of the land.

Under the mandatory terms couched in the above provisions, right to resentencing that is allowed under article 50(p) is permitted if the prescribed punishment had changed before sentencing. From the available record and from the law as it is in Francis Karioko Muruatetu & another v Republic, Petition No 15 of 2015, the applicant has already enjoyed a reduction from a death sentence to life imprisonment and thus cannot get a second bite at the cherry in attempting to rely on article 50(p) that is not applicable to him.”
10. It is my finding that the application is an abuse of the process of court. It is mischievous and frivolous.
11. The application filed on 10th June 2021 is thus dismissed.

Orders accordingly.

**RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 28TH DAY OF SEPTEMBER, 2022.**

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**R. LAGAT-KORIR**

**JUDGE**

**Ruling delivered in the presence of the applicants (in person) Mr. Wainaina for the State and Kiprotich (Court Assistant).**

