



**Oluoch v Republic (Miscellaneous Criminal Application E050 of 2021)
[2022] KEHC 13132 (KLR) (27 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13132 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CRIMINAL APPLICATION E050 OF 2021**

JN KAMAU, J

SEPTEMBER 27, 2022

BETWEEN

KELVIN OTIENO OLUOCH APPLICANT

AND

REPUBLIC RESPONDENT

(Originating from HCCRA No 8 of 2018)

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 at the High Court in HCCRA No 8 of 2018 which was dismissed in its entirety. He appealed to the Court of Appeal but he had not been assigned a serial number as at the time of writing this judgment.
3. On May 11, 2021, he filed the application for review of the sentence herein. In the affidavit in support of his said application, he stated that he was seeking for review of sentence. In this regard, he relied on the case of *Francis Karioko Muruatetu & Another vs Republic* [2017] eKLR which was applied in the case of *William Okungu Kittiny v republic* [2018] eKLR.
4. In his written submissions that were filed on February 11, 2022, he submitted that the Supreme Court of Kenya decreed that the constitutionality of the mandatory nature of the sentence as provided for by the requirement of section 296(2) of the *Penal Code* could only be regarded as harsh, unjust, unfair or (sic) deprived the courts their legitimate strength and jurisdiction to exercise and thus individualising an appropriate sentence to the relevant aspect of the records, character, social interest and consciousness of the society for award of the appropriate sentence to the accused person (sic). He asked this court to consider the said aspects in reviewing his sentence.



5. He further submitted that the provisions of section 296(2) prescribing mandatory death sentence for the offence of robbery with violence was at variance with section 134 and 137 of the *Criminal Procedure Code* which prescribed rules of framing a charge (sic). He added that pursuant to section 216 and 32(a) of the *Criminal Procedure Code*, a court ought to consider the accused person's mitigation. He asked this court to consider his mitigation and look on the impact of the victim assessment report.
6. He asserted that he was a first offender who came into conflict with the law and that there were no previous records of his criminal culpability. He stated that he was remorseful for engaging in unlawful criminal acts. He pleaded with this court to exercise leniency as the aim of the court was to encourage reformation.
7. He also requested the court to consider that he was arrested at the age of thirty (30) years and had so far spent five (5) years in custody. He contended that he was a young man who had left behind a young family of two (2) children who solely depended on him as their sole bread winner prior to his long incarceration. He averred that his family was overwhelmed with responsibilities and pointed out that his health status had also deteriorated.
8. It was his assertion that he had maintained disciplinary guidelines between the officers and fellow inmates within the prison which earned him remarkable recommendation by the prison authorities and was rated the best at all times. He added that he had been nurtured mentally, spiritually and physically by engaging in rehabilitation courses and was awarded certificates for completion in philip acts and Bible study program, health education and lamp and light courses. He believed that the skills he had gained would assist him integrate well back to society.
9. He thus urged the court to consider the time he had spent in custody pursuant to section 333(2) of the *Criminal Procedure Code*.
10. In its written submissions that were filed on February 10, 2022, the respondent submitted that the decision on constitutional validity of mandatory death sentence in the case of *Francis Karioko Muruatetu & Another vs Republic* (Supra) only related to murder cases. It argued that the said decision did not invalidate the mandatory sentences or minimum sentences in the *Penal Code*, the *Sexual Offences Act* or any other statute.
11. It pointed out that the matter herein was one of robbery with violence which did not fall under the ambit of the case of *Francis Karioko Muruatetu & Another v Republic* (Supra) and that even if he had not based his application on the said case, there was overwhelming evidence against him which was why his appeal was dismissed.

Legal Analysis

12. On July 6, 2021, the Supreme Court of Kenya gave guidelines in the case of *Francis Karioko Muruatetu & Another vs Republic* (Supra) to the effect that the said decision only applied in respect to sentences of murder under sections 203 and 204 of the *Penal Code* and that it was not applicable to capital offences 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*.
13. Notably, the holding in the case of *Francis Karioko Muruatetu & Another vs Republic* (Supra) was inapplicable herein as the applicant had been charged and convicted of the offence of robbery with violence and not murder as was emphasised by the Supreme Court in its aforesaid guidelines. Consequently, his prayer that the court reviews his sentence thus fell by the wayside as the said case did not invalidate the minimum or mandatory sentences in the *Penal Code*, *Sexual Offences* or any other statute as was correctly submitted by the state.



14. His prayer that the number of years he had spent in custody be considered by virtue of section 333(2) of the *Criminal Procedure Code* cap 75 (Laws of Kenya) was inapplicable in the circumstances as he had been sentenced to death. There was no indication that this sentence was subsequently commuted to a determinate period of imprisonment. Section 333(2) of the *Criminal Procedure Code* was thus inapplicable herein.

Disposition

15. For the foregoing reasons, the upshot of this court's decision was that the applicant's application for review of sentence that was lodged on May 11, 2021 was not merited and the same be and is hereby dismissed.
16. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF SEPTEMBER 2022

J. KAMAU

JUDGE

