



REPUBLIC OF KENYA



**Pascal v Republic (Criminal Revision E067 of 2022)
[2022] KEHC 13197 (KLR) (Crim) (27 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13197 (KLR)

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

**CRIMINAL
CRIMINAL REVISION E067 OF 2022**

JM BWONWONG'A, J

SEPTEMBER 27, 2022

BETWEEN

ERIC KIPKEMBOI PASCAL APPLICANT

AND

REPUBLIC RESPONDENT

(Being an application for revision of the re-sentencing by of Hon. Mutuku (SRM) delivered on 19th March 2019 in Kibera Chief Magistrate's Court Criminal Case No. 5056 of 2004 Republic v Eric Kipkemboi Pascal 2 following an appeal in Nairobi High Court Criminal Appeal No. 413 of 2005 and a further in the Court of Appeal in Criminal Appeal No. 103 of 2008.)

RULING

The Case For The Applicant

1. The applicant was charged and convicted of the offence of robbery with violence contrary to section 296 (2) of the *Penal Code* (cap 63) Laws of Kenya. The Chief Magistrate's court sitting in Kibera sentenced the applicant to death, which sentence was later commuted to life imprisonment by the State President in 2009.
2. Before his sentence was commuted to life imprisonment by the State President, the applicant had appealed against judgement in the High Court Criminal Appeal Number 413 of 2005 and thereafter to the Court of Appeal in Criminal Appeal Number 103 of 2008 with the High Court and the Court of Appeal dismissing his appeals in their entirety. *Vide* petition number 384 of 2016, the applicant applied for re-sentencing in the magistrate's court. In a decision delivered on March 19, 2019, hon Mutuku (SRM) re-sentenced the applicant to serve 30 years imprisonment commencing from the date of conviction.



3. The applicant has now approached this court *vide* a chamber summons dated March 2, 2022 seeking the revision of his sentence by the magistrate's court. The application is supported by an affidavit sworn by the applicant. He urges the court to consider the time spent in remand custody and the same be taken into account under the provisions of section 333 (2) of the *Criminal Procedure Code* (cap 75) Laws of Kenya.

The case for the respondent

4. The respondent filed submissions in support of its case.

The Submissions Of The Respondent

5. In response to the application, the respondent has filed a preliminary objection dated May 23, 2022. The objection raised is that pursuant to article 165 (6) of the *Constitution* of Kenya and sections 362 and 364 of the *Criminal Procedure Code* (cap 75) Laws of Kenya, this court lacks the jurisdiction to hear and determine the instant application. Secondly, the court is *functus officio* since the applicant had already been re-sentenced to 30 years imprisonment by the magistrate's court.
6. When the application came up for hearing, the applicant sought leniency from the court.
7. Ms Joy learned prosecution counsel maintained that this court lacks jurisdiction to entertain the application.

Issues For Determination

8. I have considered the rival submissions of the parties. As a result, I find that the following are the issues for determination.
 1. Whether this court has jurisdiction to determine the application.
 2. Whether the applicant has made out a case for the grant of the orders sought

Analysis and Determination

9. I have considered the application and the preliminary objection. I note that the applicant substantively seeks a review of his sentence of 30 years imprisonment imposed upon him following a re-sentencing by the magistrate's court. The question which calls for an answer is whether this court has jurisdiction to entertain the present application.
10. As I have indicated above, the applicant's appeal to this court against his conviction and sentence by the trial court was heard and determined by this court (JB Ojwang, J (as he then was and now retired) and HA Omondi, J) in a judgement delivered on June 10, 2008. The applicant's appeal was found to be without merit and was dismissed by that court. He subsequently filed an appeal to the Court of Appeal. In a similar vein in the judgement delivered on May 17, 2013 by the Court of Appeal (Visram, JA (rtd), Nambuye JA(rtd), and Kiage JA) dismissed his appeal for lacking in merit.
11. Later on, he applied for re-sentencing and the Chief Magistrate's court sitting in Kibera re-sentenced him to serve 30 years imprisonment. It is this sentence that he now seeks to be review.
12. It is trite law that the jurisdiction of courts in Kenya is always conferred by either the *Constitution* or other written laws (statutory laws) and that a court of law can only exercise jurisdiction as conferred by the *constitution* or a written law. A court of law cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. The jurisdiction of the High Court includes unlimited original jurisdiction in criminal and civil matters, jurisdiction to enforce the bill of rights, appellate jurisdiction,



interpretative jurisdiction and any other jurisdiction, original or appellate that is conferred on it by legislation. Additionally, it also has supervisory jurisdiction.

13. I find that this court has jurisdiction to review a sentence imposed by a subordinate court pursuant to the provisions of section 362 as read with section 364 of the Criminal Procedure Code or where this court is approached vide an application for re-sentencing pursuant to the decision of the Supreme Court in Francis Karioko Muruatetu & another vs Republic [2017] e-KLR, where the trial court did not exercise discretion in sentencing due to the mandatory nature of the sentence as was provided by law at the time of sentencing.
14. I find that this court has jurisdiction to review a sentence by way of re-sentencing as set out by the Supreme Court in Francis Karioko Muruatetu & another vs Republic, supra. The sentence sought to be reviewed must be a sentence imposed by a court of law. The sentence that the magistrate's court purported to review was imposed by the state President under article 133 (1) (2) (c) of the Constitution of Kenya, which provides as follows: -
15. On the petition of any person, the President may exercise a power of mercy in accordance with the advice of the advisory committee established under clause (2), by-
 - a.
 - b. Substituting a less severe form of punishment; or
16. It is clear from the foregoing provisions that the sentence, which the magistrate's court purported to review was imposed by the State President acting in accordance with the advice of the advisory committee; which is not a court of law. I also find that there is no constitutional or statutory law that enables an aggrieved party including the applicant herein, upon whom the State President has imposed a sentence, in accordance with the advice of the Advisory Committee to seek review of such a sentence. It therefore follows that the magistrate's court had no jurisdiction to review the sentence of life imprisonment that was imposed by the State President.
17. The lack of jurisdiction is due to the following considerations.
18. First, this is due to our principle of the tripartite separation of governmental powers into three branches namely the judiciary (the courts), legislature (Parliament- national assembly and the Senate) and the executive (the Presidency and cabinet secretaries/ministers). Under this principle each branch is assigned specific functions. The applicant had exhausted his judicial remedies by way of appeals. He had crossed over to the executive branch which commuted his death sentence to one of life imprisonment.
19. Second, the court may not know the grounds or the reasons upon which the State President acted; for the record of the proceedings and the advice of the advisory committee were and are not part of the court record. In those prevailing circumstances, it becomes extremely difficulty to review such a sentence even if there was jurisdiction in the court to do so.
20. In view of the foregoing considerations, it was not open to the applicant to return to the courts to seek a review of his sentence by way of re-sentencing. Court are barred from exercising jurisdiction over matters which the constitution has assigned to the executive branch. The court cannot intrude into the affairs of the executive branch under the guise of the decision of the Supreme Court in Francis Karioko Muruatetu & Another vs Republic, supra.
21. In the premises, I find that the magistrate's court had no jurisdiction to re-sentence the appellant. Consequently, the order of the court that imposed a sentence of 30 years imprisonment *in lieu* of



the substituted sentence of life imprisonment by the President is hereby quashed with the result the substituted sentence of life imprisonment is hereby reinstated.

22. The application fails and is hereby dismissed, with the result that the life imprisonment is hereby restored.

JUDGEMENT SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 27TH DAY OF SEPTEMBER, 2022.

J M BWONWONG'A

JUDGE

In the presence of-

Mr. Kinyua court assistant

The applicant in person

Ms Joy for the Respondent

