

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HIGH COURT MISC. CRIMINAL APPLICATION NO. 21 OF 2020

JAMES MUTUA MWOLOLO.....APPLICANT

-VERSUS-

REPUBLIC..... RESPONDENT

RULING

1. Before me is an application brought under section 333(2) of the Criminal Procedure Code seeking review of sentence under the principles set down in the Supreme Court Petition No. 15 and 16 of 2015 – **Francis Karioko Muruatetu & Another –vs- Republic.**
2. In the application, the Applicant has relied on Article 22 and 258(2)(c) of the Constitution to contend that this is a matter of public interest, and Article 165(3)(d)(ii) of the Constitution to contend that this court has jurisdiction to hear and determine the application.
3. In his application the Applicant has urged this court to give breath to section 216 and 329 of the Criminal Procedure Code, and contended that the said two sections of the statute law were violated by the trial court. The Applicant also relied on the case of **Evans Wanjala Wanyonyi –vs- Republic (2019) eKLR**, wherein the Court of Appeal reiterated what it had stated earlier in the case of **Christopher Ochieng –vs- Republic and Jared Koita –vs- Republic Kisumu Criminal Appeal No. 93 of 2014** in relation to minimum or mandatory sentences.
4. In prosecuting this application, the applicant opted not to make any oral or written submissions, and relied on the application and grounds as well as certificates of passing shoe maker examinations while in prison.
5. The application is opposed by the State. In this regard, the Director of Public Prosecutions filed a replying affidavit sworn by Ann Penny Gakumu on 19th May 2020, in which the State emphasized that the victim was aged only eight (8) years, and thus the life imprisonment imposed was justified.
6. The Director of Public Prosecutions also filed written submissions emphasizing that the trial court had considered the circumstances of the case and the mitigating factors before sentencing, the Applicant, and the said sentence having been upheld by the Machakos High Court, the Applicant had no business coming to this court on the matter, as this court had become *functus officio*.
7. I have considered the application and the opposition to it by the State in their replying affidavit and written submissions. I note that it is in the Respondent’s documents that the High Court judgment in Machakos Criminal Appeal No. 96 of 2014 was filed, which appeal judgment was delivered on 23rd July 2015 was filed and in that judgment the court noted that the Applicant was not remorseful after conviction and instead insisted that he had not committed the offence.
8. Though the appeal file was said by the Deputy Registrar Machakos to have been forwarded to Makueni High Court, I was not availed the appeal file in which I presume the trial court file or at least the proceedings would be contained.
9. In my view though the Director of Public Prosecutions says that the High Court is *functus officio* after determining the appeal that is not so with regard to sentencing after the Supreme Court decision in the **Muruatetu case** (supra). It was indeed the position before the Muruatetu decision though.
10. Therefore, this court is entitled even after a substantive judgment is delivered by the highest court, upholding the trial court’s judgment, to entertain an application for review of sentence in cases related to mandatory or minimum sentences.
11. In this present case, the maximum sentence is life imprisonment as the victim was a child aged 8 years. In his application the applicant has not raised any mitigation but merely said that he wants the period he was in custody to be taken into account in sentencing under section 333(2) of the Criminal Procedure Code, and urged this court to reduce his sentence to that already served.
12. The victim being a child of tender years, aged 8, the Applicant not being apologetic either in the trial court, on appeal and in this court, and the trial court and High court having concurred in the conviction and sentence with the appeal court noting that the applicant was not remorseful, I decline to review the sentence. The application is thus hereby dismissed.

DATED SIGNED & DELIVERED, THIS 22ND DAY OF APRIL 2021, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE