



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL MISC. APPLICATION NO.114 OF 2019

ABDI RASHID ISMAIL.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant herein was charged, convicted and sentenced to life imprisonment in Criminal Case No. 60 of 2014 in the Chief Magistrate’s Court in Garissa having been charged with 2 counts. Count I - Rape contrary to Section 3(1) (a) of the Sexual Offences Act and attempted rape contrary to Section 4 of the said Act. In the alternative to the main counts, he faced the charge of indecent assault.

2. The applicant pleaded guilty to the two main counts. He was sentenced to life imprisonment on the main count. The sentence on the second count was left abeyance.

3. The applicant appealed to this court in Criminal Case No. 28 of 2016 and in reducing the sentence of life imprisonment **Dulu J** had this to say:

“The appellant from the facts on record used a lot of force in executing his mission. The facts clearly disclose cruel act by the appellant and that must have been the reason why the trial court imprisoned the appellant for life. However, in my view since the prosecution did not say that the appellant was a repeat offender and since the appellant pleaded for leniency, the sentence for life imprisonment was not justified.....”

With the above sentiments **Dulu J** reduced the life sentence to 15 years.

4. In his application before court the applicant mitigates further against the 15 years sentence and cites Section 333(2) of the Criminal Procedure Code and the decision of **Francis Karioko Muruatetu & Another v Republic Supreme Court Petition No. 16 of 2015**.

5. The State has opposed the application by stating that the principle of **Francis Karioko Muruatetu & Another v Republic Supreme Court (supra)** is not applicable in this case.

6. This court totally agrees with the State that the principle enunciated by the Supreme Court in the case of **Francis Karioko Muruatetu & Another v Republic Supreme Court (supra)** is not applicable in this case. The trial court in this matter exercised discretion and meted out life imprisonment. This court in its wisdom reduced the same to 15 years imprisonment.

7. The applicant cannot now come back to the same court seeking for a revision of the sentence as reduced. To do so, is to ask this particular court to sit on appeal in a matter dealt with by a court of concurrent jurisdiction.

8. In **John Kagunda Kariuki v Republic [2019] eKLR** Ngugi J stated inter alia:

“10. In the present case, the applicant’s appeal has already been heard by the High Court for a review of the sentence imposed. He is at liberty to make an argument for reduced sentence at the Court of Appeal.

11. Consequently, I reach the conclusion that the applicant cannot, in the circumstances of this case benefit from the doctrine propounded in Muruatetu case. I therefore dismiss the application for re-sentencing as unmeritorious.”

9. This court cannot agree more with the reasoning above, it is persuaded and will adopt the same approach.

10. Further Section 333(2) of the Criminal Procedure Code is not applicable. The applicant ought to have raised the issue at trial or even on appeal where he sought reduction of sentence. He cannot raise it now. It is certainly an afterthought and an abuse of the revision powers of this court.

11. The application is therefore dismissed.

DELIVERED AND SIGNED AT GARISSA THIS 24TH DAY OF JUNE, 2021.

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ALI-ARONI

JUDGE