



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

MISC. CRIMINAL APPLICATION NO. E006 OF 2021

DIRECTOR OF PUBLIC PROSECUTION.....APPLICANT

VERSUS

ALFRED MUSILA.....RESPONDENT

RULING

1. Before this court is an application dated 26.01.2021 filed by the Director of Public Prosecution and which seeks for orders that this court be pleased to call for the records in High Court Petition No. 44 of 2020 with the view of correcting an error apparent on the face of the record relating to the applicant's submissions in reply to the said petition; that this Honourable Court be pleased to allow the parties to make fresh submissions in respect of the said petition 44 of 2020; and that this court do give further orders as it may deem fit in the circumstances.

2. The applicant's case is that the respondent herein was originally charged and convicted for the offence of robbery with violence in Criminal Case No. 429 of 2005 and Criminal Case No. 431 of 2007 and after which he filed appeals against convictions in the two files being HCCR Appeal No. 9 of 2007 and HCCR Appeal No. 8 of 2007 respectively and which appeals were dismissed prompting the respondent to file separate constitutional petitions to wit HC Petition No. 8 of 2019 and HC Petition No. 9 of 2020.

3. That in a ruling delivered on 30.06.2020, the court allowed Petition 8 of 2019 and reduced the sentence to a prison term of 25 years from the date of sentencing. However, during the hearing of Petition 9 of 2020, the Counsel for the applicant erroneously submitted that the prayers that the respondent was seeking had been granted in Petition 8 of 2019 and thus the petition was res judicata and thus the court dismissed the said petition based on the said erroneous submissions.

4. At the hearing of the application, Ms. Mati for the applicant reiterated the contents of the supporting affidavit. The respondent made oral submissions to the effect that he indeed filed petition number 8 of 2019 and petition No. 40 of 2019 and that they were all consolidated.

5. I have considered the application herein and the submissions made by the parties.

6. I have noted the issue raised in the application and further perused the court record and I note that indeed the respondent herein was charged with the offence of robbery with violence in Embu Chief Magistrate's Criminal Case No. 429 of 2005 and wherein he was charged with other two accused persons. The facts of the case being that on 15.01.2005 at Gatumbi village Kyeni North Location in Embu District within Eastern Province jointly while being armed with offensive weapons namely pangas, axes and toy pistols robbed Yunis Njeri Njeru Kshs. 6,000/-, 8 packets of cigarette, toothpaste and coins worth Kshs. 4,000/- all valued at Kshs. 16,000/- and at, immediately before or immediately after the time of the robbery struck the said Yunis Njeri Njeru. The respondent was convicted and appealed in Embu High Court Criminal Appeal No. 49 of 2007 and which appeal was dismissed in the judgment delivered by J.N. Khaminwa J and Mary Kasango J on 21.11.2007.

7. The respondent was also charged with the offence of robbery with violence in Embu Chief Magistrate's Court Criminal Case No. 431 of 2005, the particulars of the offence being that on the 7th day of December 200 at Gitare sub-location in Embu District within Eastern Province being armed with an offensive weapon namely a metal bar robbed Sammy Munyi Duncan Kshs. 3,050/- and at, immediately before or after the time of robbery wounded Sammy Munyi Duncan. He was convicted for the said offence and after which he appealed to this court in Embu High Court Criminal Appeal No. 48 of 2007 and which appeal was dismissed in the judgment delivered by J.N. Khaminwa J and Mary Kasango J on 7.12.2007.

8. The respondent proceeded to file a Constitution Petition No. 40 of 2019 and wherein he sought resentencing in Embu High Court Criminal Appeal No. 49 of 2007. The said petition was consolidated with other two petitions and they were allowed in a judgment delivered by Muchemi J on 30.06.2020.

9. He proceeded to file another petition being Constitution Petition No. 44 of 2020 seeking resentencing in Embu High Court Criminal Appeal No. 48 of 2007 but which petition this court dismissed as being *res judicata* and after Ms. Ngessa for the state made submissions in that respect (in opposing the petition).

10. It is clear from the above analysis that indeed this court in dismissing the petition No. 44 of 2020 acted on erroneous submissions to the effect that the application was *res judicata*. As such, the orders made on 23.10.2020 are ordinarily a candidate for review.

11. However, the effect of the review of the said orders or calling the records in Petition No. 44 of 2020 with the view of correcting the error on the face of record in relation to the submissions made before this court by Ms. Ngessa (as the applicant prays) will lead to the resentencing of the respondent. This is in applying the principle of law which was established by the Supreme Court in **Francis Karioko Muruatetu –vs- Republic Petition No. 15 of 2015** and as was applied by the Court of Appeal in **William Okungu Kittiny -vs- Republic [2018] eKLR** to the effect that the mandatory minimum sentence in the offence of robbery with violence is unconstitutional.

12. At the time the respondent was resentenced in Embu High Court Criminal Appeal No. 49 of 2007 pursuant to Constitution Petition No. 40 of 2019, the law was that courts would resentence not only in cases where a petitioner was sentenced to death in murder but also where the petitioner was sentenced to death in a case of robbery with violence. The law has subsequently changed and pursuant to the directions given by the Supreme Court on 6.07.2021 in **Petition No. 15 & 16 (Consolidated)- Francis Karioko Muruatetu & Another –vs- Republic**, resentencing can only be in respect of a sentence for murder charges. As such, calling the records herein sought will be an act in futility and indeed an academic exercise as this court cannot resentence the respondent even after the parties are allowed to make fresh submission in the matter.

13. As such, the application herein is struck out.

14. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 29TH DAY OF JULY, 2021

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondent