REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISCELLANEOUS CRIMINAL APPLICATION NO 62 OF 2019

JAMES OCHIENG ODHIAMBO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Applicant herein was tried and convicted of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. He was sentenced to death which was later commuted to life imprisonment.

2. Being dissatisfied with the said decision, the Applicant lodged an Appeal in the High Court **Kisii Criminal Appeal No 129 of 2012** where the Court affirmed the conviction and sentence and dismissed his Appeal in its entirety.

3. On 6th November 2019 the Applicant filed this application for review of the sentence. In his affidavit in support of his application, he relied on the case of **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR** where it was held that the death penalty was unconstitutional and hence sought an appropriate sentence. He also placed reliance on the cases of **Meru Misc App No 4 of 2015 Douglas Muthaura Ntoribi vs Republic** (eKLR citation not given), **Kisumu Appeal No 56 of 2013 William Okungu Kittiny vs Republic** (eKLR citation not given) amongst other cases in arguing that he was not accorded a fair trial thus contravening Article 50(2)(q) of the Constitution of Kenya, 2010.

4. In his Written Submissions, he reiterated his aforesaid averments and asserted that in the case of **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR**, the Supreme Court held that mandatory sentences deprive courts of their legitimate jurisdiction to exercise discretion to individualise an appropriate sentence to relevant aspects of character and record of each accused person.

5. He pleaded with this court to consider that he was thirty two (32) years of age and had a promising future. He added that he had since spent eleven (11) years in custody, having been arrested at the age of twenty one (21) years and urged the court to consider granting him an opportunity to re-shape his future which would otherwise be ruined by the long incarceration. He added that he was a first offender and very remorseful.

6. He contended that he had undertaken various reformation programmes such as grade III in Carpentry tested by the Government Testing Agency, NITA. It was his submission that having gained the skills, he was ready to be integrated into the society.

7. The State acknowledged that he was now rehabilitated and had amended his ways. However, it opposed his application for review of sentence for the reason that on 6th July 2021 the Supreme Court of Kenya gave fresh directives in interpreting **Petition No 15 & 16 (CONSOLIDATED) of 2015 Francis Karioko Muruatetu (supra)** and **Wilson Thirimbu Mwangi vs Republic**, whereby the Court stated that the decision on the constitutionality of the mandatory nature of death sentence made in the said case only related to murder cases.

8. It further relied on Section 362 and 364 of the Criminal Procedure Code in arguing that the High Court could only exercise revisionary jurisdiction over the sentence and/or proceedings of a subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of the subordinate in issue and which was not the case herein. It relied on the case of **High Court of Embu Criminal Review No 12 of 2020** (eKLR citation and names of parties not given) where Muchemi J arrived at a similar conclusion.

9. On 6th July 2021, the Supreme Court gave guidelines in the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) to the effect that the decision of Muruatetu and these guidelines apply only in respect to sentences of murder under Sections 203 and 204 of the Penal Code. It also clarified that all offenders who had been subject to the mandatory death penalty and desired to be heard on sentence would be entitled to re-sentencing hearing.

10. The Supreme Court was categorical that an application for re-sentencing arising from a trial before the High Court could only be entertained by the High Court, which has jurisdiction to do so and not the subordinate court. It was also emphatic that where an appeal was

pending before the Court of Appeal, the High Court would entertain an application for re-sentencing upon being satisfied that the appeal had been withdrawn.

11. It further directed that in a re-sentencing hearing, the court must record the prosecution's and the appellant's submissions under Section 329 of the Criminal Procedure Code, as well as those of the victims before deciding on the suitable sentence. It added that where the appellant has lodged an appeal against sentence alone, the appellate court would proceed to receive submissions on re-sentencing.

12. It clarified that the guidelines would be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals and that the same would also apply to sentences imposed under Section 204 of the Penal Code before the decision in Muruatetu.

13. It reiterated that in re-hearing the sentence for the charge of murder, the court had to take into account the mitigating factors that had earlier been set out in the same case of **Francis Karioko Muruatetu & Another vs Republic** (Supra). It further directed that the Judiciary Sentencing Policy Guidelines to be revised in tandem with the new jurisprudence enunciated in the said case.

14. It was emphatic that the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) was not applicable to capital offences other than murder, 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. It was clear that the said case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) could not be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences were inconsistent with the Constitution of Kenya.

15. It pointed out that the petitioners in the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) had approached the court for specific reliefs. It clarified that with regard to the mandatory death sentence in capital offences other than murder, 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 and directed that a challenge on the constitutional validity of the mandatory death penalty be heard and determined in the High Court and then by the Court of Appeal, if necessary, whereafter a similar outcome as that in the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) may be reached.

16. The fact that the Applicant herein was remorseful and had undergone various rehabilitation programs could not assist him for the reason that he had been charged and convicted of the offence of robbery with violence and not murder and as the Supreme Court decreed in its guidelines on 6th July 2021, the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) was inapplicable herein. His prayer that the court reviews his sentence thus fell by the wayside.

DISPOSITION

17. For the foregoing reasons, the upshot of this court's decision is that the Applicant's application for review of the sentence that was filed on 6th November 2019 was unmerited. His prayer for review of the sentence was unmerited and the same be and is hereby dismissed.

18. Accordingly, the court upholds the conviction and sentence of the Applicant for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code Cap 63 (Laws of Kenya).

19. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF SEPTEMBER 2021

J. KAMAU

JUDGE