



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL PETITION NO E027 OF 2021

TITUS OWINO OKELLO.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Petitioner herein was tried and convicted of the offence of robbery with violence contrary to Section 295 as read with Section 296 (2) of the Penal Code. He was sentenced to fifteen (15) years imprisonment.
2. Being dissatisfied with the said decision, he lodged an Appeal in **Kisumu Criminal Appeal No 49 of 2019**. The same was dismissed on 18th December 2019.
3. On 9th April 2021, the Petitioner filed this Petition for review of the sentence. In his affidavit in support of his application, he invoked Articles 22, 23, 165 of the Constitution in support of his review of fifteen (15) years sentence. He sought a non-custodial sentence on the ground that he had transformed and was well rehabilitated having undertaken courses while in prison. He urged this court to consider Section 333(2) of the Criminal Procedure Code in reviewing his sentence.
4. In his Written Submissions, he reiterated his aforesaid averments and pleaded with the court to show him mercy. He 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. He argued that the discretion of the Trial Court to mete out a sentence that was commensurate to the circumstances of his case was curtailed by the minimum sentence.
5. He pleaded with this court to consider that he was thirty one (31) years of age with responsibilities of taking care of his wife and school going children. He stated that he had spent three (3) years in prison and that from the time he was arrested, his wife got traumatised and ran away abandoning his children who were currently in the hands of a good Samaritan. He urged this court to consider granting him an opportunity to re-shape his future which would otherwise be ruined by the long incarceration.
6. He submitted that he was a first offender and very remorseful. He contended that he had undertaken various reformation programmes such as Diploma in Discover Bible School Lessons and Health Education. It was his submission that having gained the skills, he was able to be engaged in lawful work and live a life free of crime in the society.
7. The State opposed the Petitioner's application for review of the sentence. It pointed out that the decision in **Francis Karioko Muruatetu & Another vs Republic** (supra) did not apply in this instant case. It added that this court had already determined the issue of review of sentence herein and under the doctrine of precedents, it could not review its own decision. It was categorical that the Petitioner's sentence was fair, legal and lawful in the circumstances for the reason that the offence of robbery with violence attracts a death sentence.
8. 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.
9. 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.

10. 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.

11. 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.

12. 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.

13. 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.

14. 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 the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) may be reached.

15. The fact that the Petitioner 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.

16. His prayer that the court reviews his sentence and imposes on him a non-custodial sentence on the ground that his rights under Article 22, 23 and 165 of the Constitution of Kenya, 2010 had been violated thus fell by the wayside.

17. Be that as it may, this court noted that Cherere J did not pronounce herself from when the sentence that was meted upon him was to run. The Trial Court also stated that he was sentenced to fifteen (15) years imprisonment. Section 333(2) of the Criminal Procedure Code provides as follows:-

“Subject to the provisions of section 38 of the Penal Code (Cap 63), every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take into account of the period spent in custody.”

18. This was a position that was reiterated by the Court of Appeal in the case of **Ahmed Abolfathi Mohammed & Another vs Republic [2018] eKLR**. As the learned judge had since transferred from Kisumu High Court, this court took the considered view that there was sufficient reason for it pronounce itself on when judgment should run to prevent a miscarriage of justice. It was the considered opinion of this court that proceeding in such a manner would not amount to sitting on appeal on a judgment of a court of equal and competent jurisdiction.

DISPOSITION

19. For the foregoing reasons, the upshot of this court's decision is that the Petitioner's Petition for review of the sentence that was filed on 9th April 2021 was merited and the same be and is hereby allowed. Accordingly, the court hereby upholds the conviction and sentence of the Petitioner for the offence of robbery with violence contrary to Section 295 as read with Section 296 (2) of the Penal Code (Laws of Kenya) but hereby orders and directs that the period the Petitioner spent in custody, if at all, shall be taken into account when computing his sentence in accordance with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

20. It is so ordered.

DATED and DELIVERED at KISUMU this 24th day of September 2021

J. KAMAU

JUDGE