



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISCELLANEOUS CRIMINAL APPLICATION NO E012 OF 2021

JERIM OTIENO OTUOMA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Petitioner herein was tried and convicted on two (2) counts; one being for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code and the second one being for defilement contrary to Section 8(1) of the Sexual Offences Act No 3 of 2006. He was sentenced to death on the first count and twenty (20) years imprisonment in the second count. The second count was held in abeyance.
2. Being dissatisfied with the said decision, he lodged an Appeal in the High Court being, **Criminal Appeal No 10 of 2016**. In a judgment that was delivered on 15th December 2016, the Court affirmed the conviction and sentence and dismissed his Appeal in its entirety.
3. On 9th February 2021 the Petitioner filed this application for review of the sentence. The said application was supported by his Affidavit in which he stated that he was relying on the case of **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR** where the court held that mandatory sentences deprive courts their legitimate jurisdiction to exercise discretion to individualise an appropriate sentence to relevant aspects of character and record of each accused person.
4. He also relied on the case of **Christopher Ochieng vs Republic [2008] eKLR** where the court held that minimum mandatory sentences were unconstitutional.
5. He pleaded with this court to consider that he was arrested at the age of thirty-five (35) years and was the sole bread winner of his family. He added that he had so far spent eight (8) years in custody and was now forty-three (43) years of age. He urged the court to consider granting him an opportunity of shaping up his future which would otherwise be ruined by the long incarceration. He asserted that he is a first offender and very remorseful for having engaged in a criminal activity.
6. He submitted that while he was in prison, he had maintained high level discipline which earned him to be rated among the most disciplined prisoners and therefore promoted to special stage (TRUSTEE). He contended that he had undergone various rehabilitation programs such as Carpentry, Joinery, Biblical Studies from AFCM and Emmaus Bible School, Health Education, Voice of Prophecy, Biblical Studies by Lutheran Media Ministry, Alcohol Drugs and Substance Abuse, Prisoners Journey and Biblical Studies from Lamp and Light. It was his submission that having gained the skills, he was ready to be integrated back into the society.
7. The State 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 **Francis Karioko Muruatetu vs Republic** (Supra) that the same only related to murder cases.
8. It argued further that under Sections 362 and 364 of the Criminal Procedure Code the High Court can 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 court in issue and which was not the case herein. In this regard, he relied on the case of Embu Criminal Review No 12 of 2020 where the court held that it lacks jurisdiction to revise its own orders regarding sentence.
9. It added that the circumstances surrounding the offense were heinous to warrant the death sentence on the applicant in that; the Applicant used a knife as the weapon to threaten the complainant as he robbed her off a phone, he also assaulted the complainant who was a minor, sexually. It urged the court to dismiss the Applicant's application and uphold his conviction and sentence.

10. 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.

11. 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.

12. 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.

13. 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.

14. 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.

15. 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.

16. 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.

17. Notably, the fact that the Applicant 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.

18. Further, his prayer that the court reviews his sentence under Article 50(2) of the Constitution of Kenya and proof of rehabilitation was also immaterial. Indeed, as was submitted by the State, this court cannot seat on appeal of its own decision. In this regard, this court found and held that there was no merit in his prayer for review of his sentence as death sentence had not yet been abolished under the Kenyan law.

DISPOSITION

19. For the foregoing reasons, the upshot of this court's decision was that the Applicant's application for review of sentence that was lodged on 9th September 2021 was not merited and the same be and is hereby dismissed.

20. It is so ordered.

DATED and DELIVERED at KISUMU this 25th day of October 2021

J. KAMAU

JUDGE