



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISCELLANEOUS CRIMINAL APPLICATION NO 29 OF 2020

RICHARD OMONDI OMBEWA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Petitioner herein was tried and convicted of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. On 7th October 2004, he was sentenced to death.
2. Being dissatisfied with the said decision, the Petitioner lodged an Appeal in the High Court in **Criminal Appeal No 232 of 2004**. In a judgment that was delivered on 13th March 2007, the court affirmed the conviction and sentence and dismissed his Appeal in its entirety.
3. Being dissatisfied with the above decision, he filed an application for sentence review **Criminal Petition No 24 of 2017** where Ochieng J reduced his death sentence to thirty (30) years imprisonment to begin from 7th October 2004.
4. On 5th August 2020, the Applicant filed the present application for review of the sentence pursuant to section 333(2) of the Criminal Procedure Code. His application was supported by his Affidavit in which he stated that he had fully been rehabilitated, having attained grades in vocational training such as Upholstery, Carpentry, Joinery, Home Based Care and Restorative Justice. It was his submission that having gained the skills, he was ready to be integrated into the society.
5. He placed reliance 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. He added that in the same decision the court appreciated the case of **Christopher Ochieng vs Republic [2008] eKLR** where he argued that the court held that mandatory minimum sentences disregard all individual characteristics by a dint of article 28 of the Constitution.
6. He invoked Section 333(2) of the Criminal Procedure Code and pleaded with the court to consider the period he had already spent in custody as from the date of arrest which was on 2nd May 2000.
7. He submitted that he was arrested at the age of twenty (20) years and has been in custody for twenty (20) years and his family left with the burden of responsibilities because of his long incarceration. He added that he was a first offender and very remorseful and that while in prison, he had maintained a high level of discipline and was rated as one of the most trusted prisoners.
8. The State was opposed to the Applicant's application for review of the sentence. It pointed out that the Applicant herein had previously approached this court and his sentence reviewed. It argued that this court therefore had already dealt with the issue of sentence review to its conclusion. To buttress its point, it relied on the case of **Samuel Kamau Macharia vs KCB & 2 Others Civil Application No 2 of 2011** where the Court held that a court's jurisdiction flows from either the constitution or legislation or both and cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.
9. It pointed out further that the court that dealt with the first issue of resentencing is of similar jurisdiction as this court. It invoked Section 362 and 364 of the Criminal Procedure Code as read with Article 50(2) and Article 165(6) of the Constitution of Kenya 2010 in explaining that the said Sections limit the revisionary powers of the High Court to orders of the subordinate Court.
10. It further explained that the circumstances surrounding how the offense was committed was the most heinous in that the Applicant and his co-accused were armed with various crude weapons and subjected the matron of the school and the students to assault causing pain, injury and rape for two and a half (2½) hours. It was their submission that the Applicant's application should be dismissed.

11. A reading of the record shows the Applicant's application for review of sentence pursuant to the case of **Francis Kariokor Muruatetu & Another vs Republic** (supra) had already been dealt with by this court and a decision delivered on 27th November 2018. However, this court noted that Section 333(2) of the Criminal Procedure Code was not taken into account then and found that this would be a suitable case for it to exercise its discretion as far as the said Section is concerned.

12. The fact that the Applicant herein was remorseful and had undergone various rehabilitation programs could not assist him for the reason that a court of equal and competent jurisdiction such as this one had dealt with the issue of time from when his sentence ought to have commenced. His prayer that the court reviews his sentence thus fell by the wayside.

13. The only option that was open to him was to approach the Court of Appeal to consider whether or not the learned trial judge erred in law and in fact in not having pronounced himself regarding the provisions of Section 333(2) of the Criminal Procedure Code.

DISPOSITION

14. For the foregoing reasons, the upshot of this court's decision was that the Applicant's application for review of the sentence that was filed on 5th August 2020 was not merited and the same be and is hereby dismissed.

15. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF OCTOBER 2021

J. KAMAU

JUDGE