



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

PETITION NO. 118 OF 2018

JAMES KABERIA M'ITObI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Applicant, James Kaberia M'Itobi, was charged and convicted for the offence of Attempted Murder contrary to Section 220 of the Penal Code and sentenced to life imprisonment.

2. He filed an appeal being HCCRA No. 356 of 2001 but the Court (Sitati J) upheld the conviction as well as the sentence of the trial Court. He made a further appeal to the Court of Appeal at Nyeri being Criminal Appeal No. 175 of 2005 and his appeal was again dismissed by the Court (Omolo, Githinji & Onyango Otieno JJA).

The Application

3. The Applicant has approached this Court by way of an application dated 11th June 2018 and filed on 25th February 2021 seeking a reduction of his sentence. The principal ground upon which his application is premised is that the Supreme Court, in ***Francis Karioko Muruatetu & Another vs Republic; Katiba Institute & 5 others (Amicus Curiae)*** Petition No. 15 & 16 (Consolidated) of 2015 [2017] eKLR declared that mandatory sentences are unconstitutional. He further urges that he has been in prison for 18 years and has been rehabilitated.

4. In his submissions, he seems to have erroneously urged as one who had been sentence under Section 8 (2) of the Sexual Offences Act. This was an error because he was charged and convicted for Attempted Murder contrary to Section 220 of the Penal Code and not for Defilement under Section 8 (2) of the Sexual Offences Act.

5. One of the arguments in his submissions is that the indefinite life sentence imposed upon him is incompatible with the correctional services motto of '*kurekebisha na haki*' and the primary purpose of a sentence of imprisonment under the United Nations Standard Minimum Rules (Mandela Rule No. 4) hence inconsistent with Article 2 (6), 25 (c), 27 (1) and (2) and 50 (2) of the Constitution. He urges that the sentence limits his prospect of a future in contravention of Article 28 and 51 (1) of the Constitution.

6. He relies on ***Evans Wanjala Wanonyi vs Republic*** (2019) eKLR where the Court applied the ratio in the ***Francis Muruatetu*** case. He urges that he was a first offender and is thus entitled to the least severe punishment. He urges that following his incarceration, he has been living peacefully with fellow inmates and has rehabilitated.

Prosecution's Response

7. The Prosecution have opposed the application and they filed submissions dated 4th October 2021. They urge that the Court should take into account the manner in which the offence was committed. That the Petitioner attempted to kill the victim by chopping off his left palm and cutting him with a panga on the head. The victim was an Assistant Chief whom the Petitioner attacked when he had gone to effect an arrest on the Petitioner for an offence in which the Petitioner had been implicated. That the Petitioner left his house wielding a panga which he used to chop off the victim's hand and inflicted panga cuts on the victim's head, causing him a fracture of the skull. That the sentence, taking into consideration the gravity of the offence was lawful and was not excessive. That the Petitioner indeed had malice to commit the crime.

8. They urge that the Petitioner has not expressed remorse and that he has never tried to reach out to the victim who is living without a hand. They urge that there is nothing to show that the Petitioner has acquired any new skills while in prison.

9. They urge that in the direction issued on 6th July 2021 in **Francis Karioko Muruatetu & Another vs Republic; Katiba Institute & 5 others (Amicus Curiae)** Petition No. 15 & 16 (Consolidated) of 2015 [2021] Eklr, the Supreme Court held that the ration in the case is only applicable for the offence of murder contrary to Section 204 of the Penal Code and not applicable for any other offence. They urge for the Court to dismiss the Petition.

Determination

10. Section 220 of the Penal Code provides that any person who attempts unlawfully to cause the death of another is guilty of a felony and is liable to imprisonment for life. The trial Court's exercise of discretion in sentencing the Appellant to life imprisonment was thus lawful.

11. The Court has also considered that the Supreme Court, on 6th July 2021, issued directions clarifying that the ratio in **Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 others (Amicus Curiae)** Petition No. 15 & 16 (Consolidated) of 2015 [2017] eKLR, is only applicable to cases of murder contrary to Section 204 of the Penal Code, and not to all other offences. The Supreme Court held as follows: -

“[15] To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences 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, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases.”

12. These Directions are binding on this Court by virtue of Article 163(7) of the Constitution of Kenya which provides that **‘all courts, other than the Supreme Court are bound by the decisions of the Supreme Court.’**

13. The Court, therefore, declines the Applicant's application for a reduction in his sentence based on the ratio in the **Francis Muruatetu** case.

14. The Court observes that the manner and the circumstances under which the Applicant injured the victim was brutal. The victim, an Assistant Chief was on official duty and had gone to effect arrest on the Applicant, only for him to be accosted by the Applicant who chopped of his hand and cut him on the head with a panga.

15. While the Applicant may have rehabilitated as he claims to have, the Court considers that other objectives of sentencing including retribution and deterrence must be met. The Court, therefore, finds no reason to disturb the sentence of life imprisonment meted out by the trial court against the Applicant.

ORDERS

16. Accordingly, for the reasons set out above, the Court makes the following orders: -

i) The Applicant's application for a reduction in his sentence is declined.

Order accordingly.

DATED AND DELIVERED THIS 25TH DAY OF NOVEMBER 2021.

EDWARD M. MURIITHI

JUDGE

Appearances

Jmaes Kaberia M'Itobi, the Appellant in person.

Ms Nandwa, Prosecution Counsel for the Respondent.