



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CRIMINAL APPL. NO. E104 OF 2021

CHRISTOPHER NYOIKE KANG'ETHE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant herein was charged at the Chief Magistrate's Law Courts vide Criminal Case No. 1372 of 2001, with three (3) counts of robbery with violence contrary to; section 296(2) of the Penal Code (cap 63) Laws of Kenya. He was found guilty on all the three (3) counts after the trial and sentenced to death on count (1) and the sentence on the other counts was held in abeyance.

2. He then filed High Court Miscellaneous Application No. 630 of 2018, seeking for re-sentencing after the decision in the case of *Francis Kariako Muruatetu & Another vs Republic; Constitutional Petitions No(s) 15 and 16 of 2015*; wherein the mandatory nature of death penalty was declared unconstitutional. The matter was referred to the lower Court for re-sentencing.

3. Pursuant to that order, the applicant filed another Miscellaneous Application No. 49 of 2019, at the Chief Magistrates Court at Milimani Nairobi, and upon hearing the same, the sentence was reduced to a period of eight (8) years imprisonment.

4. He now seeks in the application herein that, the period he was in custody during trial, be factored in the sentence. The application is supported by his own affidavit, in which he deposes that, he has been in custody for 19 years, after he was arrested and charged. That while sentencing him, the trial court stated that, the sentences will run from the date of its pronouncement, being 26th February 2020 and overlooked the provisions of; section 333(2) of the Criminal Procedure Code (Cap 75) Laws of Kenya to consider the period in custody while on trial.

5. He now moves the Court under the provisions of section; 362 and 364 of the Criminal Procedure Code, to vary, reverse, or affirm any decision made by the subordinate Court on sentence. That the Court invokes the provisions of; Article 50(2) (q) of the Constitution of Kenya, 2010 which provides for the least sentence be meted out. Further, the Court issues any such other orders it deems appropriate in the instant case.

6. The applicant further avers that, should the Court, impose any other sentence in addition to the one already served, the Court be pleased to consolidate the same, with the time served for ease of computation, and in addition, place him under suspended sentence provided, pursuant to the provisions of; section 35(1) of the Penal Code. That, he undertakes to adhere to the terms that, the Court may impose.

7. The application was considered at the first instant whereupon the court ordered that, the matter be served for directions and the original lower court file No,1372 of 2001, be provided. The file was subsequently availed. In the same vein, on 20th September 2021, the Honourable Court called for the lower court file, Miscellaneous Criminal Application File No. 49 of 2019 and it was availed. The Respondent were also ordered to respond to the application.

8. The Respondent, through the learned State Counsel Ms Akunja responded to the application orally and, told the Honourable Court that, the applicant has benefitted from the decision of the Supreme Court of Kenya in Muruatetu's case and therefore, the Court is *functus officio*.

9. The application was disposed of vide written submissions filed by the applicant, which I have considered herein, and in which he makes reference to; articles 27(1), (2) (4) and (5) of the Constitution of Kenya, 2010, that deal with equality before the law, right to equal protection, and benefit of the law.

10. Finally, he refers to the provisions of; sections 46 of the Prisons Act, arguing that, the Prison Authorities have been unable to compute the sentence of eight (8) years imposed as the court order states that the period of custody should run from the date of re-sentence.

11. I have considered the application in the light of the materials before the court and I find that, the starting point to consider is whether the court has jurisdiction to hear and determine the application. The power of the Court to deal with matters arising from the subordinate Court is two-fold, appellate jurisdiction under section 347 (1) and (2), and supervisory under section 362 and 364 of the Criminal Procedure Code.

12. The provisions of section 347 (1) and (2), of the code states;

“(1) Save as is in this Part provided—

(a) a person convicted on a trial held by a subordinate court of the first or second class may appeal to the High Court; and

(b) Repealed by Act No. 5 of 2003, s. 93.

(2) An appeal to the High Court may be on a matter of fact as well as on a matter of law.

13. The applicant in the instant matter has not filed an appeal against the sentence. Therefore, these provisions do not apply. The provisions of; section 362 state as follows:

“The High Court may call for and examine the record of any criminal proceedings before any 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 any such subordinate court”

14. The aforesaid provisions set the parameters under which the High Court may revise a sentence imposed by the lower court. That is, it may review the sentence for purposes of satisfying itself as to the “correctness, legality or propriety” thereof. In that regard, the sentence meted herein is lawful and legal, as the penalty for the offence of; robbery with violence includes death sentence.

15. As such, the applicant has not proved that, the sentence herein is incorrect, illegal or improper and on that ground, the parameters set out under section 362 of the Criminal Procedure Code have not been met. Therefore, the sentence cannot be reviewed, revised, and/or set aside. I therefore find that, the Court lacks the jurisdiction to deal with this matter and dismiss the application due to want of jurisdiction. The only recourse available to the applicant is appeal.

16. However, before I conclude, I note that, the applicant has also invoked the decision of Muruatetu. It suffices to note that, that decision is not available to the applicant following its review by the Supreme Court of Kenya, on 6th July 2021. As of now, re-sentencing applies in respect of death sentence in regard to murder cases, only. Even then, the applicant has already benefitted from Muruatetu’s case, vide the re-sentencing that reduced his sentence from death to eight (8) years.

17. In summation, I decline to allow the application and order this file and another file Miscellaneous Application No. 630 of 2018, in which the applicant sought for re-sentencing be and are hereby closed.

It is so ordered.

DATED, DELIVERED VIRTUALLY AND SIGNED ON THIS 22ND DAY OF NOVEMBER, 2021

GRACE L. NZIOKA

JUDGE

Applicant present in person

Mr Kiragu for the Respondent

Edwin Ombuna – Court Assistant