



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL REVISION NO. 413 OF 2020**

**MARTIN MUNGATHIA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The applicant herein was charged and later convicted of the offence of Robbery with Violence contrary to Section 296 (2) of the Penal Code, in Isiolo Criminal Case No. 891 of 2009 which charged alleged that, on 31/8/2009 at Juakali area, in Isiolo District, within Eastern Province, with others not before court being armed with dangerous weapon namely Somali Sword, he robbed Osman Saney Hamud Ksh. 1200 and at or immediately before or immediately after the time of such robbery used actual violence to the said Osman Saney Hamud.
2. The trial court found him culpable of the offence and sentenced him to death. He appealed against that decision in High Court Criminal Appeal No. 70 of 2010 and subsequently in the Court of Appeal in Criminal Appeal No. 56 of 2013 and in both instances, his appeals were dismissed and the sentence upheld.
3. He then moved this court through a notice of motion dated 3/8/2020 pursuant to Section 362 and 364 of the Criminal Procedure Code and all other enabling provisions of the law and pleaded that the court be pleased to review his sentence.
4. The ground shown to premise the application are that the trial court did not consider his mitigating factors, and that the mandatory nature of the sentence in Section 296(2) of the Penal Code is unconstitutional. He further contends that he has been in custody for the last 10 years and prays this court to give a second chance in his life by reviewing his sentence. In expressing his remorse, he promises not to indulge in such criminal activities.
5. In his submissions filed on 31/8/2021, he urged the court to resentence him considering that he has been in prison for long and has since rehabilitated by undergoing various rehabilitation programs. He contended he was a first offender, had been arrested when he was 36 years, he was remorseful and was a father of 4 children, who were in the care of his elderly mother, since his wife remarried. He contended that he had learnt the mistake he made, but he had since known God and prayed for forgiveness and liberty even though his death sentence has since been commuted to life imprisonment.
6. The prosecution in opposing the request urged the court to be guided by the Supreme Court's decision in *Francis Karioko Muruatetu & another v Republic [2017] eKLR* where the, Supreme Court had initially held that the mandatory nature of the death sentence was unconstitutional, as it denied the court its discretion in sentencing, it subsequently issued directions on 6/7/2021, to the effect that the decision in Muruatetu (Supra) is only applicable to the offence of murder.
7. The powers of revision as part of supervisory jurisdiction of this court under section 362 of the Criminal Procedure Code can only to be invoked to enable this Court satisfy 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. It is not available where an appeal has been pursued past this court to the court of appeal.
8. The petitioner was charged with robbery with violence contrary to Section 296(2) of the Penal Code. A trial ensued where he was properly convicted and after due consideration of the mitigating factors, the trial court appropriately sentenced him to serve the prescriptive mandatory sentence of death. If one was to set on a journey to revise the sentence, there real likelihood of a contradictory finding on revision against a decision on appeal. That would be most undesirable. Even failure to observe the requirement of section 333(2) of the Criminal Procedure code cannot be validly pursued after an appeal has been determined.
9. For the foregoing reasons, the application is hereby dismissed.

DATED SIGNED AND DELIVERED AT MERU THIS 19<sup>TH</sup> DAY OF NOVEMBER, 2021

**PATRICK J.O OTIENO**

**JUDGE**

**In presence of**

Applicant in person

Mr. Maina for the prosecution

**PATRICK J.O OTIENO**

**JUDGE**