

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.204 OF 2019

JOHN LEMASHON KISIKU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, John Lemashon Kisiku was convicted with others, of two counts of **attempted robbery with violence** contrary to **Section 297(2)** of the **Penal Code**. The trial court held that the prosecution was able to established to the required standard of proof beyond any reasonable doubt that the Applicant together with others, while armed with pistols robbed Rose Kemunto Matagaro and James Mose Michira of unknown amount of money and immediately before or immediately after the time of such attempted robbery, shot dead one Florence Onsongo and also seriously wounded Rose Kemunto Matagaro, Jeremiah Matagaro and James Mose Michira. The Applicant was sentenced to death. His appeal both to the High Court and to the Court of Appeal were dismissed. The death sentence meted on the Applicant was commuted to life imprisonment by Presidential decree. That would have been the end of the matter but for the window opened by the Supreme Court's decision of **Francis Karioko Muruatetu –vs- Republic [2017] eKLR** which declared mandatory death sentence unconstitutional. Those who had been so sentenced were given the opportunity to give their mitigation in a resentencing hearing.

The Applicant filed an application for resentencing before the High Court but during the hearing, directions were given that the Applicant do present his mitigation before the Chief Magistrate's Court, Kibera which was the trial court. The Applicant did appear before the said court (Hon. Kitagwa – SRM) and urged his mitigation. After considering the same, the trial court set aside the sentence of life imprisonment that was imposed on the Applicant. Instead, it sentenced the Applicant to serve a custodial term of thirty (30) years with effect from 29th September 2000 when the Applicant was initially convicted and sentenced by the trial court. Taking into account the period of remission that the Applicant is entitled to (unless otherwise stated by the prison authorities), the Applicant is remaining with a few months before he serves his sentence.

The Applicant was not satisfied by the decision of the trial court. He has come to this court seeking further orders from the court to have the period that he was in remand custody considered, and in the circumstances, craves for the order of the court that he has served his sentence. Ms. Akunja for the State asked the court to consider whether the sentence of thirty (30) years imprisonment was sufficient taking into account that the Applicant was armed with a pistol during the commission of the crime

This court has carefully considered the facts of this application. The Court of Appeal in **Ahmad Abolfathi Mohammed & Another –vs- Republic Criminal Appeal No. 135 of 2016** (unreported) held at Page 25 thus:

“As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive. In *Bernard Kimani Gacheru v. Republic, Cr App No.188 of 2000* this Court stated thus:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, any one of the matters already stated is shown to exist.”

The above sentencing principles equally apply when this court is reconsidering a sentence meted out by the trial court while resentencing an applicant. In the present application, it was clear to the court that the trial court did not commit any error in principle or fail to take into consideration a relevant factor which it ought to have taken into consideration when it resented the Applicant. The Applicant claims that the period that he was in remand custody prior to his conviction was not taken into consideration when the trial court resented him. This court holds that in a resentencing hearing, the court is taking a global view of the custodial sentence that it ought to resentence such an applicant and not a specific sentence as is the case when the Applicant was initially sentenced.

This court is not persuaded that the Applicant has established a case for this court to reconsider the custodial sentence that was imposed by the trial court. In the opinion of this court, the sentence was on the lenient side taking into consideration the fact that a human life was lost during the attempted robbery. Other victims of the attempted robbery sustained gunshot wounds which permanently scarred their lives. The

Applicant should be grateful with the sentence that was imposed on him.

In the premises therefore, this court holds that the Applicant's application lacks merit and is hereby dismissed. This court shall not interfere with the custodial sentence that was imposed by the trial court during resentencing. It is so ordered.

DATED AT NAIROBI THIS 5TH DAY OF MARCH 2020

L. KIMARU

JUDGE