



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**HIGH COURT CRIMINAL REVISION NO. 8 OF 2019**

**DON.....APPLICANT**

**-VERSUS-**

**REPUBLIC..... RESPONDENT**

**RULING**

1. **DON** the Applicant herein was charged and convicted vide Makindu P.M. Cr case no. 311/2011 on four (4) counts of the offence of robbery with violence contrary to section 296(2) of the Penal Code. Upon conviction he was sentenced to death on 2<sup>nd</sup> December 2011. He filed Machakos HCRA No. 238 of 2011 which was dismissed on 30<sup>th</sup> October 2014 in its entirety by J.J B.T Jaden and L. Mutende.

2. He filed Machakos Misc. No. 176/2018 seeking resentencing. On 19<sup>th</sup> December 2018 the same was allowed by Kemei J. and the matter remitted to Makindu P. M's court for the purpose of resentencing. It was heard by Hon. J.O Magori SPM on 25<sup>th</sup> February 2019 and the Applicant was resented to twenty (20) years imprisonment on each of the four (4) counts. An order was made for the sentences to run concurrently with effect from 2<sup>nd</sup> December 2011.

3. He is now before this court seeking a revision of the sentence imposed on him on 25<sup>th</sup> February 2019. The grounds upon which this is sought are as follows:

- He was a first offender.
- He is remorseful.
- He has been rehabilitated and ready to be re-integrated back into the society.
- He was very young at the time of commission of the offence.
- He is asthmatic and HIV positive.

4. The application is opposed by the Respondent through learned counsel Mrs. Ann Gakumu who filed a replying affidavit and submissions. She has submitted that the application is a total abuse of the court process. That the trial court while re-sentencing him took into consideration all the mitigating factors before reviewing the death sentence to twenty (20) years imprisonment. It is her submission that the trial Magistrate did not act on a wrong principle nor overlook any material factors in the re-sentencing process to warrant further review or alteration by this court.

5. She referred to section 382 of the Criminal Procedure Code which provides for instances where finding or sentence are reversible by reason of error or omission in charge or proceedings. Counsel refers to the cases of **Aggrey Chiteri vs- Rep (2019) eKLR** and **Leonard Kipkemoi –vs- Rep (2018) eKLR** where such a matter was considered.

6. I have considered the application, the submissions by both parties and the law. As has been seen from the chronology set out above, the Applicant was initially sentenced to death which was confirmed on his appeal to the High court on 30<sup>th</sup> October 2014. However due to the new development in the law courtesy of the supreme court decision in **Francis Karioko Muruatetu & Another –vs- Rep (2017) eKLR** he was referred to the trial court for resentencing where he was given a sentence of twenty (20) years, imprisonment.

7. During the re-sentencing, he was given an opportunity to mitigate which he did. He told the court how he had reformed and was remorseful for joining bad company. He even said he was asthmatic and HIV positive. This was on 25<sup>th</sup> February 2019. The issue is now whether this mitigation was considered.

8. I have noted from his first mitigation on 2<sup>nd</sup> December 2011 that he never mentioned anything about him being asthmatic and/or HIV positive. Did he contact this while in prison or what? Despite claiming that he has been going for treatment he did not produce any single document to support these claims.

9. The Applicant was said to have been a first offender. He was convicted on four (4) counts of robbery with violence. It means him and others robbed four (4) persons on the material night. Had it not been for the quick action by the watchmen and the police, the Applicant and his accomplices had purposed to cause havoc at the complainant's [Particulars Withheld] petrol station, Emali.

10. The Applicant wants this court to set him free because he has allegedly reformed and the ten (10) months he was in custody prior to his conviction should also be considered.

11. When re-sentencing, I believe that its important for the court to state what it has taken into account as it resentsences. In this case the re-sentencing court indicated the mitigation and the fact that the Applicant was a first offender. He stated that in light of the Supreme court decision in the **Francis K. Muruatetu** case he was re-sentencing the Applicant to twenty (20) years imprisonment.

12. I have considered the circumstances under which the offence was committed, the items stolen from the victims and their value and the force exerted on the victims. I have also considered that the Applicant was first arraigned in court on 24<sup>th</sup> March 2011 and the case was finalized on 2<sup>nd</sup> December 2011 (8 months) with him still in custody. He has served a total of eight (8) years and six (6) months to date.

13. The sentence provided for under the law for this offence is death. Having considered all that I have stated above and the role the Applicant played in the matter I cannot see any error or omission that the trial court made in sentencing him to twenty (20) years imprisonment.

14. The sentence is lawful and deserving. For the trial Magistrate to reduce the sentence to twenty (20) years imprisonment from the death sentence, it is clear that he took into account all these circumstances including the eight (8) months the Applicant had been in custody.

15. My finding is that the application lacks merit and it is disallowed. The sentence of twenty (20) years imprisonment on each of the four (4) counts is confirmed. The sentences will run concurrently as ordered.

Orders accordingly.

**Delivered, signed & dated this 25<sup>th</sup> day of June 2020, in open court at Makueni.**

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**H. I. Ong'udi**

**Judge**