



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

PETITION NO. 44 OF 2020

ALFRED MUSILA MUTHANJE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The applicant herein was charged with the offence of Robbery with Violence Contrary to Section 296 (2) of the Penal Code, in criminal case number 431/2005 at the Chief Magistrate's court at Embu. The particulars were that; on the 7th day of December, 2004 at Gitare Sub-Location in Embu District within Eastern province being armed with an offensive weapon namely a metal bar robbed SAMMY MUNYI DUNCAN Kshs. 3,050 and at/or immediately before or after the time of the robbery wounded Sammy Munyi Duncan.

He was found guilty, convicted and sentenced to death.

He has moved the court by way of the petition dated the 5th day of June, 2020 seeking revision of the sentence. In his application, he avers that after the conviction and sentence he appealed to the High Court in Embu vide criminal appeal number 48/2007 and his appeal was dismissed.

He has urged the court to review the sentence for the reason that the death sentence imposed by the trial court and upheld by the High Court is inconsistent with Articles 25 and 50 of the Constitution.

He has sought for a declaration that his constitutional rights were highly violated in sentencing him to death and as such, an appropriate sentence of a definite period should be imposed on him. He has relied on the case of ***Francis Kariuki Muruatetu & Another vs. Republic (Petition number 15 of 2015)***.

In his submissions filed in court on the 12th day of August, 2020, he states that he has sought the intervention of the court because at the time of his sentencing the courts' discretion in imposing the mandatory death sentence in capital offences was limited and the only mandatory sentence under Section 296 (2) of the Penal Code was death.

He further states that even though the death sentence imposed upon him was commuted to life, as per the presidential decree, he feels discriminated by both law and the nature of the indefinite life sentence as it has denied him a chance to atone for the offence he committed almost 15 years ago.

He states that the life sentence is extremely harsh, humiliating and that it offends Article 27(1)(2) and 28 of the Constitution thereby urging the court to impose a lenient sentence and be guided by the Supreme Court decision in the ***Francis Karioko Muruatetu*** case which declared mandatory death sentence unconstitutional.

He has urged the court to consider his plight in that he is physically disabled having lost one eye and that he is a first offender. He has asked the court to consider the primary purpose of a sentence of imprisonment under the United Nations Standard Minimum Rules.

When the application came up for hearing, he adopted his written submissions.

On her part, counsel for the Respondent raised a preliminary objection on a point of law to the effect that the application is Res judicata.

She submitted that the applicant upon conviction and sentence, appealed against both in criminal appeal number 48 of 2007 and the appeal was dismissed on the 7th day of December, 2007 as it was found to have no merits.

Counsel submitted that the applicant being dissatisfied with the decision rendered by the High Court appealed to the court of appeal which

also dismissed his appeal. The applicant thereafter filed a review under the Muruatetu guidelines at Embu High Court when his application for revision was heard and on the 30th June, 2020 the court reduced the death sentence to a definite time of 25 years. Counsel argued that a similar application having been determined by the High Court, the petitioner cannot bring another application of a similar nature as the same is Res Judicata.

This court has taken the liberty to peruse the record of proceedings. I am able to confirm that the applicant was convicted of the offence of robbery with violence in Chief Magistrates Criminal case number 431 /2005 at Embu. He appealed against the conviction and sentence in criminal appeal number 48/2007 at Embu and his appeal was dismissed.

Though counsel for the respondent submitted that the applicant filed an appeal to the court of appeal against the judgment of the High Court, there is no indication of the same in the record available to this court. What is clear, however, is that he filed a petition for the revision of the sentence in the High Court at Embu being petition number 40/2020 which was consolidated with other two petitions. The petitions were heard and in her ruling the learned Judge remarked that the circumstances of the offences were aggravated and quite traumatizing to the complainant and her family. Despite the foregoing, the judge went ahead and stated that sentence of death meted out on the petitioners required to be revised under the principles laid down in the supreme court in the Muruatetu case. The Judge set aside the death sentence and substituted it with twenty-five (25) years imprisonment to run from the date of arrest on 28th January, 2005.

In view of the foregoing, it is clear that the applicant has already been heard on revision and the present application is Res Judicata.

It is hereby dismissed.

Dated, signed and delivered at NAIROBI this 23rd day of October 2020.

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L. NJUGUNA

JUDGE

In the presence of:

..... **for the Petitioner**

.....**for the Respondent**