

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. 103 OF 2019

PETER KARIUKI MATHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant seeks a review of the sentence after having been heard by the trial court on resentencing. He exhausted all the appellate processes but after the **Francis Karioko Muruatetu V Republic (207) eKLR** case was entitled to resentencing by the trial court. He was charged with robbery with contrary to **Section 292(2) of the Penal Code** particulars being that on the 9th of April, 2004 at Ngong in Kajiando District within Rift Valley province jointly with another not before court while armed with a pistol robbed Dominic Kihuri Muriuki of one motor vehicle Reg. No. KAP 903 K make Toyota Corolla Saloon grey in colour, a mobile phone make segem, cash Kshs. 700/= and a diary all valued at Kshs. 506,800/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence against the said Dominic Kihuri Muriuki.

2. He was convicted and sentenced to suffer death which conviction and sentence were upheld by both the High Court and the Court of Appeal. In the re-sentencing ruling, the learned magistrate Hon. Gandani, CM noted that the applicant and another were armed with a pistol when they carjacked and robbed the complainant of his motor vehicle and other goods. The complainant escaped as the carjackers were attempting to push him to the boot. She considered the following aggravating factors namely; that the robbers were armed with a firearm, they attempted to push the complainant to the car's boot with a probability of causing harm to him, strangling the complainant to force him to follow instructions so that they could drive him into a forest and threatening to shoot him if he tried to escape. The court also considered that after the applicant was arrested, he lied that the complainant had sold the vehicle to him which caused the complainant to also be locked up in cells for twenty days.

3. In mitigation, the applicant said that he is a family man and sickly. In the opinion of the court, the applicant was not ready to reform because for the 14 years he was in custody he had not taken up to learn a single skill that would assist him to earn a living once he left the prison. The court accordingly set aside the death sentence and substituted it with 20 years imprisonment. The court also urged the applicant that for the period he shall be in prison, to take advantage and train on life support skills.

4. In the application before this court, the applicant asked the court to consider the period he was in custody since he was arrested and further order a remission of a third of his sentence pursuant to Section 46 of the Prisons Act.

5. In my view, the aggravating factors were well articulated by the learned trial magistrate. The only factor that I take issue with is that the learned magistrate failed to pick out from the circumstances of the case, the mitigating factors which under the **Muruatetu case** ought to be considered in sentencing. In the case, the complainant was not harmed despite that the robbers were armed. He also recovered his stolen motor vehicle. In that case, although the applicant does not sound a remorseful person, save to state that he is ailing and is a family man, I would opine that a sentence of 20 years is harsh and excessive. Given all the circumstances of the case, I set aside the 20 years imprisonment and substitute it with a jail term of 15 years.

6. By dint of **Section 333(2) of the Criminal Procedure Code**, the learned trial magistrate was obliged to take into account the period the applicant spent in custody before sentencing him. By failing to pronounce herself on this issue implies that the applicant would start serving sentence from the date of resentencing which is 18th February, 2019.

7. For this reason, I order that the sentence imposed by this court shall be reduced proportionately by the period the applicant has been in custody. The period commences from the date of arrest. See the case of **Ahamad Abolfathi Mohamed & Anor vs R 2018] eKLR** where the Court of Appeal sitting in Nairobi stated that while applying **Section 333(2) of the Criminal Procedure Code**, alongside its proviso, the sentence of imprisonment ought to run from the date of arrest.

8. In this regard, since the Appellant was not released on bond, his sentence commences on 15th May, 2004, the date he took plea as it was not disclosed which date he was arrested. The net effect is that the applicant has served his sentence. I order that he be forthwith set free unless otherwise lawfully held.

Dated and delivered at Nairobi This 30th Day of May, 2019.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of;

1. Applicant in person

2. Miss Kimaru for the Respondent.