



**Khalumba & another v Republic (Miscellaneous Criminal Application
72 of 2020) [2023] KEHC 23906 (KLR) (18 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23906 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CRIMINAL APPLICATION 72 OF 2020
PJO OTIENO, J
OCTOBER 18, 2023**

BETWEEN

CHRISTOPHER NDUSI KHALUMBA 1ST APPLICANT

KELVIN SHITAMBASI 2ND APPLICANT

AND

REPUBLIC RESPONDENT

(Arising from Chief Magistrate's Court in Kakamega Criminal Case No. 72 of 2015.)

RULING

1. Before me is a Petition for review of sentence by the applicants seeking that his sentence imposed by Ogola J. be reduced and in addition that the period served in remand prison pending trial be reckoned with and deducted from the sentence in terms of section 333(2) *Criminal Procedure Code*.
2. The Applicants had initially been charged before the Chief Magistrate's Court in Kakamega Chief Magistrates Court Criminal Case No. 72 of 2015 with the offence of Robbery with Violence Contrary to Section 296(2) of the *Penal Code* and thereafter convicted and sentenced to suffer death.
3. Aggrieved with the decision of the trial court, the Applicants filed Criminal Appeal No. 125 of 2017 at Kakamega High Court and in a judgment delivered by Justice E.K Ogola on 13th day of December, 2019, the death sentence meted on the applicants was quashed and the applicants were sentenced to 20 years' imprisonment to run from the date of arrest. That decision was evidently informed by the decision by the Supreme Court in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR on the principal that sentencing is a judicial function and a court ought not feel hamstrung by statutory mandatory sentence and did not ignore the application of section 333(2) *Criminal Procedure Code*.
4. In canvassing the application, the applicants have filed their submissions while the respondent elected not to file any asserting that the court was *functus officio*.



5. The department of probation has had their contribution in the two reports filed and touching on the circumstances of each of the two applicants. Both reports show that there persists hostility in the community and the direct victims of the crime against the applicants who are viewed to belong to a violent and repressive terror gang that operated in the village before their conviction.

Applicants' Submissions

6. They submit that they were never given an opportunity to mitigate during the appeal and that the 20 years' imprisonment sentence is harsh and excessive. They also argue that there is no existing reason to aggravate the sentence since the complainants are people not known to them and that no enmity exists between them.
7. Lastly, they ask the Court to consider the time they have spent in custody and cite the case of *Edwin Otiemo Odbiambo v R* (2009) where the Court reduced a 15-year sentence to 10 years. They claim to have reformed during the prison term and that they are socially adaptable to the outside world.
8. I have perused the application and the submissions and identify the only issues for determination to be whether the Applicants' application for review is merited. I consider that to be the only issue because the question whether the sentence took into account the period spent in custody was clearly addressed by the Judge on appeal.
9. Looking at the application for review, the Applicants appear to argue that they were not accorded an opportunity to mitigate before they were sentenced and that their right to the least severe of the sentence under section 333 was not upheld. Both grounds cannot be true from the records which demonstrate that the trial magistrate duly took the mitigation from the Applicants.
10. That notwithstanding however, where the sentence has been challenged and reversed on appeal, it is not open for the High Court to be called upon to consider and effect a second review. The window for review of sentence created by the Supreme Court in *Francis Karioko Muruatetu & Another v. Republic* [2017] eKLR must not be misunderstood to give to the High Court the unbridled right to keep going back to its previous decisions on the guise revision of sentences. The jurisdiction of the court on revision many times yield same results as appeal and where an appeal has been dealt with, it is most undesirable to approach the court a second time on revision.
11. In this matter, it is the holding of the court that, over and above the fact that the request has been made on false facts, once the appeal was decided and the sentence reduced by upsetting what the trial court considered the only sentence, this court's jurisdiction was exhausted and the court became *functus officio*.
12. For the reason that the court is *functus officio*, the application seeking review is struck out and the court file ordered closed. Let the trial court file, if still held in the High court Registry, be returned to the trial court forthwith.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 18TH DAY OF OCTOBER 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:-

No appearance for the Applicants

No appearance for the Respondent



Court Assistant: Polycap

