



**REPUBLIC OF KENYA**

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

**PETITION NO. 88 OF 2020**

**JOHN KARIUKI IRERI.....1<sup>ST</sup> PETITIONER**

**COROLINE MUMBI NGONDI.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The petitioners herein have moved this court vide a petition dated the 6<sup>th</sup> day of October, 2020 under Article 22(1), 25(d), 50(b)(d)(i)(ii) of the Constitution and Section 268 and 281 of the Penal Code, seeking several prayers as set out in the said petition.
2. The petition proceeded by way of written submissions on the part of both petitioners whereas the counsel for the respondent made oral submissions. In her submissions, the 1<sup>st</sup> petitioner submitted that being a first offender, she has the right to the benefit of the law as enshrined under Article 27(1) and (2) of the Constitution.
3. She further submitted that she is constitutionally entitled to the benefit of the least severe punishment of the prescribed punishment and has urged the court to reconsider the sentence that was imposed on her by the trial court.
4. She argued that if the trial court had considered the provisions of Sections 216 and 329 of the Criminal Procedure Code when sentencing, the Hon. Magistrate could have arrived at a lesser sentence. That by failing to consider the above sections, the trial court was not well informed as to the proper order or just sentence to impose and hence failed to consider the other alternative forms of sentence bearing in mind that the charges that they were facing do not fall in the category of offences that do not call for non-custodial sentence and/or community service order.
5. She submitted that since she was sentenced, she has been living peacefully with fellow inmates and the prison administration while engaging herself in various rehabilitation programmes and has gained knowledge/skills which can enable her to easily reintegrate back to the society.
6. On his part, the 2<sup>nd</sup> petitioner submitted on the objectives of sentencing to wit; retribution, deterrence, rehabilitation, restorative justice, community protection and renunciation and relied on the case of **Dahir Hussein Vs Republic Criminal Appeal No. 1 of 2015 [2015] eKLR** in which the court highlighted the said principles. It was further submitted that the 2<sup>nd</sup> petitioner has reformed and has relied on a letter dated 28<sup>th</sup> August 2019 from the officer in charge of Embu Main Prison as evidence that the 2<sup>nd</sup> petitioner has reformed, he is remorseful and honest. The petitioner also submitted that he has since pursued several courses which have transformed his life and that the purpose of the criminal justice in reforming him has been met.
7. The 2<sup>nd</sup> petitioner submitted on various penal sections which are recognized in Kenya being imprisonment, community service orders, probation orders, fines, payment of compensation, forfeiture and committal to rehabilitation centres among others and averred that the law does not put one superior to the other as long as the end of justice is met. He cited the case of **Fatuma Hassan Salo Vs Republic Criminal Appeal No. 429 of 2006 [2006] eKLR** which emphasizes on the discretion of the court while sentencing but which discretion must be exercised judicially and that the trial court must be guided by evidence and sound legal principles.
8. Further, he relied on the case of **Republic Vs Catherine Ndunge Muthoka [2019] eKLR** in which the court sentenced an accused person charged with murder to a five-year probation. In addition, he relied on various instruments in international law which apply in Kenya pursuant to Article 2(5)(6) of the Constitution. He urged the court to impose an alternative sanction provided for in the law and consider that the 2<sup>nd</sup> petitioner has since reconciled with the complainant.
9. On her part, counsel for the respondent submitted that the court is *functus officio* as it has heard and determined similar petitions. She urged the court to find that the petition herein is *res judicata*.

10. The court has considered the petition and the submissions made by the parties. Looking at the submissions made by the petitioners, it is not in dispute that they both appealed against the conviction and the sentence in Criminal Appeal Nos. 30 and 31 of 2017 and 591 of 2014 and all the appeals were heard and determined. What the applicants are seeking in this petition is for this court to review the decisions that were made in those appeals. The applicants did not lodge appeals in the Court of Appeal against the decisions of the High Court.

11. This court cannot sit in review or appeal over the decisions made by a court of a concurrent jurisdiction with this one. The issues raised in this petition are issues that should be addressed by the court of appeal and not by this court.

12. The court also notes that the petitioner herein had earlier on filed criminal application Nos. 11 of 2020 and 12 of 2020 which were heard by Justice Muchemi, J. and struck them out for want of jurisdiction. I concur with the submissions made by the counsel for the respondent that the application herein is *res judicata*. The same is hereby dismissed with costs.

13. It is so ordered.

**Delivered, dated and signed at Embu this 11<sup>th</sup> day of May, 2021.**

**L. NJUGUNA**

**JUDGE**

.....for the Petitioners

.....for the Respondent