



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**HIGH COURT MISC. APPLICATION CASE NO. 337 OF 2013**

**LESIIIT, J**

**RAJESH CHOTALLAH SHAH..... APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an application for review of sentence from the decision of this court in High Court Criminal Case No.337 of 2013 (Lesiit, J) on 7<sup>th</sup> March 2019 pursuant to the Supreme Court decision of Francis Kariko Muruatetu & Anor vs. Republic & Others Petition No. 15 & 16)*

**RULING**

1. The Applicant has filed a second application in this file which is a Chamber Summons application dated 4<sup>th</sup> November 2019 and filed on 4<sup>th</sup> March, 2020. The application seeks five orders as follows:

- (1) That this application be certified urgent and heard expeditiously.**
- (2) That this application be heard on a priority basis.**
- (3) That this honourable court be pleased to call for the removal of I the applicant from Kamiti medium prison security prison.**
- (4) That I the applicant am poor and unable to pay the costs of this application.**
- (5) That this honourable court may pass any other orders it may deem fit.**

2. Prayer 1 and 2 are moot.

3. The application is premised on grounds stated on the face of the application thus:

- (a) I the applicant stand to lose out on a bright future when released from prison upon the completion of my sentence.**
- (b) Despite my incretion, I do have basic rights that are enshrined in the Constitution of Kenya 2010.**
- (c) This honourable court can substitute a term of imprisonment with any other punishment such as probation of a community service order, as it may deem correct in its wisdom.**
- (d) It is in the interest of justice and my future that this application be allowed as prayed and which Application is supported by the sworn affidavit of I the Applicant and further grounds to be adduced at the hearing hereof.**

4. The Applicant argued the application before me on 19<sup>th</sup> April 2021. In his submission, he urged that the court has powers to substitute the balance of his jail term to a non-custodial sentence of Community Service Orders. He said he had 7 months to go. He relied on several cases which were not provided and whose citations were not complete. He offered to serve in the court Registry for the remainder of his jail term.

5. Mr. Kiragu, Learned Prosecution Counsel opposed the application on behalf of the State. Counsel gave a history of the Applicant's case.

He urged that the Applicant exhausted his appeal in the Court of Appeal, both the conviction and sentence by this court were upheld. Mr. Kiragu urged that the Applicant returned to this court for Re-sentence and that on 27<sup>th</sup> March 2019, the court ordered that he serves 20 years' imprisonment. Counsel urged that there must be an end to litigation.

6. Mr. Kiragu urged that the Applicant had not shown how his case was unique as to deserve a non – custodial sentence. He urged that the Applicant failed to show how the cases he relied on related to the circumstances of his case. Neither did he annex any documents in support of averments in his affidavit. He urged the court to dismiss the application.

7. The Applicant in response admitted that he had not provided any documents to substantiate his averments in the affidavit filed in support of the application, saying he was unable to provide them. He did not substantiate his claim.

8. The Applicant was convicted by this court for two counts of **murder** contrary to **section 203** of the **Penal Code**. He murdered his father and stepmother on 5<sup>th</sup> July 2008. The judgment was delivered on 3<sup>rd</sup> December 2009. On the same day the court sentenced the Applicant to death.

9. The Applicant was back again before this court, this time riding on the **Supreme Court decision of Muruatetu and another vs. Republic, Petition No. 15 of 2015**. He filed a statement of his mitigation and urged the court to be guided by the judgement of the Supreme Court. Indeed, this court heard his application for Re-Sentencing together with his mitigation, as prescribed in the Guiding Judgment of the Supreme Court of **Muruatetu**, supra, relied on and set aside the life imprisonment he faced after his death penalty was commuted by the President, and in substitution imposed a sentence of 20 years' imprisonment to be served from 18<sup>th</sup> July 2008.

10. The Applicant is back again before this court, this time asking to have the remainder of his jail term commuted to an order of community service orders (CSO sentence.). He has not invoked any law. Instead he has relied on various judgments, which as observed earlier hereinabove, were neither provided nor full citations given. For that reason, I was unable to get the cases.

11. Even if I was to get the cases he relies on, I doubt they will be of any guidance, not only because they are merely persuasive, but because of the fact that a trial court has no power to review its own order in sentence as, its tantamount to sitting on appeal in its own decision.

12. This of course is subject to the Guiding judgment of the Supreme **Court, Francis Muruatetu & another supra**. In that decision the Supreme Court stated that trial courts which imposed the mandatory death penalty should Re-sentence the accused persons, on application, after receiving mitigation, and upon taking into account factors spelt out in that judgment.

13. There was no Guidance given to the effect that the same trial court could consider a review or revision of the sentence after Re-Sentencing. Neither was a direction given by that court providing for the filing of an appeal from the sentence arising an order on Re-Sentencing.

14. The Applicant's application is *mala fide*, and has no legal backing of law to support it. The Applicant has benefited twice in this matter. He had his sentence of death commuted to life imprisonment. Following **Muruatetu**, supra, he has had his life imprisonment set aside and substituted with a sentence of 20 years' imprisonment.

15. This application is for striking out which I do. In effect the application has no merit, neither is it allowed in law. Accordingly, it is stuck out in its entirety.

**DATED AT NAIROBI THIS 11<sup>TH</sup> MAY, 2021.**

**LESIT, J**

**JUDGE**

**DELIVERED THROUGH TEAMS ON 11<sup>TH</sup> MAY, 2021.**

In the presence of:

Applicant in Person

Ms Kimani for Respondent

**LESIT, J.**

**JUDGE**