



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HIGH COURT CRIMINAL REVISION NO. 186 OF 2019

CHARAO NJOGO NJOGO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. By a chamber summons application filed in court on; 26th June, 2019, the applicant is seeking for the following orders as here below verbatim reproduced; -

- a. That the court be pleased to hear and determine this application for review of the imposed sentence;
- b. That this Honourable court be pleased to order to be supplied with subordinate court records for perusal and satisfaction in accordance with section 362 and 364 of the Criminal Procedure Code.
- c. That the Honourable court be pleased to order to invoke section 333(2) of the Criminal Procedure Code *this the time spent in remand.*
- d. That the court be pleased to make any other order which it deems as fit and just.

2. The application is based on the provisions of; Article 50(2) of the Constitution of Kenya, 2010, and an affidavit sworn by the applicant. He deposes that, he was arrested and arraigned in court on; 27th July 2016 charged vide Chief Magistrate's Court, Criminal Case No. 1942 of 2016, charged with the offence of; robbery with violence contrary to; section 295 as read together with section 296(2) of the Penal code.

3. He was subsequently convicted and sentenced to serve ten (10) years imprisonment. However, the period of four (4) years he was in custody was not taken into account. That the trial was unreasonably delayed without any cogent reasons, hence the plea that the subject period be considered.

4. The application was served upon the Respondent and the Respondent informed the court that, they had filed grounds of opposition. However, at the time of writing this ruling, none could be traced. Be that as it were, the learned State Counsel, Ms Akunja orally addressed the court and submitted that, following the Supreme Court of Kenya decision's on 6th July 2021, in the case of; *Francis Karioko Muruatetu & another v Republic, (2017) eKLR*, the Court held that, only death sentence can be a subject of re-sentencing, in respect of a sentence meted in a murder trial. The application herein is not tenable as the court is *factus officio*.

5. I have considered the subject matter herein, in the light of the materials before the court and I find that, the applicant was arrested on; 26th and arraigned in court on 27th July 2016, charged as aforesaid, with the offence of; robbery with violence, in the main count and an alternative count of; handling stolen property contrary to section 322(1) of the Penal code.

6. He pleaded not guilty to both charges and the matter proceeded to full hearing. At the conclusion of the case, the trial court delivered a judgment on 25th January, 2019, wherein the applicant was found guilty on the main count and convicted accordingly.

He was subsequently sentenced on 8th February 2017 to serve ten (10) years imprisonment from 27th July 2016.

7. As aforesaid the applicant has moved the court under its revisionary powers pursuant to; section 362 and 364 of the Criminal Procedure Code which states as follows:

362 “The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court” (emphasis added).

364 (1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—

a. in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;

b. in the case of any other order other than an order of acquittal, alter or reverse the order.

2. No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

3. Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

4. Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

5. When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.

8. The parameters of section 362 aforesaid requires the High court to satisfy itself as to the correctness, legality or propriety of the sentence herein. The applicant was charged and convicted of an offence of; robbery with violence. The provisions of sections 295 and 296 of the Penal Code (cap 63) laws of Kenya provides as follows in relation to the same:

295. “Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

296.(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

9. From the aforesaid the provisions, the sentence meted herein of ten (10) years is legal and lawful. As such, provisions of section 362 of Criminal Procedure Code do not apply.

10. The applicant also relies on the provisions of section 333(2) of the Criminal Procedure Code, which states as follows:

(2) “Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody”.

11. I have considered the record of the trial court and I note that, the court clearly stated that, the sentence meted was to commence from the 27th July, 2016, the date the applicant was arraigned in court. What other period was he in custody which was not considered? It therefore follows that, the application has no merit for the reasons stated herein and I dismiss it.

12. However, before I down the tool of trade, I note that, the Respondent addressed the court on the issue of the Supreme Court of Kenya's decision in the case that has since come to be known as Muruatetu's case. However, the applicant was not seeking for re-sentencing but review. The upshot is that; the application is dismissed.

DATED, DELIVERED AND SIGNED ON THIS 13TH DAY OF OCTOBER, 2021

GRACE L NZIOKA

JUDGE

In the presence of:

Applicant in person

Ms Kibathi for the Respondent

Edwin - Court Assistant