



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

PETITION NO 023 OF 2020

ISSA ABDUL ODHIAMBO.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Petitioner herein was tried for two (2) counts of robbery and was convicted for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. He was sentenced to death. He was also tried and convicted on Count II which was being in possession of a firearm without certificate contrary to Section 4(2)(a) as read with Section 4(3)(3)(a) of the Penal Code and was sentenced to ten (10) years imprisonment. He had also been charged with an alternative charge for Count I being handling stolen property contrary to Section 322(2) of the Penal Code.

2. Being dissatisfied with the said decision, he lodged an Appeal in the High Court being, **HCCRA No 150 of 2011** which was dismissed in its entirety. He did not appeal to the Court of Appeal.

3. On 25th November 2020, the Petitioner filed this Petition for review of the sentence. The said application was supported by his Affidavit in which he stated that this court had jurisdiction to determine and impose an appropriate sentence by virtue of the case of **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR**. He also relied on the cases of **Douglas Muthaura Ntoribi vs Republic (2018) eKLR & Robert Achapa Okello vs Republic** (eKLR citation not given).

4. In his Written Submissions, he relied on several cases amongst them **Kisumu HCCRA No 19 of 2010 Joseph Yusuf Mimo vs Republic** and **Nairobi Evanson Miururu Gichane vs Republic** (eKLR citations not given) where the appellate courts set aside the death sentences and replaced the same with lower imprisonment sentences.

5. He submitted that he had not had any disciplinary issues while in prison and having seen his wrong doing, he ought to be given a second chance in life. He pointed out that he had undertaken Certificate in Tailoring Grade II and III and was issued with National Grade Trade Certificates. He argued that reform and rehabilitation of a prison should form the basis of determination of his sentence.

6. He asserted that he had been in custody for over nine (9) years and thus urged this court to re-sentence him and impose a lenient sentence and consider the period he had spent in prison as provided in Section 333(2) of the Criminal Procedure Code. He also urged this court to impose a sentence that was equivalent to the time he had been in custody and/or grant him a non-custodial sentence.

7. The State opposed his Petition for review of sentence for the reason the present Petition was *res judicata*. It submitted that Ochieng J invoked the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) in **HCCR Misc Application No 27 of 2019** in which the Petitioner herein had sought re-sentencing and dismissed the said application.

8. This court perused the decision that Ochieng J delivered on 6th February 2019 and noted that it was the Petitioner herein who had actually invoked **Francis Karioko Muruatetu & Another vs Republic** (Supra) and not by the learned judge as had been contended by the State.

9. Be that as it may, after considering the Petitioner's application, the learned judge dismissed the Petitioner's application for re-sentencing on the case of on the ground that being unwell was not a reason for reduction of a sentence that was otherwise lawful. This court thus agreed with counsel for the State that the present application was *res judicata* as the Petitioner had relied on the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) to support his argument for a reduction of his sentence.

10. To avoid dismissing this Petition on a technicality, this court nonetheless deemed it prudent to consider the same on merit. On 6th July 2021, the Supreme Court of Kenya gave guidelines in the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) to the effect

that the said decision and those guidelines only applied in respect to sentences of murder under Sections 203 and 204 of the Penal Code.

11. It was emphatic that the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) was not applicable to capital offences other than murder, such as treason under Section 40 (3), robbery with violence under Section 296 (2) and attempted robbery with violence under Section 297 (2) of the Penal Code.

12. It pointed out that the petitioners in the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) had approached the court for specific reliefs. It clarified that with regard to the mandatory death sentence in capital offences other than murder, such as treason under Section 40 (3), robbery with violence under Section 296 (2) and attempted robbery with violence under Section 297 (2) of the Penal Code and directed that a challenge on the constitutional validity of the mandatory death penalty be heard and determined in the High Court and then by the Court of Appeal, if necessary, whereafter a similar outcome as that the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) may be reached.

13. Notably, the fact that the Petitioner was remorseful and had undergone various rehabilitation programs and the fact that in his letter of 8th February 2021, the Officer In Charge of Kibos Maximum Security Prison had recommended that he be given assistance that might facilitate his early release to the society could not assist him for the reason that he had been charged and convicted of the offence of robbery with violence and not murder.

14. As the Supreme Court decreed in its guidelines on 6th July 2021, the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) was inapplicable herein, his prayer that the court reviews his sentence thus fell by the wayside. His prayer for consideration of the number of years he had spent in custody be considered by virtue of Section 333(2) of the Criminal Procedure Code was immaterial in the circumstances of this case as the death sentence was indeterminate.

DISPOSITION

15. For the foregoing reasons, the upshot of this court's decision was that the Petitioner's Petition for review of sentence that was lodged on 25th November 2020 was not merited and the same be and is hereby dismissed.

16. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 14TH DAY OF DECEMBER 2021

J. KAMAU

JUDGE