



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL PETITION NO. E005 OF 2021**

**IN THE MATTER OF THE VIOLATION OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF ARTICLES 20, 22, 23 AND 27 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF VIOLATION AND THREATENED VIOLATION OF RIGHTS**

**AND**

**FUNDAMENTAL FREEDOMS UNDER ARTICLES 10 (1) (a) (b), (c) 20(3) (b), 22(1) 23(1), 25 (c), 27(1), (2), (4) (5) (7) (8), 28, 29 (a), 40, 47(1), 50, 157 and 259 (1) (a) (b) (c) (d) OF THE CONSTITUTION OF KENYA**

***(CORAM: F.M. GIKONYO J.)***

**SABIANO MBONDO OKANGA.....PETITIONER**

**-VERSUS-**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT**

**JUDGMENT**

[1] The petitioner was the accused person in criminal case number 523 of 2000 charged with the offence of robbery with violence under **Section 296 (2)** of the Penal Code and was convicted on 7<sup>th</sup> July 2001.

[2] He has been incarcerated at Kamiti Maximum Prison for a period of 22 years now including the period served while in remand.

[3] Thereafter the petitioner preferred an appeal against the conviction and sentence in consolidated criminal appeal no. 310 and 311 of 2011 in the High Court at Nakuru. The appeal was dismissed on 15<sup>th</sup> July 2008. The petitioner then continued to serve his sentence.

[4] Following the Supreme Court's judgment in the case of ***Francis Karioko Muruatetu & another Vs Republic [2017] eKLR***, the petitioner filed an application for resentencing dated 1<sup>st</sup> February 2021. The same was heard and determined by Hon. G.N. Wakahiu. The trial magistrate delivered his ruling on 24<sup>th</sup> May 2021 wherein he directed that the petitioner do serve his sentence for a period of 32 years from the date of his conviction which he inadvertently added 10 more years to the time the petitioner has already served.

[5] In a resentencing application filed by Stephen Kaleng Makalale the petitioner's former co accused at the trial court in the High Court Misc. Criminal Application No. 39 of 2020 the court, on the basis of ***Muruatetu*** decision, found that he had reformed and had paid back to society for his crimes. The said Stephen Kaleng was set free and his sentence computed to the period served.

[6] The Petitioner has invoked this court's constitutional jurisdiction by way of Petition dated 16<sup>th</sup> July 2021 and filed on 29<sup>TH</sup> July 2021 in which he is asking this court to invoke the powers conferred to it under **10 (1) (a) (b), (c) 20(3) (b), 22(1) 23(1), 25 (c), 27(1), (2), (4) (5) (7) (8), 28, 29 (a), 40, 47(1), 50, 157 and 259 (1) (a) (b) (c) (d)** of the **Constitution of Kenya 2010** and provide redress for what he terms as violation, denial, infringement and continued threat of his fundamental rights under the Constitution.

[7] The specific prayers by the Petitioner are:

*i. A declaration that the orders of the magistrate's court sentencing the petitioner to 32 years is discriminatory and offended the provisions of Article 27 of the Constitution of Kenya.*

*ii. The honourable court be pleased to resentence the petitioner in line with high court's ruling in Misc. Criminal Application no. 39 of 2020.*

*iii. This honourable court be pleased to issue further or other orders as it may deem just and expedient for the ends of justice.*

*iv. Costs of this suit.*

[8] The Petition is supported by the affidavit of Sabiano Mbondo Okanga.

[9] The Petition is opposed by the Respondent through written submissions. They did not file a Replying Affidavit.

#### **The Petitioners' Submission**

[10] The petitioner submitted that he has exhausted his right of appeal at the high court and the court of appeal. He is left with the option of resentencing like his co accused. The same grounds his co accused was released are the same grounds he has fulfilled and satisfied.

[11] In conclusion the petitioner submitted that his petition be allowed as prayed.

[12] The petitioner has relied on the following authorities.

*i. Luka Kingori Kithinji & Another Vs Republic [ 2011] eKLR*

*ii. Marando V The Republic [1980] KLR 114*

*iii. Muturi Investments Limited V National Bank Of Kenya Limited [2006] eKLR*

*iv. Solo Nzuki V Salaries And Remuneration Commission & 2 Other [2019] eKLR*

#### **The Respondent's Submission**

[13] The respondent submitted that the principle of sentencing co accused persons ought to suffer the same punishment where they played the same role in the commission of the offence. However, the ruling by **Justice Rachel Ngetich in Nakuru High Court Misc. Criminal Application No. 39 of 2020** on his co accused was not brought to the attention of the trial court by the petitioner. Therefore, rendering two different sentences in the same matter ought not to have occurred.

[14] The respondent submitted that following the new Supreme Court directions on **Muruatetu** and the applications for resentencing and the trend of the courts has been to dismiss the applications and the petitions.

[15] The respondent submitted that the applicant has not challenged the constitutionality of the mandatory nature of the death sentence as the only sentence applicable in robbery with violence matter but rather the uniformity of the sentence.

[16] In conclusion the respondent has submitted that the court of appeal is the proper forum as this court is *functus officio* after the court rendered its decision on appeal.

[17] The respondent has relied on the following authorities;

*i. Ayons Mbaazi Vs Republic [2001] eKLR*

*ii. John Michael Mghanga V Director Of Public Prosecution [2021]eKLR*

*iii. Andrew Amatala V Republic [2021] EKLR*

#### **ANALYSIS AND DETERMINATION**

[18] The following are the issues for determination in this Petition:

**(i) Whether this court has jurisdiction -**

**(a) To hear this Petition; and**

**(b) To grant the declarations and orders sought.**

[19] This is a constitutional petition. The Petitioner is seeking remedy for what he considers to be breach of his fundamental rights and freedoms; he and co-accused have been sentenced differently with him receiving a more sever sentence for the same offence.

[20] The court derives its jurisdiction to determine questions of violation or threat of violation of rights and fundamental freedoms in the Bill of Rights from Article 165 of the Constitution. In particular, Article 165(3) (b) of the Constitution article grants the High Court:

**“Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied; violated; infringed or threatened;”**

[21] The argument by the Respondent is that the issues raised by the Petitioner ought to have been raised and adjudicated upon, and indeed were live and conclusively and finally determined by the Court of Appeal.

[22] However, if you care to examine the claims by the petitioner, you will find that they raise *prima facie* constitutional questions on violation of right and fundamental freedoms enshrined in the Bill of Rights. The petitioner has also premised his petition on inter alia, Articles 22(1) and 23(1) of the Constitution. Article 22(1) provides thus:

**“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened”.**

[23] Article 23(1) states that:

**“The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.”**

[24] Accordingly, the court has jurisdiction to hear and determine whether the Petitioner’s rights and fundamentals freedoms have been violated.

#### **Merits of petition**

[25] Of the intricacy of sentencing, Justice McArdle is quoted saying: “

**Anyone can try a case. That is as easy as falling off a log. The difficulty comes in knowing what to do with a man once he has been found guilty.”**

[26] Resentencing is even more complicated as the applicant may have already served a substantial part of the sentence, acquired skills, reformed and rehabilitated in readiness for re-integration into society. Such circumstances were not there at the time of the initial sentence, yet, they are relevant considerations. I may wish to pose certain questions. In a resentencing as was ordered in Muruatetu, several dilemmas may arise. For example, in some cases, a co-accused may have reformed, yet, the other has not. In other cases, a co-accused may have serious conditions of health which have intervened during the tenure of the sentence. Would such circumstances be treated for what they are worth in the law on sentencing? And, would such approach produce differentiated results for the accused persons? My view is that, in a jurisdiction with proper parole system, such matters are treated within the said system and the applicable rules, and each individual is judged on his conduct after sentence. The question of discrimination will not, therefore, arise. But, our system may not be squarely on point. Hence, these difficulties I have expressed. I hope the Supreme Court will take cue and provide guidelines on these issues as they did in hemming application of Muruatetu case lest we should see different approaches by different courts which may become so inconsistent with each that different result could be reached in the same case for co-accused persons.

[27] Be that as it may, the Petitioner has, *inter alia*, challenged the non -uniformity of the sentence between him and his co-accused. He has also been in custody for about 22 years and section 333(2) of the CPC comes to his aid. His co-accused was also re-sentenced to the term served and is now a free person.

[28] The need to have uniformity and certainty in sentences met out on similar offences committed under similar circumstances is strong in this case. I also note that it is now generally agreed that there is discretion in sentencing in respect of the offence of robbery with violence in section 296(2) of the Penal Code.

[29] Taking all the foregoing factors into account, the sentence of 32 years’ imprisonment imposed on him by the sentencing magistrate is harsh and excessive in the circumstances of this case. The sentence is hereby set aside. In lieu thereof, the petitioner is sentenced to a term equal to the period served; and he shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 7TH DAY OF DECEMBER, 2021**

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**F. GIKONYO M.**

**JUDGE**

In the Presence of:

1. Karanja for DPP
2. The appellant
3. Kasaso CA