



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISC. CR. APPLICATION NO. 27 OF 2019

ISSA ABDUL ODHIAMBO.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

The Applicant, **ISSA ABDUL ODHIAMBO**, has invoked the decision made by the Supreme Court of Kenya in the case of **FRANCIS KARIOKO MURUATETU**.

1. His application dated 8th May 2019, indicates that the Applicant was sentenced to suffer death.
2. Following his conviction and sentence, the Applicant lodged an appeal, being **HIGH COURT CRIMINAL APPEAL NO. 151 OF 2012**.
3. I presume that the said appeal was dismissed by the High Court, because in his supporting affidavit, the Applicant said that he has a pending appeal at the Court of Appeal, Kisumu.
4. According to the Applicant, he was convicted for the offence of **ROBBERY WITH VIOLENCE** contrary to **Section 296 (2)** of the **Penal Code**.
5. The Applicant told this court that the case in which he was tried and convicted was **CRIMINAL CASE NO. 119 OF 2009**, at the Magistrate's Court, Kisumu.
6. When I was perusing the record of the proceedings in this case, I came across **HIGH COURT CRIMINAL APPEAL NO. 20 OF 2018**.
7. In that case, the Applicant disclosed that he had been sentenced on 12th October 2011, in **CRIMINAL CASE NO. 119 OF 2009**.
8. I found it curious that in a case where the Applicant was convicted and sentenced in 2011, he had filed an appeal 8 years later.
9. I then noted that both **HIGH COURT CRIMINAL APPEAL NO. 151 OF 2012** and **HIGH COURT CRIMINAL APPEAL NO. 20 OF 2018** appear to emanate from a judgment which was delivered by the Chief Magistrate's Court, on 12th October 2011. Secondly, the said 2 appeals appear to emanate from the same Criminal Case, being **No. 119 of 2009**.
10. As if those facts are not baffling enough, I noted that in **HIGH COURT CRIMINAL APPEAL NO. 20 OF 2018**, the Applicant swore an affidavit on 1st March 2018, indicating that he had been sentenced to 15 years Imprisonment, for the offence of Defilement.
11. I concluded that there is definitely something wrong with the information contained in the affidavits sworn by the Applicant.
12. I will revert to that aspect of the application later.
13. Meanwhile, I find that the fact that the Applicant was suffering in prison is not a basis for the review of the sentence that was handed down by the trial court.
14. Similarly, the court cannot vary a lawful sentence either because the accused person was the sole bread-winner in his family, or because the accused person had reformed whilst serving prison sentence.

15. An accused person, as well as a person who had already been convicted, is entitled to receive appropriate medical attention whilst he was in custody.
16. The fact that a person has been arrested and is undergoing a trial, does not take away his constitutional right to be handled in a humane manner.
17. And even a conviction does not take away the convict's right to human dignity, as stipulated in **Article 28** of the **Constitution**.
18. Therefore, if a convict was unwell, the prison authorities have an obligation to ensure that he is accorded appropriate medical attention.
19. Of course, I appreciate that most probably the prison authorities, (just like most Judges and Magistrates) do not have any training in medical affairs. Therefore, it is not their mandate to determine the nature of treatment that a convict was in need of, or the particular medical facility to which the convict should be accorded the most appropriate treatment.
20. The prisons are required to have medical facilities and medical personnel who should be able to determine the most appropriate form of medical intervention required for any person who is unwell.
21. Therefore, when a person who is in custody seeks orders to be sent to any particular hospital or other medical facility, the Courts ought to derive guidance from the medical personnel at the prisons; because it is they who are best-suited to make referrals to particular medical establishments, depending on their evaluation of the convict under their care.
22. When a medically qualified person makes a referral, the prison authorities will be accorded a clear guide about the particular department to which the convict will be taken, at the hospital to which he had been referred.
23. And the doctor who is receiving the patient at the hospital will have the benefit of the history recorded by the qualified colleague, who had been providing treatment to the convict.
24. In this instance, I find that there is no evidence before me, to demonstrate that the Applicant was sick.
25. And if he was sick, I have no evidence upon which I can determine that he cannot be accorded appropriate medical treatment at the prison facility.
26. However, even if it were to be ascertained that the Applicant was unwell, I find that that alone is not a basis for the reduction of a sentence which was otherwise lawful.
27. Therefore, the application is without merit, and is therefore dismissed.
28. But before concluding this Ruling, I direct the learned Deputy Registrar of this Court to provide a copy of the Ruling to the Director of Criminal Investigation, with a view to having the Applicant duly investigated. I so order because it does appear to me that the Applicant probably told untruths in the affidavits he swore.

DATED, SIGNED and DELIVERED at KISUMU This 6th day of February 2020

FRED A. OCHIENG

JUDGE