



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**RE-SENTENCE REVISION NO 11 OF 2019**

*(From the original Misc. Criminal Application No. 9 of 2018 Originating from Criminal Case No. 113 Of 2007 at Nairobi)*

**EVANS KALO ALIAS CARLOS ..... APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**RULING**

1. This ruling is in respect of an application dated 11<sup>th</sup> November 2019 in which the applicant sought for review of the order of the Principle Magistrate delivered on 9<sup>th</sup> day of December 2019 out of an application arising from an application for resentencing pursuant to the MURUATETU decision by the Supreme Court of Kenya.

2. The brief facts of this matter is that the applicant was charged with the offense of robbery with violence contrary to section 296(2) in Nairobi criminal case no 113 of 2007 wherein he was convicted and sentenced death as then provided for in law. Being dissatisfied with the conviction and sentence, he filed an appeal to the High Court being High Court Criminal Appeal no 795 of 2007 which dismissed his appeal. He then moved to the Court of Appeal being criminal Appeal no360 of 2012 which appeal was also dismissed.

3. The applicant was not deterred and by a petition filed on 26/8/2016 being High court Petition No. 315 of 2016 the same petitioned this court by way of a constitutional petition on alleged violation of his constitutional rights to fair trial, then MURUATETU happened. On 9/10/2018 the applicant amended his petition pursuant to the Supreme Court decision therein and sought for resentencing. By an order of this court Ngenya Macharia J dated 13/ 11/ 2018 the matter was referred to the trial court for resentencing, the subject of this ruling.

4. On 9<sup>th</sup> October 2019 Hon. H Onkwani SPM rendered herself as follows on the applicant's application for resentencing:-

***"I have considered the factors and submissions of the appellant that he is now a reformed man. I note from the record that a pistol and rounds of ammunition were recovered from the house of the accused. I have not had the benefit of receiving the victim impact statements and the probation officers report.***

***I note from the record that death the death penalty for accused was commuted life imprison. Having considered the 11 years that the applicant has so far served in prison and the magnitude of the offence I hereby resented the Applicant in a total of 30years in imprison applicant so far served 11 years, he is to serve a further 19 years' imprisonment"***

5. It is the above ruling that triggered the present application filed under certificate of urgency by way of Chamber Summons in which he sought that the court review the thirty (30) year custodial sentence and if finds it prudent to consider new custodial sentence for the remainder of the period to be served, he further sought that the court consider the period the applicant had stayed in custody before conviction in line with section 333of the criminal procedure code. It was supported by his affidavit in which he deposed that the court does consider both the reform and rehabilitation he had undergone since his incarceration together with medical antecedents.

6. This application was heard by way of skype in view of Covid 19 pandemic, the applicant filed written submissions which he relied upon, while Ms Chege opposed the application. The applicants written submissions can be summarized as follows; he was convicted at time when the court could not exercise discretion since the sentence was mandatory. after the decision of the Supreme Court in Francis K Muruatetu, he contended that the trial court imposed a sentence which was very severe without taking into consideration his mitigation. He submitted that the court did not take into account the probation report, and the prison report. He urged the court to look at the probation report along with his mitigation. He submitted the case of **SABASTIAN OKWERO MREFU VS REPUBLIC, PETITION NO 151 OF 2012** where the court stated that ***"in the circumstances, where there were no injuries, the mandatory death sentence was not appropriate and it was substituted with a term served of 11 years .... despite being armed with an AK 47 rifle and having threatened the members of the public***

by shooting in the air”.

7. He submitted further that he had undergone several rehabilitation programmes while in custody and had been a role model thereat, he stated that he was a first offender and sought that his sentence be reduced to the period already served so as to enable him re-join his family who has lacked fatherly love. In support he tendered the following cases:- **ISMAEL MZEE ISMAEL vs REPUBLIC MISC APP. NO 59 OF 2019** Where the applicant was sentenced to 5 years and **ANTONY JUMA KAKAI vs REPUBLIC [2018]** where the appellant was sentenced to 20 years from the date of conviction.

8. He submitted that the court while determining the appropriate sentence should consider the circumstances under which the offence was committed as was stated in the case of **MARTIN BAHATI MAKOKHA AND ANOTHER vs REPUBLIC, CRIM APP. NO 81 & 82 OF 2009** where a sentence of ten years was given in the place of death sentence. He stated further that his sentence should run from the date of arrest and that he was entitled to remission in line with the decision in the case of **ABDUL AZIZ ODUOR AND ANOTHER vs REPUBLIC, CRIMINAL APPEAL NO 18 & 102 OF 2018** and **IBRAHIM ALI HALAKE VS REPUBLIC, MISC APPL NO. 395 OF 2019**. He further submitted that the court should take into consideration his health status. He stated in a rejoinder that there was no injury or any death during the said robbery.

9. The application was opposed by Ms Chege who submitted that all the issues raised were considered by the trial court and that section 333(2) was considered. She submitted that applicant was part of a gang that raided a bank where there were very many victims all being bank employee. They forced themselves into the bank safe box where a total of ksh. 4628000 was lost the applicant went underground and was arrested after one year. She sought for an order dismissing the application.

## DETERMINATION

10. Whereas the application is stated to be that of review, it is clear that what the applicant is seeking is an order of revision of the trial court's decision on resentencing the same having opted not to file an appeal there from. The jurisdiction for review lies with the trial court. The courts revision jurisdiction is exercised under the provisions of section 362 of the Criminal procedure code which gives the court the power to call for and examine the record of any criminal proceedings before a subordinate court for purposes of satisfying itself as to the legality, the correctness or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any subordinate court. Section 364 thereof provides that:-

***“(1) in the case of proceedings in the subordinate court the record of which has been called for or which otherwise comes to its knowledge the High Court May-***

***(a) In the case of a conviction exercise any of the powers conferred to the court of appeal by sections 354, 357 and 358 and may enhanced the sentence***

***(b) In the case of any other order other than an order of acquittal alter or reverse the order.”***

11. Justice Odunga in the case of **JOSEPH NDUVI MBUVI V REPUBLIC [2019 e KLR]** sets out the powers of the High court as follows:-

***“5. In my view, the revisionary jurisdiction of the High Court should only be invoked where there are glaring acts or omissions but should not be a substitute for an appeal. In other words, parties should not argue an appeal under the guise of a revision. It is for this reason that the decision whether or not to hear the parties or their advocates is discretionary save for where the orders intended to be made will prejudice the accused person. As was stated by the High Court of Malaysia in PUBLIC PROSECUTOR vs MUHARI BIN MOHD JANI AND ANOTHER [1996] 4 LRC 728 at 734, 735:-***

***“The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of “paternal or supervisory jurisdiction” in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice...If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion...This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case”.***

12. It is therefore clear that those powers are limited to what the statute and the constitution of Kenya under Article 165(6) and (7) provides. What this court is called upon to determine is the legality, correctness or propriety of the sentence given by the court on the applicant's application or petition for resentencing. In order to exercise that power, the court must be satisfied that the trial court acted upon wrong principles or failed to consider some fundamental principles. From the material placed before me, the applicants only complaint is that the trial court did not consider the probation officer's report and the pre conviction period.

13. To my understanding, the requirement for presentencing report is not mandatory but a tool which the trial court may use in determining an appropriate sentence and that the only right which the court confirmed was the right to mitigation as was stated by the Supreme Court in the case of **MURUATETU** as follows:-

***“[52] We are in agreement and affirm the Court of Appeal decision in Mutiso that whilst the Constitution recognizes the death penalty as being lawful, it does not provide that when a conviction for murder is recorded, only the death sentence shall be imposed. We also agree with the High Court's statement in Joseph Kaberia Kahinga that mitigation does have a place in the trial process with regard to convicted persons pursuant to Section 204 of the Penal Code. It is during mitigation, after conviction and***

*before sentencing, that the offender's version of events may be heavy with pathos necessitating the Court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness.*

*[53] If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualize the circumstances of an offence or offender may result in the undesirable effect of 'over punishing' the convict.*

*[54] A fair trial has any facets, and includes mitigation and, the right to appeal or apply for review by a higher Court as prescribed by law. Counsel for the petitioners and amici curiae both urged that the mandatory death sentence denied the petitioners enjoyment of their rights under Article 50 (2) (g) of the Constitution. On this issue, we are persuaded by the decision in *Edwards v The Bahamas* (Report No. 48/01, 4<sup>th</sup> April 2001) which was decided by the Inter-American Commission on Human Rights. In that matter, Michael Edwards was convicted of murder and a mandatory death sentence imposed on him.”*

14. Save for the fact that the applicant was not given credit for the pre-conviction period and being alive to the fact that sentencing remains a function of the trial court and that in resentencing, my understanding of the Supreme Court decision is that the court ought to look at the circumstances at the time of the commission of the offense and not what the offender had become since his conviction, which is the jurisdiction of the Power of Mercy committee, I am unable to find fault with the trial courts determination. From the record it is clear that she took into account the mitigation of the applicant and the circumstances of the offence. It is not the duty of this court while exercising its revision jurisdiction to substitute its decision for that of the trial court; see **GEORGE ALADWA OMWERA vs REPUBLIC [2016] e KLR.**

15. In the final analysis I find no merit in the application herein which I hereby dismiss, save that the applicant shall be entitled to a credit for the pre-conviction period, that is to say the period between 18/1/2007 and 10/12/2007 when he was convicted, rounded off to one (1) year for the purpose of this ruling, under the provisions of section 333(2) Of CPC. He shall also be entitled to remission for the period considered served on the basis of the ruling of the trial court as per the decision of Odunga J in the case of **ABDUL AZIZ ODUOR AND ANOTHER (supra).**

16. I therefore make the following orders.

- a) The application for resentencing is hereby dismissed.
- b) The lower Court's ruling is affirmed save that the sentence shall be less one (1) year under the provisions of Section 333(2) of the Criminal Procedure Code. The pre-conviction detention period.
- c) The Applicant is entitled to remission on the period served and it is ordered.

**Dated, signed and delivered at Nairobi this 21<sup>st</sup> day of May, 2020 through Google Teams.**

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**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

*Ms Onunga for the State*

*In person for the Accused*

*Court assistant- Karwitha*