



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

CRIMINAL MISC. APP NO. 30 OF 2019

LOWOYA SAMAL..... APPLICANT

VERSUS

REPUBLIC..... RESPONDENT

RULING

1. The Applicant was initially charged with the offence of robbery with violence contrary to section 296(2) of the penal code in Kakuma SRM CR No 244/2016 and was subsequently found guilty and sentenced to suffer death as by law established.

2. Being dissatisfied with the said judgment, he appealed to this court in criminal Appeal No.38/2017 and by a judgment dated 28/2/2019, Justice Riechi allowed his appeal and held as follows:-

“I find that the evidence does not disclose the offence of robbery with violence. It rather discloses the offence of causing grievous harm, contrary to section 234 of the penal, Under section 364 of the criminal procedure code, I hereby quash conviction on robbery with violence, set aside the death sentence and hereby substitute the offence with causing grievous harm contrary to section 234 of the penal code. I hereby sentence the Appellant to serve 10 years imprisonment from the date of judgment 3/8/2017”

3. The Appellant opted not to file an appeal to the Court of Appeal and by a purported notice of motion filed on 12/11/2019 sought to be granted non-custodial sentence CSO having considered the period spent in prison. The application was supported by his affidavit in which he deponed that his sentence was reduced from death to ten (10) years for the offence of grievous harm and that he had so far served a third of his sentence and should therefore be granted non custodial sentence. It was contended that he was remorseful and had been rehabilitated.

4. At the hearing hereof, Mr. Mongare submitted that the sentence given of ten (10) years was very reasonable taking into account the offence committed. He stated that if the Applicant was dissatisfied with the courts determination, he should have lodged an appeal to the Court of Appeal. The Applicant on the other hand sought for reduction of sentence.

5. This court having heard the Applicant’s appeal and rendered itself on sentence became *functus officio* as regards the issue of reduction of sentence. It is further clear that the nature of the offence the Applicant was charged with is not that which can be subjected to ‘CSO’ which the Applicant is seeking for.

6. I take the view that the application herein is misguided upon the misunderstanding of the Supreme Court decision on the now infamous **Francis K Mumatetu case**. Not every case is subject to re-sentencing hearing, it is only cases where the Applicants were charged with offences attracting maximum sentence which the court gave without considering the mitigation of the Applicants and the circumstances of the case, that may be subjected to resentencing hearing

7. I have noted that the Applicant herein robbed a NPR officer of his AK 47 Rifle and which was recovered from him and the injuries sustained by the said NPR officer as per the P3 form produced at the trial and find no merit in the application herein for re-sentencing. The Applicant still retains the right of appeal to the Court of Appeal, or in the alternative to subject himself to the power of mercy committee and not to approach this court by way of resentencing hearing.

8. I therefore find no merit on the application herein which I hereby dismiss.

Dated, Signed and Delivered at Lodwar through Skype this 12th day of May, 2020

.....

J WAKIAGA

JUDGE

In the presence of:-

Mr. Mwaura for the State

Applicant - present

Court Assistant: Maureen