



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CRIMINAL APPLICATION NO. 15 OF 2019**

**JAMES MASOMO MBATHA.....APPLICANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The accused person **James Masomo Mbatha** brought a Notice of Motion filed on 21<sup>st</sup> January, 2019 seeking for review of the life sentence that was meted on him. The application is under Article 50(P) (Q) of the constitution and based grounds in his supporting affidavit that he was convicted of murder and appealed to the court of appeal whereupon the appeal was dismissed and has now sought for a review under Article 50 (2) (p) (q) of the Constitution. The court directed that the matter be canvassed vide oral submissions and that a report on the petitioner be filed by the Machakos County Probation officer.

2. The petitioner submitted that he has felt the effect of the life imprisonment that was meted upon him having been reduced from a death sentence. He submitted that he deserved to be given a second chance as he was remorseful and while in prison he attained several skills as per the certificates presented before the court. The state opposed the application and submitted that the grounds forming the basis of resentencing are remorsefulness, seriousness of the offence and character of the offender. Learned counsel submitted that the applicant has not demonstrated how his character has been for the past 12 years; he went through the appeal process and still does not appear remorseful as he denies committing the offence. Further that the offence was in the nature of gender-based violence; one of the victims was elderly, the others were mere toddlers aged 4 and 3 years. Therefore he urged the court to dismiss the application for resentencing. In rejoinder, the applicant submitted that the prison department delayed in preparing his report and further that the fact that he was allowed to attend classes is a clear sign that he has a good conduct.

3. According to the probation report dated 15.5.2019 that was filed in court, the victims of the offence were the applicants in laws and it was rooted in a brawl over Kshs 500,000/-. The family of the victims demand justice and the offender's family would not mind having him back .Further there was an agreement between the family members that was presided over by the clan elders and the terms could not be fulfilled by the offenders family due to poverty. The offender's family was asked to deliver 28 cows as compensation; the family of the victims does not wish to be associated with the offender's family and are not interested in any form of reconciliation. The probation officer left it to court to make the final decision on the fate of the applicant.

4. I have considered the application. The issues for determination are whether the court has jurisdiction to review a conviction and whether the applicant is entitled to resentencing. The application is brought under **Article 50 (2) (p) and (q)** of the Constitution which states that the accused person has a right :

***(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and***

***(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law."***

5. The right to resentencing under the above provisions are a principle of fair trial and also are subject to the law and more specifically the supreme law of the land.

6. Under the mandatory terms couched in the above provisions, right to resentencing that is allowed under Article 50(p) is permitted if the prescribed punishment had changed before sentencing. From the available record and from the law as it is in **Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015**, the applicant has already enjoyed a reduction from a death sentence to life imprisonment and thus cannot get a second bite at the cherry in attempting to rely on Article 50(p) that is not applicable to him.

7. The provisions of Article 50(q) are not applicable to the instant application for the court has no jurisdiction to entertain the application. The jurisdiction to do so is vested with the court of appeal and this court cannot purport to exercise powers that it is not vested with. In the case of **Suleiman Shabhal vs Independent Electoral and Boundaries Commission & 3 Others {2014} eKLR**, court observed that **"it is an established principle of law that the relief sought ought to be granted cautiously and sparingly, most judiciously and ensuring the supremacy of the constitution is not eroded.**

8. As regards the issue whether the petitioner's quest to have the sentence reviewed, it is noted that he had been convicted for the murder of four defenceless female victims and further wounded a fifth victim. The offences comprised of gender based violence. The report reveals that the petitioner descended on the victims and butchered them and further torched their house. The actions were vile in the extreme and which led to loss of four innocent lives in addition to a fifth one who was maimed. The report reveals that the petitioner had visited his in-laws to fetch his daughter after a disagreement with his wife and ended up engaging in an orgy of violence on them and did not even spare his own

daughter. Those innocent lives were lost because of the petitioner's own interest. Even though the petitioner claims that he really feels guilty about the incident he appears to be denying committing the offences. The prison authorities have not availed any report on the petitioner regarding the question whether he has reformed. The seriousness of the offences herein militates against a resentencing. In any event the sentences have already been commuted to life imprisonment. I find the said sentences to be reasonable in the circumstances of this case.

9. In the result, I find the petitioner's application lacks merit and is ordered dismissed.

Orders accordingly.

**Dated and delivered at Machakos this 8<sup>th</sup> day of July, 2019.**

**D.K KEMEI**

**JUDGE**