



**Chebet v Republic (Criminal Petition E041 of 2021)
[2022] KEHC 9856 (KLR) (14 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 9856 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL PETITION E041 OF 2021
RN NYAKUNDI, J
JULY 14, 2022**

BETWEEN

KIMUTAI CHEBET APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant herein was charged of the following offences;
 - a. 4 counts of Robbery with violence contrary to section 296(2) of the [Constitution](#)
 - b. Handling stolen goods contrary to section 322(2) of the Penal Code
 - c. Being in possession of a firearm without a firearm certificate contrary to section 4(1) of the [Firearms Act](#).
2. The appellant pleaded guilty in Chief Magistrates Criminal Court case no. 5249 of 2001 and was sentenced to death for the offence of Robbery with violence contrary to section 296(2) of the [Constitution](#), one-year imprisonment for the offence of handling stolen goods contrary to section 322(2) of the [Penal Code](#) and twelve years' imprisonment for the charge of Being in possession of a firearm without a firearm certificate contrary to section 4(1) of the [Firearms Act](#).
3. In 2003, the appellant appealed against the conviction and this honourable court found no merit in his appeal and dismissed it accordingly.
4. The Petitioner filed a Notice of Motion application dated 2nd March 2021 expressed to be brought under section 379(4), 316 and 357 of the [Criminal Procedure Code](#) and seeks the following orders;
 - a. a. Orders to be heard for review of sentence vide resentencing hearing.
 - b. b. Spent



- c. Leave for probatory/non-custodial sentence.
5. The application is based on the following grounds;
 - a. The petitioner prays for an appropriate sentence that has an ending period.
 - b. The petitioner prays for resentencing ending the period which sentence was meted on him from 2011 to the date of trial and sentencing.
 - c. That the court be guided by the supreme court decision in *Francis Karioko Muruatetu and Anor vs R* (Petition No. 15 of 2015).
 - d. That the supreme court sought to have the legal definition of a death sentence respectively which was unanimously declared unconstitutional.
 - e. That he has already paid the price of his actions and deserves a remedy in the form of resentencing.
6. The appellant also based the application on mitigating factors as well. These include the grounds that the court has discretion on sentencing under articles 159(2), 160(1), 165(3)(a)(b) and sections 316,357,362 and 364(1) of the Criminal Procedure Code. Further, he relied on the fact that he was a first time offender, remorseful and has been in custody for 20 years. He has taken full advantage of the rehabilitative programs in prison.
7. The appellant cited the case of *S vs Mchunu & Another* (AR24/11) (2012) ZAKZPHC 56, Kwa Zulu High Court and the case if *Juma Iddi Mustapha vs Republic* (2019) eKLR among a plethora of similar authorities in support of his submissions.
8. He contended that he has acquired certificates in
 - a. 17 biblical certificates
 - b. 5 diplomas in theology
 - c. KCPE
 - d. KCSE
9. With this knowledge he is ready to be a proactive member of society. Further, he was convicted at 18 years of age when he was a school dropout and did not know the consequences of crime. He is now 38 years old and has studied and obtained different certificates. He asked the court allow the appeal and find the time he has served to be sufficient.
10. There are no submissions on record for the respondent.

Upon perusing the petition and considering the submissions of the parties I have identified the following issue for determination;

a. Whether the court should review the sentence vide a resentencing hearing.

11. What the petitioner is seeking is an order for revision of the sentence of the trial court despite having filed an appeal on the same in 2003. This court is clothed with revisionary jurisdiction by section 363 of the Criminal Procedure Code which states as follows;
 - (1) A subordinate court of the first class may call for and examine the record of any criminal proceedings of a subordinate court of a lower class than it and established within its local limits



of jurisdiction, for the purpose of satisfying itself as to the legality, correctness or propriety of any finding, sentence or order recorded or passed, and as to the regularity of the proceedings.

- (2) If a subordinate court acting under subsection (1) considers that a finding, sentence or order of the court of lower class is illegal or improper, or that the proceedings were irregular, it shall forward the record with its remarks thereon to the High Court.

Section 364 of the Criminal Procedure Code provides;

- (1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—
 - (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
 - (b) in the case of any other order other than an order of acquittal, alter or reverse the order.
12. I stand guided by the finding of Justice Odunga in *Joseph Nduvi Mbuvi v Republic* [2019] eKLR where he set out the powers of the High court as follows: -

“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 Mubari 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”.

13. The power of the courts is limited to those provided in statutory provisions and the *constitution*. In revision of sentences, the appellate court is called upon to determine the correctness, legality or propriety of the sentence given by the trial court. The petitioner has not placed anything before this court to invoke the revisionary jurisdiction of the court. this petition bears all the characteristics of an appeal disguised as a petition for review and resentencing. However, I am guided by the Supreme court decision in the case of Francis Karioko Muruatetu where the mandatory death sentence was declared unconstitutional.
14. In the premises the petition only succeeds to the extent of substituting the death sentence with one of 30 years’ imprisonment from the original date of sentencing. He was in remand for barely more than two months before being sentenced and therefore the time spent in remand has no consequence on the time he is to serve. The sentence to commence with effect from 22/8/2021.



DATED, SIGNED AND DELIVERED AT ELDORET THIS 14TH DAY OF JULY, 2022.

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R. NYAKUNDI

JUDGE

In the presence of:-

Mr Mugun

Kinyua for accused present

