



REPUBLIC OF KENYA



**Sudi v Republic (Miscellaneous Application 84 of 2019)
[2024] KEHC 10385 (KLR) (23 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10385 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
MISCELLANEOUS APPLICATION 84 OF 2019**

DK KEMEL, J

AUGUST 23, 2024

BETWEEN

CHRISPINUS SIFUNA SUDI APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant herein, Chrispinus Sifuna Sudi, had been jointly charged with others not before Court with two counts of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code and sentenced to death by the Chief Magistrate's Court at Bungoma on 26th February 2008. The conviction and death sentence in respect of the offence of robbery with violence was upheld by the High Court of Kenya at Bungoma vide HCRA Numbers 13 and 14 of 2008 which were dismissed. They also lodged an appeal at the Court of Appeal vide COA No. 270 OF 2013 at Eldoret which was also dismissed.
2. Vide an undated Chamber Summons application and filed in Court on 1st August 2020, the Applicant seeks resentencing on the basis of the Supreme Court's decision in Francis Karioko Muruatetu that his death sentence be replaced with a more humane term sentence and which is commensurate with his criminal responsibility.
3. The application was supported by his affidavit in which he deposed that he was charged and convicted with the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code and sentenced to death. His first appeal was dismissed and that the Court of Appeal also dismissed his appeal. Relying on the Supreme Court decision in Francis Karioko Muruatetu, he sought for sentence re-hearing only.
4. The application was dispensed with via written submissions wherein the Applicant in a nutshell argued that the death sentence is unconstitutional when given without any discretion as the same contravenes



Articles 2(5)(6) and 50 of the Constitution. He argued that the sentence of death contravened the dictates of Article 131 (e) of the Constitution and the Sentencing Guidelines 2016. He further argued that the death sentence is against International Statute that Kenya is a signatory to. (see International Covenant on Civil and Political Rights).

5. The application was unopposed as the Respondent did not file a response thereto. However, learned counsel for the Respondent vide her oral submissions made on 6.11.2023, it was submitted that the court is functus officio.
6. Section 296(2) of the Penal Code imposes a mandatory sentence which runs afoul of Article 25(c) and read together with Article 50(2), Article 159(1), (2)(a), Article 160(1) of the Constitution of Kenya, 2010 and by dint of Article 2(4) of the Constitution of Kenya, 2010, should be struck out. In addition, that the analysis by the Supreme Court in Francis Karioko Muruatetu & another v Republic [2017] eKLR (hereinafter “Muruatetu I”) where the Court was dealing with the mandatory death sentence in Section 204 of the Penal Code applied in equal measure to the convicts under Section 296(2) of the Penal Code, and to hold a contrary view would violate Article 27 of the Constitution on equality before the law, equal protection and equal benefits of the law.
7. The Supreme Court in Muruatetu did declared the mandatory aspect of the death sentence unconstitutional as follows:

“(66) It is not in dispute that article 26(3) of the Constitution permits the deprivation of life within the confines of the law. We are unconvinced that the wording of that article permits the mandatory death sentence. The pronouncement of a death sentence upon conviction is therefore permissible only if there has been a fair trial, which is a non-derogable right. A fair hearing as enshrined in article 50(1) of the Constitution must be read to mean a hearing of both sides. A murder convict whose mitigation circumstances cannot be taken into account due to the mandatory nature of the death sentence cannot be said to have been accorded a fair hearing.”
8. The question that arises in this respect is whether the fact that the Applicant who was charged with a different offence, namely robbery with violence, is a legitimate ground to treat them differently in terms of the mandatory sentence of death, and in light of the holding in Francis Karioko Muruatetu & another v Republic [2017] EKLR.
9. The directions given on 6th July 2021 by the Supreme Court in the case of Francis Karioko Muruatetu & Another vs Republic inter alia was that the said decisional law is not an authority to declare all mandatory or minimum sentences unconstitutional. Its application was limited to murder cases falling within its scope. Therefore, this being a case of robbery with violence, the request by the Applicant for review of sentence on the basis of Muruatetu case is misconceived. He has to argue his case on the basis of law and facts of the case.
10. In James Kariuki Wagana vs Republic [2018] eKLR, Prof. Ngugi J observed that while the penalty of death is the maximum penalty for both murder and robbery with violence, the Court has the discretion to impose any other penalty that it deems fit and just in the circumstances. He further observed that the death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder. He noted that while force had been used in the case before him, it could not be said that the appellant used excessive force, nor did he “unnecessarily injure the Complainant during the robbery” and was not armed during the robbery. He therefore reduced the appellant’s sentence of death to imprisonment for fifteen years, from the date of conviction.



11. In the case before me, all the ingredients of robbery with violence have been met. The Applicant, who was in the company of others not before this Court, robbed the Complainants, and in the course of the robbery, the Applicant did not only use force, but was armed with a dangerous weapon with which he used to beat or hit or terrorize the Complainants causing bodily injuries. PW8 assessed the degree of injuries incurred by PW1 as grievous harm and PW10 producing in Court the post mortem report of the 2nd Complainant who was killed during the robbery incident.
12. In the circumstances, i will reduce the death penalty to a term of imprisonment for 40 years from the date of first arraignment in Court that is on 17th October 2005, in compliance with Section 333(2) of the Criminal Procedure Code in that at the time the offence was not bailable.

DATED AND DELIVERED AT BUNGOMA THIS 23RD DAY OF AUGUST 2024.

D. KEMEI

JUDGE

In the presence of:

Chrispinus Sifuna Sudi Applicant

Miss Kibet for Respondent

Kizito Court Assistant

