



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

PETITION NO 16 OF 2019

GEORGE OKELLO.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The petitioner (**GEORGE OKELLO**) was convicted on a charge of robbery with violence contrary to section 296 (2) of the Penal Code in ELD CMCRC No1429 of 2005. The particulars of the charge were that on 22nd February 2005 at 21.00pm, at [Particulars withheld] estate in Uasin Gishu District, he jointly with others robbed **CO** of a Nokia mobile phone, a pair of long trousers, a pair of shoes, a pair of socks, one wrist watch make Novis, and cash Kshs 1640/- and used violence. He denied the charge and after trial, he was convicted and sentenced to death.

2. He was also convicted for Unnatural offence contrary to section 162 (a) of the Penal Code, which took place on the same date and place against the victim of the robbery, in that he had carnal knowledge of the said **CO**, against the order of nature but the trial court seems to have pronounced sentence only on the first count.

3. He filed **ELD HCCRA No 13 OF 2007**, and the appeal was dismissed, the death sentence was confirmed, and the court meted out a 5-year sentence on the second count, but the same was held in abeyance.

4. He now petitions for resentencing pegged to the Supreme Court decision in the case of **FRANCIS KARIOKO MURUATETU V REPUBLIC [2017] eKLR**, stating that the death sentence was commuted to life, and he has spent 13 years in prison. He expresses remorse, saying that his stay in prison has taught him the importance of living in the midst of salvation. He also alludes to the various life skills and courses he has undergone (and annexed the various certificates), and which he says have equipped him and rehabilitated him to reintegrate into society.

5. He has attached a letter of recommendation written by the officer in charge (**ACP KURSHALA IRINGO**) **KISUMU MAXIMUM PRISON INDUSTRY** dated 19/11/2019 confirming that his general conduct and discipline are exemplary.

6. Miss Okok on behalf of the prosecution, concedes that the death sentence was harsh, and urges this court to review the same and substitute it with a custodial term.

7. The rationale behind sentencing is for:

- a) Retribution-eye for an eye principle you deserve to be punished (Sentence must be Proportionate to the Gravity of the offence),
- b) Deterrence - which operates on the notion that everyone understands that certain conduct constitutes a crime which carries a severe penalty, and that because of this the public will desist from the targeted conduct,
- c) Rehabilitation,
- d) Incapacitation,
- e) Denunciation.

8. In seeking sentence rehearing the applicant is propelled by the emerging jurisprudence from the Supreme Court in the case of **FRANCIS**

KARIOKO MURUATETU AND ANOR VERSUS REPUBLIC [2017] eKLR which opened avenues for persons serving mandatory sentences to have their sentences reheard and imposed afresh as appropriate in each situation, and urges this court to reconsider the sentence. The petitioner has relied on several recent decisions which have re-visited the mandatory sentences imposed and in exercise of judicial discretion, substituted with lesser sentences.

9. The Supreme Court in the **Francis Karioko Muruatetu** (supra) decision gave the following guidelines when this court will be considering the Applicant's application on re-sentencing:

“[71]. As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

- (a) age of the offender;***
- (b) being a first offender;***
- (c) whether the offender pleaded guilty;***
- (d) character and record of the offender;***
- (e) commission of the offence in response to gender-based violence;***
- (f) remorsefulness of the offender;***
- (g) the possibility of reform and social re-adaptation of the offender;***
- (h) any other factor that the Court considers relevant.***

[72] We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process. This notwithstanding, we are obligated to point out here that paragraph 25 of the 2016 Judiciary Sentencing Policy Guidelines states that:

Where there are guideline judgments, that is, decisions from the superior courts on a sentencing principle, the subordinate courts are bounded by it. It is the duty of the court to keep abreast with the guideline judgments pronounced. Equally, it is the duty of the prosecutor and defence counsel to inform the court of existing guideline judgments on an issue before it.”

10. In this instance, the petitioner has taken his incarceration positively and gained various life changing skills which would enable him to re-integrate into the free society. I also take into account the value of the property involved, and the fact that for the accompanying act of sodomy, although the 5-year sentence was held in abeyance, the period served has more than covered for it. I am thus persuaded that this matter merits review of the sentence, and the death sentence (now commuted to life) is set aside, and substituted to the period already served.

This court deems the period sufficient to cover the 5-year sentence which had been held in abeyance- the same is now deemed as having been duly served.

11. The petition is merited, and succeeds- the petitioner shall thus be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this 24th day of March 2021 at Eldoret

H. A. OMONDI

JUDGE