



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

PETITION NO. 79 OF 2018

SULEIMAN MWACHINGOZE MWAULIDI.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT ON RESENTENCING

1. The Petitioner together with his colleague were charged, and convicted of the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. His Appeal to the High Court was heard and dismissed.
2. The Petitioner has now petitioned this Court for review of sentence in view of the Supreme Court declaration in **Francis Karioko Muruatetu & Another v Republic SCK Pet. No. 15 of 2015 (2017) eKLR**, which decided that mandatory nature of any sentence is unconstitutional. As a consequence, in the case of **William Okungu Kittiny v Republic Kisumu Criminal Appeal No. 56 of 2013 [2018] eKLR**, the Court of Appeal applied the *Muruatetu* decision mutatis mutandis to the provisions of Section 296 (2) of the Penal Code which imposes a mandatory death penalty for the offence of robbery with violence. The Petitioners are seeking that the death sentences imposed on them be set aside and for the Court to impose an appropriate sentence.
3. The facts of the case against the Petitioner were that, on 19/12/2012 at 3 am, he and others while armed with a metal rod, robbed the complainant of his motorcycle Registration KMCX 156T and that immediately before or immediately after the time of such robbery injured the complainant by hitting him on the head using the metal rod.
4. The Petitioner and his colleague were sentenced to death by the magistrate's Court on 30/4/2015 for the reason that death sentence was mandatory for the offence of robbery with violence. So the Petitioner has been in custody and in jail cumulatively for 9 years.
5. The Petitioner when offered an opportunity to mitigate, he merely stated that he was not satisfied with the judgment. However, the prosecution recommended that the Petitioner be treated as a first offender. Nevertheless, the Petitioner submitted that he is the sole breadwinner of his young family, and that his family is currently destitute. The Petitioner therefore prays for a non-custodial sentence.
6. **Mr. Fedha**, Learned Counsel for the prosecution (D.P.P) submitted that taking into account the circumstances surrounding the Petitioner's charge, a deterrent sentence of 25 years including time served would be adequate. Further, the Petitioner might benefit from the provision of Section 46 of the Prison Act.
7. I have considered *The Sentencing Policy Guidelines, 2016* and its application, which is intended to promote transparency, consistency, and fairness in sentencing (See **Michael Kathewa Laichena & another v Republic [2018] eKLR**).
8. Further, In **Francis Karioko Muruatetu & Another v Republic (Supra)** the Supreme Court stated the following guidelines as mitigating factors 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 and

(h) any other factor that the Court considers relevant.

9. From the evidence of the complainant, and taking into consideration, the serious nature of the offence, and the violence meted out on the complainant, I am of the considered opinion that apart from death sentence, the Petitioner deserves a deterrent sentence, which should be a lesson to would-be offenders. I re-sentence the Petitioner to **15 years** imprisonment from date of his arraignment in Court. **See Nickson Ligakha & another v Republic [2020] eKLR** where the Court of Appeal sentenced the Appellant to 15 years imprisonment.

10. For avoidance of doubt, the Petitioner's sentence having been commuted to a definite imprisonment term the Petitioner is also entitled to benefit from remission of sentence **if he meets the conditions**. It is so ordered.

Right of appeal to be exercised within fourteen (14) days.

That is the Judgment of the Court.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 18TH DAY OF MARCH, 2021.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Mr. Fedha for State

Petitioner in person

Ms. Peris Court Assistant