REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL PETITION NO 78 OF 2020

KENNEDY ONYANGO MUGA...PETITIONER

VERSUS

REPUBLIC..RESPONDENT

JUDGMENT

1. The Petitioner had been charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. He had also been charged with an alternative count of handling stolen goods contrary to Section 322 (2) of the Penal Code and a second count of possession of public stores contrary to Section 324 of the Penal Code. He was convicted of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code and sentenced to death which was subsequently commuted to life imprisonment.

2. Being dissatisfied with the said decision, he appealed to the High Court in **Kisumu Criminal Appeal No 117 of 2006.** His appeal was dismissed on 22nd July 2008. Being dissatisfied with the decision of the High Court, he appealed to the Court of Appeal **Kisumu Criminal Appeal No 273 of 2008** but his appeal was also dismissed. His assertion that he never filed an appeal to the Court of Appeal was thus incorrect.

3. On 2nd September 2020, he filed an application for review of sentence. In his affidavit that he swore in support of his application, he stated that he was sentenced to mandatory death sentence which was later commuted to life by the President in the year 2009. He added that he had been in custody for the last fifteen (15) years since arrest. He averred that the mandatory death sentence meted on him was unconstitutional, inhumane and degrading

4. In his Written Submissions, he reiterated his aforesaid averments and asserted that in the case of **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR**, the court held that mandatory sentences deprive courts of their legitimate jurisdictions to exercise discretion to individualise an appropriate sentence to relevant aspects of character and record of each accused person.

5. He pleaded with the court to consider that he was arrested at the age of twenty (20) years and was the sole breadwinner in his young family. He asserted that he was a first offender and remorseful. He added that he had reformed after undertaking rehabilitation programs including Grade III, II and I in tailoring tested by the government agency, NITA and argued that this would assist him integrate well back to society and avoid crime.

6. The State did not oppose his Petition for review of sentence. It pointed out that in the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra), the Supreme Court set out the following as mitigating factors for re-sentencing, which it urged this court to consider. These were age of the offender, whether he was a first offender, whether he had pleaded guilty to the offence, character and record of the offender, commission of the offence in response to gender-based violence, remorsefulness of the offender, the possibility of reform and social re-adaptation of the offender and any other factors the court would consider relevant

7. It appreciated that the Petitioner was a first offender who had reformed and done courses that had prepared him for integration back to society. It recognised that he was sentenced on 30th June 2006 and had been in prison for fourteen (14) years and nine (9) months. It recommended that this court reviews his sentence to twenty five (25) years imprisonment taking into account the period spent in custody pursuant to section 333(2) of the Criminal Procedure Code.

8. On 6th July 2021, the Supreme Court gave guidelines in the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) to the effect that the decision of Muruatetu and these guidelines apply only in respect to sentences of murder under Sections 203 and 204 of the Penal Code. It also clarified that all offenders who had been subject to the mandatory death penalty and desired to be heard on sentence would be entitled to re-sentencing hearing.

9. The Supreme Court was categorical that an application for re-sentencing arising from a trial before the High Court could only be entertained by the High Court, which has jurisdiction to do so and not the subordinate court. It was also emphatic that where an appeal was pending before the Court of Appeal, the High Court would entertain an application for re-sentencing upon being satisfied that the appeal had

been withdrawn.

10. It further directed that in a re-sentencing hearing, the court must record the prosecution's and the appellant's submissions under Section 329 of the Criminal Procedure Code, as well as those of the victims before deciding on the suitable sentence. It added that where the appellant has lodged an appeal against sentence alone, the appellate court would proceed to receive submissions on re-sentencing.

11. It clarified that the guidelines would be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals and that the same would also apply to sentences imposed under Section 204 of the Penal Code before the decision in Muruatetu.

12. It reiterated that in re-hearing the sentence for the charge of murder, the court had to take into account the mitigating factors that had earlier been set out in the same case of **Francis Karioko Muruatetu & Another vs Republic** (Supra). It further directed that the Judiciary Sentencing Policy Guidelines to be revised in tandem with the new jurisprudence enunciated in the said case.

13. It was emphatic that the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) was not applicable to capital offences other than murder, such as treason under Section 40 (3), robbery with violence under Section 296 (2) and attempted robbery with violence under Section 297 (2) of the Penal Code. It was clear that the said case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) could not be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences were inconsistent with the Constitution of Kenya.

14. It pointed out that the petitioners in the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) had approached the court for specific reliefs. It clarified that with regard to the mandatory death sentence in capital offences other than murder, such as treason under Section 40 (3), robbery with violence under Section 296 (2) and attempted robbery with violence under Section 297 (2) of the Penal Code and directed that a challenge on the constitutional validity of the mandatory death penalty be heard and determined in the High Court and

then by the Court of Appeal, if necessary, whereafter a similar outcome as that the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) may be reached.

15. The fact that the Petitioner herein was remorseful and had undergone various rehabilitation programs could not assist him for the reason that he had been charged and convicted of the offence of robbery with violence and not murder and as the Supreme Court decreed in its guidelines on 6th July 2021, the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) was inapplicable herein.

16. His prayer that the court reviews his sentence under Article 27(1)(2)(5) of the Constitution of Kenya 2010 thus fell by the wayside.

17. Notably, the Petitioner was sentenced to life imprisonment in which case Section 333(2) of Criminal Procedure Code was inapplicable.

DISPOSITION

18. For the foregoing reasons, the upshot of this court's decision is that the Petitioner's petition for review of the sentence that was filed on 2nd September 2020 was not merited and the same be and is hereby dismissed.

19. Accordingly, the court hereby upholds the conviction and sentence of the Petitioner herein for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code Cap 63 (Laws of Kenya).

20. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF SEPTEMBER 2021

J. KAMAU

JUDGE