REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL PETITION NO 76 OF 2020

DANCUN OTIENO OPONDO.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Petitioner herein was tried and convicted of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. He was sentenced to death but this was subsequently commuted to life sentence.

2. Being dissatisfied with the said decision, the Petitioner lodged an Appeal in the **Kisii Criminal Appeal No 54 of 2012**. His Appeal was dismissed. He then lodged a second Appeal at the Court of Appeal **Kisumu Criminal Appeal No. 204 of 2014**. However, this Appeal was also dismissed.

3. On 28th August 2020, the Petitioner filed this application for review of the sentence. In his affidavit that he swore in support of his application, he stated that his death sentence was commuted to life imprisonment by the President in 2009. He pointed out that he had already served sixteen (16) years and relied on the case of **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR** to argue that the mandatory death sentences 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 Supreme Court held that mandatory sentences deprive courts of their legitimate jurisdiction to exercise discretion to individualise an appropriate sentence to relevant aspects of character and record of each accused person. He argued that the discretion of the Trial Court to mete out a sentence that was commensurate to the circumstances of his case was curtailed by the minimum sentence.

5. He pleaded with this court to consider that he was thirty four (34) years of age and being a young man, he had a long way to go in life. He averred that he had since spent ten (10) years in custody, having been arrested at the age of twenty four (24) years, and urged the court to consider granting him an opportunity to re-shape his future which would otherwise be ruined by the long incarceration. He further added that he had since lost both his parents and a sibling leaving him with no one to give him material and moral support. He submitted that he was a first offender and very remorseful.

6. He contended that while he was in prison, he had undertaken various reformation programmes and had acquired Grade III, II, and I in Masonry, Certificate in Bible Course from Nuru Lutheran Media Ministry, Certificate in Health Studies, Certificate from Rodi Kenya, Diploma in Biblical Studies from Discover Bible School and Certificate in sustainable agriculture. It was his submission that having gained the skills, he was able to integrated into the society and earn his living without indulging in crime.

7. The State opposed his application for review of sentence for the reason that on 6th July 2021 the Supreme Court of Kenya gave fresh directives in interpreting

Francis Karioko Muruatetu vs Republic (Supra) that same only related to murder cases.

8. It further submitted that Petitioner chose not to mitigate in the Trial Court despite having been given a chance to do so. It added that when his second Appeal was determined, the decision in **Francis Karioko Muruatetu vs Republic** (Supra) was still being considered for robbery with violence cases but that the Court of Appeal still upheld his conviction and sentence.

9. 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.

10. 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.

11. 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.

12. 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.

13. 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.

14. 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.

15. 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.

16. 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. His prayer that the court reviews his sentence thus fell by the wayside.

DISPOSITION

17. For the foregoing reasons, the upshot of this court's decision was that the Petitioner's petition for review of the sentence that was filed on 28th August 2020 was not merited and the same be and is hereby dismissed.

18. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF SEPTEMBER 2021

J. KAMAU

JUDGE