REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. CRIMINAL APPLICATION NO. 21 OF 2019

MWENDWA MUSILI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

A. Introduction

1. This is a petition seeking for orders for resentencing based on the Supreme Court Petition of **Francis Karioko Muruatetu and Another v R. (2017) eKLR.**

2. The applicant was convicted of the offence of robbery violence contrary to Section 296 (2) of the Penal Code in Runyenjes Criminal Case No. 57 of 2018 and subsequently sentenced to death. The applicant appealed the conviction and sentence vide Embu High Court Criminal Appeal No. 140 of 2008 which was dismissed. He states in his petition that no appeal was filed in the Court of Appeal due to lapse of time and that his application for extension of time was not successful.

3. When the petitioner applied for re-hearing on sentence in this court, he was referred to Runyenjes Court for disposal of his petition. However, the file was sent back on grounds that the original file had been destroyed in a record disposal exercise. This court then used the typed proceedings in the skeleton file and proceeded with this application.

4. I wish to point out that although the original file is not available, this court has the benefit of complete typed proceedings which were in the skeleton file at Runyenjes Court. I have no doubt that these proceedings will be sufficient for the purposes of determining the application.

5. In response to the petition for resentencing Ms. Mati for the respondent asked the court to take into consideration the seriousness of the offence and the circumstances under which the offence was committed as well as the guidelines set forth in the **Francis Karioko (supra)** case.

B. Analysis of Law

6. The Supreme Court in the **Muruatetu** case, supra sets out guidelines to assist the courts in the determination of the sentence where mitigation was not considered prior to the said case. The guidelines are as follows: -

> ***"As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable.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.

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:

GUIDELINE JUDGMENTS

Where there are guideline judgments, that is, decisions from the superior courts on a sentencing principle, the subordinate courts are bound 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".

7. The Supreme court has set out certain principles which should guide courts in sentencing, which this court should consider. The Supreme Court then dealt with the importance of pre-sentence hearing and entertainment of mitigation from the accused person, among others. The Court has made clear exactly how the mitigation of the accused person should be applied by the court before the accused is sentenced. The Court stated that *'it is during mitigation, after conviction and before sentencing, that the offenders' version of events may be heavy with pathos necessitating the court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death penalty.'*

8. The particulars of the applicant's charge were that on the night of the 2nd September 2007 at around 1am, the applicant and another person not before court whilst armed with a panga and a metal panga broke into PW1's shop and demanded money. The applicant and his co-accused robbed the complainant of Kshs. 1,800/= and a Nokia phone 1110.

9. In his submissions on mitigation before this court, the applicant submitted that he was 42 years at the time of arrest, a first time offender and he has since spent 11 years in prison. He submits that he has since become fully aware of the consequences of his crime and seeks a softer sentence.

10. The applicant said that his sentence was commuted to a life imprisonment in 2008 by the head of State. Pursuant to the **Muruatetu Petition** (supra), this court can exercise its discretion in re-hearing on sentence.

11. I have considered other cases where convicts for robbery with violence were re-sentence after the *Muruatetu case*. In **Benjamin Kemboi Kipkone v Republic (2018) eKLR** where 3 robbers armed with an AK 47 rifle robbed the complainant of Kshs. 250,000/= and a mobile phone, Chemitei J. substituted the death sentence with 20 years imprisonment.

12. In **Paul Ouma Otieno v Republic (2018) eKLR** where the accused being armed with an AK 47 rifle and a kitchen knife robbed the complainant of Ksh. 450,000/= and 3 mobile phones. Majanja J. substituted the death sentence with 20 years imprisonment.

13. In **Wycliffe Wangugi Mafura v Republic Eldoret Criminal Appeal No. 22 of 2016 (2018)** the Court of Appeal imposed a sentence of 20 years imprisonment where the appellant was involved in robbing an Mpesa shop agent with the use of firearm.

14. In **Benson Ochieng & France Kibe v Republic (2018) eKLR,** Joel Ngugi J. re-sentenced the petitioners to 20 years imprisonment upon considering that the offence was aggravated by the use of multiple guns by an organized gang to commit armed robbery.

15. I have considered the above stated principles of sentencing and that the appellant has been incarcerated for a period of 11 years. Upon considering the sentences in the above cited authorities, I am of the view that the applicant deserves a sentence of at least twenty (20) years imprisonment. The sentence of death imposed on the applicant is hereby set aside. I re-sentence the petitioner to serve twenty (20) years imprisonment commencing from the date of arrest.

16. I am aware of the provisions of Section 333 (2) of the Criminal Procedure Code which provides that sentence shall run from the date of arrest where the accused remained in custody during the trial.

17. The accused was arrested and placed in custody on 2/09/2007 while the plea was taken on 7/07/2007. At that time, bail was not available in the law for capital offences.

18. The accused remained in prison remand until 9/07/2009 when he was convicted and sentenced to death. The law requires that this period ought to be taken into consideration during resentencing although the amendment of the law that introduced Section 333(2) of the Criminal Procedure Code came after he was sentenced to death. It is my considered view that the law is applicable in resentencing of the petitioner.

19. I have considered all the necessary factors in resentencing given in the guidelines of the **Francis Karioko Muruatetu** decision.

20. The petition is merited and it is hereby allowed. The death sentence is hereby set aside and substituted it with twenty (20) years imprisonment to commence from 2/09/2007 being the date of arrest.

21. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 28TH DAY OF JANUARY, 2020.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for Respondent

Applicant present