REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

MISC.CRIMINAL APPL. NO.465 OF 2019

SMM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, SMM was convicted of the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The court held that the prosecution was able to prove that on 31st August 1994 at Dunga Road, Industrial Area in Nairobi, the Applicant with others not before court, robbed Gilbert Kariuki of Kshs.600,000/- and in the course of the robbery, killed one Kennedy Gituno. The Applicant was sentenced to death by the trial court. His appeal to the High Court was dismissed. Similarly too, his appeal to the Court of Appeal was dismissed. The conviction and the sentence was confirmed by the Court on 2nd July 2002. The death sentence imposed on the Applicant was later commuted to life imprisonment by Presidential decree. That would have been the end of the matter but for the window opened by the Supreme Court in **Francis Karioko Muruatetu -vs- Republic [2017] eKLR**. In the case, the Supreme Court declared mandatory death sentences unconstitutional. For those who were so sentenced, the Supreme Court remitted their cases back to the High Court for the purposes of resentencing after such convicts have been given an opportunity to mitigate their respective sentences.

The Applicant filed an application before this court seeking to be given an opportunity to mitigate and thereafter be resentenced. He stated that he has been in lawful custody for more than twenty-five (25) years since his arrest on 31st August 1994. He pleads with the court to take this period into consideration in determining the period that he is to serve. In his view, the period that he has been in prison is sufficient punishment. During the period of his incarceration, he has undertaken various courses that made him a better person. He had also become sick since being diagnosed in November 1994 as HIV positive. He was currently on retrovirals but had become sick with opportunistic infections. He has multiple abscesses due to reduced bodily immunity. The prison authorities noted that the Applicant had been recognized as a special stage prisoner due to his clean prison record and the fact that he had not offended against prison discipline. In his submission before court, the Applicant told the court that he had changed his behaviour and therefore should be given a second chance at life. He was arrested when he was young. He had aged while in prison. He therefore urged the court to favourably consider his application.

Mr. Momanyi for the State submitted that the Applicant was convicted after committing a robbery where a victim was killed. However, he urged the court to take into consideration the fact that the Applicant had been in prison for twenty-six (26) years. He left the court to determine the issue whether in the period of his incarceration, the Applicant had been sufficiently punished.

This court has carefully considered the submission made by the parties to this application. The Supreme Court in the **Francis Karioko Muruatetu** 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:

"25. GUIDELINE JUDGMENTS

25.1 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.""

Although the Supreme Court referred to a case of murder, this court is cognizant of the fact that the *ratio decidendi* equally applies in the case of the Applicant who was sentenced to what was stated then to be a mandatory death sentence. In **Joseph Kaberia Kahinga & 11 Others –vs- Attorney General [2016] eKLR,** the High Court sitting as a constitutional bench, held thus (at Page 27) when considering the question whether the petitioners' conviction under **Sections 296(2)** and **297(2**) of the **Penal Code** met the threshold of fair trial:

"Having considered the submission by both parties, the authorities cited in this judgment, together with the comparative laws we find and hold that the Petitioners have a case when they argue that the sub-sections of Sections 296 and 297 of the Penal Code are ambiguous and not distinct enough to enable a person charged with either of the offences to prepare and defend himself due to lack of clarity on what constitutes the ingredients of either charge. Article 50(2) of the Constitution proclaims what constitutes "a fair trial" when a person is charged with a criminal offence. We have already set it out herein above. We find and hold that all the persons that have been charged with and convicted of the offences of robbery and attempted robbery under Sections 296(1) and (2) and 297(1) and (2) of the Penal Code did not have the full benefit of the right to fair trial as provided under Article 50(2) *of the Constitution (and) Section 77(1) of the repealed Constitution."*

At page 36 the Court further held that:

"Having taken into consideration the above factors, we are of the considered view that the sections of the Penal Code upon which the Petitioners were charged and convicted, insofar as they did not allow the possibility of differentiation of the gravity of the offences in a graduated manner in terms of severity or attenuation, and the failure to give an opportunity for the consideration for the circumstances of the offender, rendered those sections i.e. Sections 204, 396(2) and 297(2) of the Penal Code deficient in terms of assisting those administering the justice system to be able to charge the offenders with the appropriate offences that will ultimately attract a proportionate sentence. It (is) in that context that the complaints by the Petitioners that the imposition of the death sentence as a one-stop contravened their fundamental rights to fair trial."

In the present application, the Applicant pleads with the court to take into consideration the period that he has been in lawful custody. In total, the Applicant has been in prison for twenty-five (25) years. According to the Applicant, the period of incarceration is sufficient punishment. He appears remorseful and has learnt that crime does not pay in the period that he has been in prison. He is a model prisoner as acknowledged by the prison authorities. He is ailing and requires daily medication to secure his health. This court is not oblivious of the fact that during the commission of the offence, a human life was lost. The family of the victim cannot get back their beloved. It is in that context that the sentence of the Applicant should be considered. The deceased was shot dead in the course of the robbery. The Applicant was a participant. This is a case where justice must be tempered with mercy.

This court is of the view that the sentence of life imprisonment that the Applicant is currently serving will not serve the ends of justice. The same is set aside. It is substituted by a sentence of ten (10) years imprisonment from today's date. It is so ordered.

DATED AT NAIROBI THIS 25TH DAY OF FEBRUARY 2020

L. KIMARU

JUDGE