REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CORAM: R. MWONGO, J.

CRIMINAL APPEAL NO. 10 OF 2017

(Being an appeal against the judgment dated 19th March, 2003 of Hon. M. Muya, SPM,

in Naivasha Criminal Case No. 396 of 2001)

JOSEPH NGUGI NJENGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant was charged and convicted for the offence of Robbery with violence contrary to **section 296 (2) of the Penal Code**. The particulars were that on 26th day of January, 2000 at Munyu Naivasha, Nakuru District of the Rift Valley province, jointly with another not before court, being armed with stones, robbed Lawrence Mwangi Gachoga one calculator and cash Kshs 2,300/= all of value of Kshs 3,150/= and at or immediately before or immediately after that robbery used actual violence to the said Lawrence Mwangi Gachoga.

2. Upon conviction, the appellant was sentenced to death on 19th March, 2003. The trial magistrate stated:-

> ***"There is no other sentence known by law. The accused is to suffer death as per law authorized. Right of appeal 14 days explained."***

3. The appellant, with leave of the High Court, Odero J, filed a petition of appeal on 21st March 2017 on the following grounds:

> *1. The trial magistrate erred in law and fact in convicting and sentencing the appellant yet the prosecution failed to prove the case beyond reasonable doubt.*
>
> *2. The trial magistrate erred in law and in fact by failing to note that at the time the offence was committed the appellant was not present.*
>
> *3. The trial magistrate erred in law and in fact by relying on contradictory statements and evidence of the prosecution witnesses.*
>
> *4. The trial magistrate erred in law and in fact by failing to consider the evidence of the appellant.*
>
> *5. The trial magistrate failed to comply with the mandatory provisions of Section 137 of the CPC thus rendering the charge defective.*

4. After waiting for a year the appellant on 22nd June 2018 filed a letter in the Registry in which he stated that he had first appealed in 2004 in High Court Criminal Appeal No. 94 of 2004, in Nakuru and had waited fourteen years without being heard. He also notified the court that his death sentence had been commuted to life imprisonment in 2009.

5. This file was first placed before me on 12th November 2019 after hearing of the appeal. The appellant stated he was ready to proceed orally *"kuongea na mdomo"*. He had not filed any submissions. The DPP also said she would make oral submissions.

6. At the hearing, the appellant stated that he had been a long time in prison waiting for his appeal. He explained that he had appealed to the High Court in Nakuru but was told the file was not available. Accordingly, he had filed a fresh appeal which was now in court. He then stated:

> ***"I was sentenced to death on 19th March 2003. I am at peace with the court's judgment. I throw myself to the court's mercy"***

Asked if he was challenging the lower court judgment, he said he was satisfied with the court's judgment.

7. The DPP opposed the appeal and made brief oral submissions in opposition demonstrating that all the elements of the offence had been proved.

8. However on the sentence the DPP conceded that the same was excessive and to that extent agreed with the appellant.

9. I have carefully perused the record of proceedings, I have also taken into consideration the fact that the accused declined to argue the appeal or to substantiate his rationale for his statement of each of the grounds of appeal.

10. In particular, on the sentence meted by the lower court I have noted as follows. After conviction, the prosecutor told the court there were no previous records. This was followed by "mitigation" and sentence under which heads the record shows as follows:

> ***"Mitigation : The court was biased against me.***
>
> ***Sentence : There is no other sentence known by law. The accused is to suffer death as per law authorized. Right of appeal 14 days explained"***

11. Clearly the record indicates that there was really no mitigation conducted. To that extent, there was no fair trial accorded the accused.

12. Further, imposition of the mandatory death penalty without reference to mitigation runs counter to constitutional guarantees enshrining respect for the rule of law as determined by the Supreme Court Case of **Francis Karioko Muruatetu & Another v. Republic [2017] eKLR (SC Petition No. 15 &16 of 2015)**

> ***"[58] To our minds, any law or procedure which when executed culminates in termination of life, ought to be just, fair and reasonable. As a result, due process is made possible by a procedure which allows the Court to assess the appropriateness of the death penalty in relation to the circumstances of the offender and the offence. We are of the view that the mandatory nature of this penalty runs counter to constitutional guarantees enshrining respect for the rule of law."***

13. Therefore, any court dealing with an offence in which the death penalty may be meted is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence. **Muruatetu** held:

> ***"[59] We now lay to rest the quagmire that has plagued the courts with regard to the mandatory nature of Section 204 of the Penal Code. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the Penal Code, unfair thereby conflicting with Articles 25 (c), 28, 48 and 50 (1) and (2)(q) of the Constitution."***
>
> ***....***
>
> ***"Article 27 of the Constitution provides for equality and freedom from discrimination since every person is equal before the law and has the right to equal protection and equal benefit of the law. Convicts sentenced pursuant to Section 204 are not accorded equal treatment to convicts who are sentenced under other Sections of the Penal Code that do not mandate a death sentence. Refusing or denying a convict facing the death sentence, to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation is clearly unjustifiable discrimination and unfair. This is repugnant to the principle of equality before the law. Accordingly, Section 204 of the Penal Code violates Article 27 of the Constitution as well."***
>
> ***"[53] If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. ……. Consequently, failure to individualise the circumstances of an offence or offender may result in the undesirable effect of 'over-punishing' the convict."***

14. Failure or refusal to hear a convict in mitigation on account of a mandatory death sentence is now considered an unlawful and discriminatory practice. The Supreme Court in **Muruatetu** held that in past cases:-

> ***"[45] We think that a person facing the death sentence is most deserving to be heard in mitigation because of the finality of the sentence."***

"[46] We are of the view that mitigation is an important congruent element of fair trial."

"Article 27 of the Constitution provides for equality and freedom from discrimination since every person is equal before the law and has the right to equal protection and equal benefit of the law. Convicts sentenced pursuant to Section 204 are not accorded equal treatment to convicts who are sentenced under other Sections of the Penal Code that do not mandate a death sentence. Refusing or denying a convict facing the death sentence, to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation is clearly unjustifiable discrimination and unfair. This is repugnant to the principle of equality before the law. Accordingly, Section 204 of the Penal Code violates Article 27 of the Constitution as well."

15. Which court should do the Resentence Re-hearing? The Supreme Court advised:

"[111] "It is prudent for the same court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners.

16. Factors that may be considered in Mitigation according to the **Muruatetu** case:

"[71] …, 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."

17. In light of the **Muruatetu** jurisprudence, I am of the firm opinion that the Appellant is entitled to a re-hearing on sentencing at which he may provide mitigational submissions to enable the court to determine the proportionate sentence to mete.

18. Accordingly I direct that the file shall be remitted back to the trial court for a re-hearing on sentence, and that the Probation Officer shall avail a report on the offender prior to that re-hearing.

19. Orders accordingly.

Dated and Delivered at Naivasha this 20th Day of February, 2020

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RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Ms Maingi for the State
2. Joseph Ngugi Njenga - Appellant present in person
3. Court Assistant - Quinter Ogutu