



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**MISC. CRIMINAL APPLICATION NO. 257 OF 2018**

**REPUBLIC**

**VERSUS**

**GRACE WAMBUI NJOROGE.....1<sup>ST</sup> ACCUSED**

**JOSEPH NJOROGE GIKONYO.....2<sup>ND</sup> ACCUSED**

**FRANCIS WAITHAK MUYA.....3<sup>RD</sup> ACCUSED**

**SAMMY MWANGI.....4<sup>TH</sup> ACCUSED**

**JUDGMENT ON APPLICATION FOR RE-SENTENCING.**

1. The four applicants filed separate applications seeking for re-sentencing. These are Miscellaneous Criminal Applications No. 305 of 2018, 306 of 2018, 102 of 2018 and 257 of 2018.

They have however been consolidated, Misc. Cr. Application NO. 257/ 2018 is the lead file.

2. The applicants were charged with various counts of **Robbery with Violence Contrary to Section 296 (2) of the Penal Code** which offences were committed between the period February 2001 and August 2001 along the Mai Mahiu – Naivasha road. They were convicted and sentenced to death as provided under the law on the 6/12/2001.

Their appeal against both conviction and sentence was dismissed on the 7/7/2006.

3. By their applications for re-sentencing following the **Supreme Court decision in the Muruatetu Case – Francis Karioko Muruatetu & another Vs. Republic (2017) e KLR**, they seek for reduction, variation or setting aside of the death penalty imposed on them by the trial magistrate.

It is noted that the death penalty was commuted to life imprisonment under the Presidential Power of Mercy conferred under **Article 133 of the Constitution.**

4. The applicants have urged the court to reconsider the circumstances as at the trial court's sentence, and their mitigating factors tendered before me.

The **Court of Appeal in William Okungu Kittiny Vs. Republic (2018) e KLR** while considering the matter of death penalty under **Section 296 (2) and 297 (2)** of the Penal Code held that the **Muruatetu decision applies Mutatis Mutandis to Section 296 (2) and 297(2)**; and further that the prescribed sentence thereof is a discretionary maxim, punishment but not unconstitutional as the Supreme Court did not outlaw the death penalty. In the case, the Court of Appeal remitted the matter for sentence re-hearing to the Chief Magistrate's Court.

5. However, the High Court has since exercised its original jurisdiction under **Article 165(3) (a) of the Constitution** to hear the resentencing applications. I shall cite a few, herebelow

6. In the **Misc. Criminal Application No. 64/2018, Kiarie Wanguha Vs. Republic (2018) e KLR** and **Benson Ochieng & another Vs. Republic (Nakuru High Court Misc. Application NO. 45 of 2018)** Prof Ngugi J rendered that the High Court can invoke its original jurisdiction under **Article 165 (3) (a) of the Constitution** and proceeded to hear the re sentencing application, including sentence rehearing under the Sexual Offences Act that provide for mandatory minimum sentences.

7. The Supreme Court in the **Muruatetu case** recommended and directed the Attorney General to set up a frame work to deal with sentence

– re hearing of cases relating to the mandatory nature of the death sentence. This is yet to happen.

8. I am persuaded that under **Article 165 (3) (a)**, the High Court may exercise its original jurisdiction to hear re sentencing applications.

9. The applicants tendered very spirited mitigation before me, and produced certificates and recommendation letters from the prison authorities to certify their conduct during the 19 years they have been in prison.

The mitigating factors range from being remorseful, reformation while in prison, young age when they committed the offences, realization that crime does not pay, and readiness to be law abiding citizens if released back to the society and to use the acquired skills to help themselves and others within their community.

I have considered the above, and decisions on the subject.

10. The Supreme Court in the **Muruatetu Case** gave guidelines for consideration.

These include:

- (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 – base 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.*

The above guidelines do not replace judicial discretion. They are advisory and not mandatory.

11. Under the **Judiciary’s Policy Guidelines 2016**, the sentence imposed must meet the following objectives:

- a) Retribution*
- b) Deterrence*
- c) Rehabilitation*
- d) Restorative Justice*
- e) Community Protection*
- f) Denunciation.*

In line with the **Muruatetu** decision, the court ought to consider, among other factors, the gravity and nature of the offence, as well as the peculiar circumstances and mitigation by each offender.

12. I have considered several decisions following the **Muruatetu** Case. Emerging jurisprudence in offences under **Section 296 (2) and 297 (2) of the Penal Code** is that the starting point ought not be less than 15 years, the rationale being that for the offence of simple robbery the penalty is 14 years. Thus in **Ibrahim Ali Halake Vs. Republic (2019) e KLR**, the court set aside life Imprisonment and substituted it with five years imprisonment considering that the applicant had served 15 years in prison.

13. In Kisumu, the **Court of Appeal in Paul Ouma Otieno Alias Collera and another Vs. Republic (2018) e KLR** sentenced the appellants to 20 years imprisonment where the robbery was aggravated.

Others are **Robert Mutashi Auda Vs. Republic, Nandi Criminal Appeal No. 247/2014**, the appellant had served 13 years in prison, that there were no injuries to the victims. The court reduced the sentence to the term already served of 13 years.

In **Richard Kiptum Yego Vs. Republic (2019) e KLR**, the court considered the 21 years the applicant had served in prison and rendered that the said period was sufficient retribution for the offence.

14. It has not escaped the court's mind that the applicants committed the robberies with violence for a period of seven months before the long arm of the Law caught up with them. They robbed their victims using dangerous weapons, and inflicted pain and injuries to them, including robbing them of their valuable goods and money. Fortunately, no loss of life was reported.

15. Having considered the guidelines on resentencing stated above, and the mitigating factors, as well as precedent and the emerging jurisprudence including the time the applicants spend in custody and prison being 19 years, I set aside the death sentence imposed on the applicants by the trial court, and substitute it with a sentence of twenty one years imprisonment to each of the applicants commencing from the date of the trial court's judgement, the 6/12/2001.

Orders accordingly.

**Delivered, signed and dated at Nakuru this 12<sup>th</sup> March, 2020.**

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**J.N. MULWA**

**JUDGE.**