



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.207 OF 2010

(An Appeal arising out of the conviction and sentence of Hon. A. Lorot (SRM) delivered on 6th April 2010 in Makadara Criminal Case No. 4232 of 2009)

EPHANTUS MWANGI WAIGUMO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Ephantus Mwangi Waigumo was convicted with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The trial court held that the prosecution had established to the required standard of proof beyond any reasonable doubt that the Appellant had on 15th October 2009 at Githurai 44 Estate in Nairobi County, jointly with others not before court, while armed with a toy pistol, robbed Robert Odeke Odede of Kshs.2,500/- and during the time of such robbery threatened to use actual violence to the complainant. The Appellant was sentenced to death.

Aggrieved by this decision, the Appellant filed an appeal to this court. The Appellant's appeal was heard by Mbaru and Rika, JJ. The court confirmed the conviction. However, the death sentence that was imposed was set aside and substituted by an order of the court directing that the Appellant be held in custody at the President's pleasure. However, following the Supreme Court decision of **Republic vs Karisa Chengo & 2 Others [2017] eKLR** which declared Judges of courts of equal status under **Article 162(2)** of the **Constitution** lacked jurisdiction to hear Criminal Appeals, the Appellant's appeal was subsequently listed afresh for retrial after the above decision was nullified.

When the Appellant appeared before this court, he abandoned his appeal against conviction and instead requested the court to resentence him in accordance with the directions issued by the Supreme Court in the case of **Francis Karioko Muruatetu -vs- Republic [2017] eKLR**. Having opted to pursue this path, the court ordered a resentence report to be prepared by the probation office so that the court can have information related to the social circumstances of the Appellant before resentencing him. The Appellant gave his mitigation and urged the court to consider the period that he had been in lawful custody before resentencing him.

It became apparent that during a substantial part that the Appellant has been in lawful custody, he has psychiatric issues which flares on and off. At the time he made his submission before court, the court requested the Appellant to avail members of his family so that they could be interviewed for the purpose of preparation of a resentence report. The elder brother of the Appellant Joseph Kamau Waigumo presented himself before the court. He confirmed that the Appellant's psychiatric condition had tremendously improved. The family was ready to receive him back if his custodial sentence was to be reviewed.

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.”

In the present appeal, the issue for determination by this court is whether the Appellant established a suitable case for this court to appropriately resentence him. As stated earlier in this Judgment, the Appellant abandoned his appeal against conviction. Instead he opted for the option to be resented in accordance with the Muruatetu decision. According to the social report filed in court on 12th February 2020, the Appellant suffers from a psychiatric condition. He has been under treatment while in prison. He has been treated on various occasions at Mathare Mental Hospital. The family of the Appellant attributed this condition to drug abuse and social issues related to his parents separating when he was very young. He is still undergoing treatment while in prison.

The issue that this court has had to grapple with is whether, if the resentence is determined in the Appellant’s favour, the Appellant will not be a danger to the society that he will be released to. The family of the Appellant have indicated that they are willing to welcome him home. The trigger events that led to the Appellant suffering the mental condition appear to have been resolved. The social inquiry report states thus:

“Your Lordship, before you is a 40 year old male arrested and convicted for the offence of robbery with violence contrary to Section 296(2) of the Penal Code. He was committed to prison in 2010. His siblings indicate that his mental health has tremendously improved in comparison to the time he was arrested. His brother expressed his joy at the considerable change he can see in him and even says he can now communicate well. This was affirmed by an interview conducted with the offender. Even though he is still slightly delusional, my inquiry revealed that he is responsive to the treatment he has been receiving. He was able to express himself coherently and can well coordinate as he narrates events. He yearns to go home and even expressed his desire to get married and settle down. He regrets his actions and pleads for a second chance to make amends. He feels he wasted much time in incarceration, a clear indicator that he is gradually regaining his cognitive equilibrium. He has a supportive family and this is essential in enabling him resettle into the community. In 2013 he met his father whom he had not known hitherto, a factor that has considerably assisted him in regaining mental stability. He even converted to Islam to identify with him. This has aided in addressing the identity crisis which was evident during my interview with him. It emerged that his father’s absence compromised his emotional security. The offender has been fully accepted by his family. His siblings have positive regard for him and have been visiting him in prison. His mother even put up accommodation for him should he be released. They promise to facilitate his visits to Mathare Mental Hospital to ensure he fully recovers. Area administration express no fears over his release. Based on the information contained herein the honourable court is better informed in dispensing with the matter at hand.”

From the above report, and having interviewed the brother of the Appellant, and taking into consideration that the Appellant has been in lawful custody for more than ten (10) years, and further, taking into consideration the nature and circumstances of the offence that he was convicted of, this court formed the view that the Appellant has made a proper case to be favourably resented.

In the premises therefore, the order that the Appellant be held at the President’s pleasure is set aside and substituted by an order of this court commuting the Appellant’s custodial sentence to the period served. The Appellant is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. He shall be released into the custody of his elder brother, Joseph Kamau Waigumo. It is so ordered.

DATED AT NAIROBI THIS 5TH DAY OF MARCH 2020

L. KIMARU

JUDGE