



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

PETITION NO. 10 OF 2019

CHARLES MAINA GITONGA.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

RULING

INTRODUCTION

1. The petitioner Mr. Charles Maina Gitonga filed the petition on 14th March 2020.
2. The petition is premised on the grounds that pursuant to the Supreme Court decision in the Case of **Francis Muruatetu & Others –v- Republic & Others (2017) eKLR** on the issue of mandatory death sentence. These grounds are:-

- a. That the court receives his mitigation for consideration of an appropriate sentence other than the mandatory death sentence
- b. That the court considers the period served in remand after sentencing from 18th October 2010 on a death sentence passed on 3.9.2011 that was later commuted to life imprisonment.
- c. He has mitigated that he was remorseful and had reformed following various rehabilitation workshops at the prisons.
- d. He also mitigated that he was a first time offender and that his family was willing to reintegrate him back to society.

3. The Petitioner sought the following orders and declarations:

- a. That the sentence be set aside, and time served be deemed sufficient sentence.
- b. To be set free.

STATEMENT OF THE FACTS

- i. The background of this petition is that in Wanguru P.M's Court Criminal Case No.769 of 2012, the petitioner was on the 1st of November 2010 jointly charged with others on the count of robbery with violence contrary to **Section 296 (2) of the Penal Code**.
- ii. He was found guilty on the count and sentenced to death on 3.9.2011. The petitioner appealed against sentence and conviction vide Kerugoya High Court Criminal Appeal No. 191 of 2013. The appeal was dismissed on 14.7.2014. The conviction and sentence of robbery with violence was upheld.
- iii. The petitioner appealed again at the Court of Appeal in Nyeri vide Criminal Appeal No. 78 of 2014, the appeal was also dismissed on 7.6.2017.
- iv. In the present petition the petitioner submits that that he seeks leniency and appropriate sentence from the court.
- v. The state through its submissions dated 15th May 2020 submitted on the principles that should guide the court as set out in the

Supreme Court decision in Francis Muruatetu –v- R and Others.

vi. The state proposed a sentence of 20 years as sufficient considering the circumstances of the robbery and the mitigating factors.

LIST OF ISSUES

4. The issue that the court has to determine include:

i. Whether the petition on resentencing has merit.

ANALYSIS

i. Whether the petition on resentencing has merit

5. The Petitioner seeks resentencing in view of the Supreme Court Petition 15 and 16 of 2015 Francis Karioko Muruatetu and Wilson Thirimbi Mwangi vs Republic wherein the Supreme Court held the view that that the mandatory death sentence was unconstitutional as it denied the accused person the right to a fair trial an absolute right under Article 25(c). of the Constitution.

6. The mandatory nature of the sentence inhibited the exercise of judicial discretion at the sentencing phase where mitigating factors ought to be considered. Thus denying the accused person a right to fair trial by failing to individualize an appropriate sentence to the relevant aspects of the character and record of each defendant, and consider appropriate mitigating factors. The courts view was that this failure was a contravention of the accused person's right to dignity as provide in Article 28, as they were subjected all to the same mandatory sentence with no regard to the circumstances of the crime, the diverse character of the convicts and the mitigating factors.

7. The case sought to revise the mandatory aspect of the death sentence, the decision did not outlaw the death penalty which is still applicable as a discretionary maximum punishment.

8. The petitioner in this case was accorded an opportunity to mitigate. He prayed for forgiveness. The trial magistrate did consider the mitigating circumstances in sentencing, but noted the brutal nature of the offence, he also noted the mandatory nature of the sentence, as he sentenced him to Death.

9. The Muruatetu precedent has been the basis of most resentencing petitions. Article 23 (1) of the Constitution gives the High Court jurisdiction to hear and determine the applications on infringement of rights and freedoms under the Bill of Rights. The Muruatetu case provides guidelines with regard to mitigating factors applicable in a re- sentence hearing for the conviction of a murder charge, they include:

(a) the 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.

10. These guidelines do not replace judicial discretion as they are advisory and not mandatory, the same can be applied to other offences with the death penalty.

11. The Sentencing Policy Guidelines, 2016 (“the Guidelines”) provides that the sentence imposed must meet the following objectives in totality;

(a) Retribution: To punish the offender for his/her criminal conduct in a just manner.

(b) Deterrence: To deter the offender from committing a similar offence subsequently as well as discourage other people from committing similar offences.

(c) Rehabilitation: To enable the offender reform from his criminal disposition and become a law-abiding person.

(d) Restorative justice: To address the needs arising from criminal conduct such as loss and damages.

(e) Community protection: To protect the community by incapacitating the offender.

(f) Denunciation: To communicate the community's condemnation of the criminal conduct.

12. In *John Kirema Kaibi v Republic Meru High Court Petition No. 40 of 2018 eKLR [2018]* where the petitioner sought for resentencing of his Murder conviction. The petitioner's sentence had already been commuted by the Presidency's power of clemency, from the death penalty to life imprisonment. The petitioner sought for a resentencing for the offence. The court considered his mitigating factors and imposed on him a sentence for 13 years.

13. In this case the petitioner's sentence had also been commuted to life sentence. Further from his submissions and the submissions of the state the following can be deduced:

i. The offence of robbery with violence had an aggravating factor as it resulted in the fatality of the victim;

ii. The petitioner has been punished for the offence he committed and has shown that he is reformed having trained in several rehabilitation programs while in custody for the past 10 years.

iii. The petitioner was young at the time of the commission of the offence and a first time offender, he also showed remorse at his mitigation;

14. In *Eldoret Court of Appeal Criminal Appeal No. 22 of 2016 [2018] eKLR: Wycliffe Wangusi Mafura -vs- Republic*, the Court of appeal allowed the appeal on sentence for robbery with violence in an aggravated offence where the accused persons were armed with pistols. The sentence was reduced to 20 years.

15. In *Paul Ouma Otieno & another v Republic [2018] eKLR* The offence was aggravated because the appellants were armed with guns and killed one of the victims, the father to the complainant. The High Court at Kisii held that a sentence of 20 years' imprisonment was adequate to serve the interest of justice.

16. In *Cyprian Ingira Ikobwa v Republic [2019] Eklr* the High Court at Kakamega resented the appellant, who was charged with robbery with violence to a term of 18 years. In this case the assault was also aggravated by use of a firearm, but the Judge took into consideration the rehabilitation of the appellant and the time served in remand.

In this case victim lost his death. The offence is aggravated.

CONCLUSION

17. From the foregoing reasons, I find the petition has merits as the sentence handed down was a mandatory life penalty.

18. Having taken into consideration the circumstances of this case and the authorities I have cited, a sentence of Twenty Five(25) years is appropriate. The sentence be computed from 18/10/2010 the date he was arraigned in court and remanded in custody during the entire trial. **Section 333(2) Criminal Procedure** refers.

Dated at Kerugoya this 30th day of July 2020.

L. W. GITARI

JUDGE