REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL PETITION NO. 85 OF 2018, 100 OF 2018 AND 26 OF 2019

JACOB MWITHALIE...1ST PETITIONER

KIBIKU M' IKIAMBA ALIAS NGUYO..................2ND PETITIONER

NAANA M. AMERU..3RD PETITIONER

VERSUS

REPUBLIC..RESPONDENT

JUDGMENT

1. The petitioners herein were jointly charged in **MERU HCCRC NO. 6 OF 2006** with the offence of murder contrary to **section 203 as read with section 204 of the Penal Code, Cap 63 Laws of Kenya.** The particulars were that on the 19th day of March 2005, In Meru District within Eastern Province, the appellants jointly with others not before court murdered **John Mugambi.**

2. The trial was conducted by **Lessit. J** who convicted the petitioners of murder and sentenced them to death. The petitioner's appealed against this court's decision in CA Criminal Appeal No, 303 of 2011. The **Court of Appeal (Visram, Koome & Otieno- Odek JJA)** heard the appeal and dismissed it.

3. The petitioners have now applied for resentencing pursuant to the decision of the Supreme Court **in Francis Karioko Muruatetu & another v Republic [2017] eKLR** more specifically paragraphs 109 to 111 where the Supreme Court statedas follows;

> **"[109] Here in Kenya, in the case of Mutiso, the Court of Appeal stated [para 38]:**
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> **"In all the circumstances of this case, the order that commends itself to us is to remit the case to the superior court with the direction that the court records the prosecution's as well as the appellant's submissions before deciding on the sentence that befits the appellant."**
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> **[110] We agree with the reasoning of the Courts in the authorities cited and the submissions of the 1st petitioner, the DPP and the amici curiae. Comparative jurisprudence is persuasive and we see no need to deviate from the already established practice. The facts in this case are similar to what has been decided in other jurisdictions. Remitting the matter back to the High Court for the appropriate sentence seems to be the practice adopted where the mandatory death penalty has been declared unconstitutional. We therefore hold that the appropriate remedy for the petitioners in this case is to remit this matter to the High Court for sentencing.**
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> **[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. For the avoidance of doubt, the sentencing re-hearing we have allowed, applies only for the two petitioners herein. In the meantime, existing or intending Petitioners with similar cases ought not approach the Supreme Court directly but await appropriate guidelines for disposal of the same. The Attorney General is directed to urgently set up a framework to deal with sentence re-hearing of cases relating to the mandatory nature of the death sentence - which is similar to that of the petitioners in this case……."**

4. On 23/6/2020 the respondent was given 14 days to reply to the petitions but has not filed any reply. I will nonetheless determine the petitions on merits.

5. The petitioners have served 13 years in jail. They all submitted that they are remorseful for their actions, have rehabilitated and are ready to serve the nation and their communities. There are no adverse pre-sentencing reports presented. However, for a court to properly analyse the mitigating circumstances, it must be well-appraised of the facts of the case.

6. The Supreme Court in the **Francis Karioko Muruatetu** (supra) gave the following guidelines in resentencing:

> **“[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:**
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> > **a. age of the offender;**
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> > **b. being a first offender;**
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> > **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:**
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> **“25. GUIDELINE JUDGMENTS**
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> **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.”**

7. Inter alia, circumstances of the commission of the offence are relevant consideration. Both the trial and appellate court found that the petitioners took part in a *mob justice* whereby they slashed the deceased using a slasher and a panga. The deceased was suspected of stealing miraa in one of the farms within Kabachi Location. The petitioners were positively identified by three of the prosecution witnesses who saw them participate in the act of slashing and cutting the deceased.

8. The court has lamented before that ‘’mob justice’’ is not only unlawful but uncouth, barbaric and savage act which has no place in this century. In fact, its true character is ‘’mob injustice’’ as it denies the victim the right to protection and benefit of the law, condemns and takes away the life of the victim without trial, and perpetuates crime in society. It is most loathed and unlawful method to mete out justice. Unfortunately, it has become prevalent in many parts of the Republic and more specifically within this jurisdiction, it is administered on the pretext of protecting miraa. Regrettably, those who administer mob injustice end up taking the law on their hands and committing worse crimes: what a shameful and foolish adventure? See also how other courts have also expressed utter disgust on this barbaric practice; for instance, **Republic v Kelvin Amata Omboto & another [2017] eKLR** that;

> **“I note that he (deceased) was clearly a victim of what is often touted as mob justice but what should ideally be "mob injustice"………… Mob justice is a very primitive and barbaric method of meting out justice that should be discouraged and condemned in the strongest terms possible as it has no place in a civilized society that observes the rule of law.”**

9. The fact that a person, without provocation, sets upon another in a mob justice, slashes the victim with a slasher or panga with brutal force or in multiple times is a relevant factor in sentencing. Such is a beastly act and reminds of the *ruffians or Mohocks* of the yore- as they were called- about whom it was written:

> **‘’…..The particular talents by which these misanthropes are distinguished from one another consist in the various kinds of barbarities which they executed upon their prisoners[1]…...**

10. In addition, according to the Francis Karioko Muruatetu case and the sentencing policy, the court should also consider the degree of gravity of the offence that the applicants committed and the mitigation of the applicants.

11. The offence is a serious one. However, I should consider whether the circumstances of the accused during his/her incarceration have changed for the better or worse. (See, **Republic v Muema Makali [2019] eKLR**). I have considered the mitigation of the petitioners herein. Whereas the petitioners stated that they have reformed and are remorseful of their actions; and whereas rehabilitation of offenders is a noble objective of punishment, but so also is true of deterrence especially in crimes such as ‘’mob injustice’’. This portends a delicate balance of the competing objectives. Of significance, the circumstances of this case expels death sentence and life sentence as being too final, and harsh respectively, to any possible rehabilitation. Accordingly, I set aside the death penalty imposed on the appellants and the subsequent

commutation of life sentence. In lieu thereof, I sentence each one of them to serve 20 years in prison. The sentence shall commence from the date of their original sentence. A copy of this ruling shall be placed on each of the files stated in the heading. It is so ordered.

Dated, signed and delivered at Meru this 29th day of July 2020

F. GIKONYO

JUDGE

STEELE: *Spectator*, No. 324