



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERUGOYA**

**PETITION NO. 21 OF 2019**

**JESEE MINJA KARAGU.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The Petitioner Jessee Minja Kiragu has filed this petition under **Article 165 and Article 25 (a)(c)(d) of the Constitution**. It is brought pursuant to the Supreme Court of Kenya decision in Francis Kioko Muruatetu and Another –v- Republic which declared the mandatory death penalty under **Section 296(2) of the Penal Code** unconstitutional. It is the contention by the petitioner that this court has jurisdiction to consider the petition. The petitioner depones that he was charged with the offence of robbery with violence contrary to **Section 296(2) of the Penal Code** and sentenced to death. Later the sentence was commuted to life imprisonment. He has exhausted his channels of appeal in the High Court vide High Court Criminal Appeal No. 29/1999 and Court of Appeal vide Criminal Appeal No. 249/2003. He urges the court to consider the reference and fresh sentencing process to impose a lesser offence other than that of death.

2. The appellant was convicted on 15/1/1999 and sentenced to death. He has filed his mitigation stating that he has reformed following the long incarceration. He has gone through rehabilitation courses and has acquired skills and knowledge. That he had just gotten married to a wife with whom they had one child. That at the time of his arrest he was only 21 years old and a first offender. He owns up to his mistake and seeks forgiveness from his family and the victim.

3. The State did not oppose the petition. He proposed a sentence of Twenty Five (25) years as the victim was seriously injured. He however left the matter at the discretion of the Court.

4. The brief background of this case is that the petitioner was charged in the Senior Resident Magistrate's Court at Kerugoya with the offence of robbery with violence contrary to **Section 296(2) of the Penal Code**. It was alleged that on the night of 22/10/98 the petitioner jointly with others not before court while armed with pangas, rungs and axes, robbed Susan Wanjiku of cash Kshs 10,200/- and at or immediately after the time of such robbery used actual violence.

5. The evidence tendered was that the complainant was a business lady who used to do business of buying and selling cereals at Makutano market.

6. On the material night she had Kshs 10,200/- which she had hidden under the pillow and at the foot of the bed. At 2.00 am she was woken up by a loud bang at the door and realized that the door was broken and some people were already inside her house. Three men entered her bedroom. She screamed for help but was hit on the head with an iron bar. The robbers demanded money. She told them where the money was. They took the money then ordered her to remove her address. She did so and they tore her knickers. They ordered her to spread her legs where upon she resisted and was cut on the left hand. The robbers forced coca cola bottle in her vagina and she sustained injuries as the coca cola bottle was being pushed into her body. The robbers then left. Neighbours assisted to take her to hospital and to report the matter to the police.

7. The complainant recognized the petitioner as one of the robbers as he was from same village and had seen him before the incident when he bought grains from her. She recognized him as the person who inserted the 300ml Coca cola bottle inside her private part. The appellant was convicted. He appealed to the High Court and Court of Appeal but the appeals were not successful.

8. The issue which arises for determination is resentencing.

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 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**.

9. 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.

10. From the record of the trial Magistrate the appellant was not given an opportunity to mitigate. The Trial Magistrate considered that the petitioner and others committed a beastly act during the robbery and proceeded to hand down the mandatory death sentence.

11. 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.**

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

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 communicates the community's condemnation of the criminal conduct.**

13. 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.

14. In this case the petitioner's sentence was commuted to life imprisonment. The offence had an aggravating factor as the petitioner inserted a bottle in the vagina of the victim causing serious injuries. The petitioner has been in prison for Twenty One years. At the time he committed this offence he was 21 years old.

15. 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.

16. 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.

17. 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.

18. **Conclusion.**

For the reasons I have stated, I come to the conclusion that the petition has merits as the sentence handed down was mandatory death penalty.

19. In view of the circumstances of this case and the persuasive decisions which I have cited , I find that a sentence of Twenty Five years would be appropriate. The sentence be computed from 15/1/1999.

**Dated at Kerugoya this 13<sup>th</sup> August 2020.**

**L. W. GITARI**

**JUDGE**