REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

PETITION NO. 8 OF 2019

IN THE MATTER OF SUPREME COURT DECISION: PETITION NO. 15 OF 2015

(FRANCIS KARIOKO MURUATETU)

IN THE MATTER OR ARTICLES; 22, 23,165, 50(1) 19 (1) (2)& (3), 20(1) (2), (3) & (4),

21 (1), 24 (1), 25 (c), 26 (1), 27 (1), 28, 47 & 48 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTIONS 297OF THE PENAL CODE,

216 & 329 OF THE CRIMINAL PROCEDURE CODE

AND

IN THE MATTER OF MACHAKOS HIGH COURT CRIMINAL APPEAL NO. 49 OF 2009

AND

IN THE MATTER OF MACHAKOS LAW COURT CRIMINAL CASE FILE NO. 52 OF 2009

BETWEEN

REUBEN MUANGE NDAMBUKI.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

(Remission of matter to the High Court for re-hearing on sentence only)

JUDGMENT

1. The Petitioner was convicted for the offence of attempted robbery with violence under section 297(2) of the Penal Code. The particulars were that on 26/01/2009 at Wotetownin Makueni district within

Eastern province the Petitioner jointly with others not before court while armed with dangerous weapons namely pistol, panga and hammer, attempted to rob one Reginah Mumbua Martinand during such attempt threatened to use personal violence on **Reginah Mumbua Martin.**

2. In his undated petition filed on 04/12/2019, the petitioner is basically seeking a re-hearing of his sentence *to wit*death penalty and has grounded the petition on the Supreme court decision in Petition No. 15 of 2015; **Francis Muruatetu Karioko**.

3. The State has opposed the petition through a replying affidavit sworn by Ann Penny Gakumu on 28/05/2020. She deposes that the trial Magistrate considered all the mitigating factors and the provisions of section 297 of the Penal Code in imposing the mandatory death sentence. She deposes that the sentencing guidelines and principles do not replace judicial discretion hence the mandatory death sentence for

an offence of attempted robbery is very much in order. Further, she avers that the trial Magistrate did not cause any error, omission or irregularity to warrant interference with the mandatory death sentence.

4. The petition was canvassed through written submissions.

Petitioner's Submissions

5. The petitioner submits that he was sentenced to death for the offence of attempted robbery with violence on 31/03/2009 and his subsequent appeals to the High Court and Court of Appeal were dismissed.

6. He submits that he deeply regrets the occurrence of the incident and has taken time to reflect on his past actions and the pain they have caused to the victim and his young family.

7. He has urged this court to take into account the factors that led to the commission of the offence and relies on **Criminal Appeal No. 12 of 2013** where the Court held that;

> *"From the said mitigation, the Appellant was a first offender, had a young family and said to have reformed and the items robbed were of modest value. The Appellant has already paid his debt to the society and learnt his lesson."*

8. He submits that he was 28 years old at the time of his arrest and made wrong decisions due to his young age, lack of permanent occupation and responsibilities. That the circumstances pushed him to make a fatal decision which has cost him a huge part of his youth and time to take care of his family. It is also his submission that he was a first offender.

9. He submits that he has undertaken rehabilitative programs while in prison and urges the court to consider the same. Further that he attained a certificate in Muslim education and acknowledges that spiritual growth is the utmost factor of rehabilitation as it creates a complete person who has the fear of God. It is also his submission that he trained in beadwork and has acquired a skill that he can use to sustain his family.

10. The petitioner has also urged the court to consider the circumstances of the offence. He submits that the victim was not injured and did not lose property. He relies *inter alia* on **Kakamega H.C Petition No. 151 of 2012; Sebastian Okwero Mrefu –vs- Republic** where in sentencing the Appellant to time served of 11 years, Chitembwe J expressed himself as follows;

> *"In the current situation, there were several robbers. The evidence shows that the petitioner was not armed with any weapon. He was arrested with the keys of the stolen vehicle a few hours after the robbery. All the robbed vehicles were recovered."*

11. Further, he submits that at the time of his arrest, capital offences were not bailable hence he has been in custody since 26/01/2009. He has urged this court to consider the time already served. He relies on section **333(2)** of the **Criminal Procedure Code (CPC)** which provides that;

> *"Subject to the provisions of section 38 of the, every sentence shall be deemed to commence from and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this code, provided that where the person sentenced under section (1) has, prior to such sentence, been held in custody, the sentence shall take into account the period spent."*

Respondent's Submissions

12. Through the senior prosecution counsel, Ann Penny Gakumu, the State submits that section 297 of the Penal Code is very particular and precise and does not provide an alternative sentence. She submits that the section gives a mandatory death sentence and does not give a lesser or lenient penalty. It is also her submission that the penalty is proportionate to the offence charged.

13. She contends that the trial was conducted with a lot of fairness where the provisions of section 211 of the CPC were clearly explained to the petitioner before being put on his defence. That the petitioner was also given ample time and opportunity to cross examine all the prosecution witnesses. It is also her submission that when the petitioner was first arraigned in court, the trial magistrate ensured that he understood the substance of the charge and all its elements.

14. Further, she submits that during the sentencing process, the trial Magistrate took into consideration all the mitigating factors and the provisions of section 297 of the Penal Code. That the trial Magistrate ensured that the petitioner was of sound mind before commencement of the trial.

15. Counsel argues that none of the Petitioner's Constitutional rights were violated and that the trial was conducted expeditiously, efficiently, lawfully, reasonably and procedurally

16. It is her submission that the **Muruatetu** decision does not make the mandatory sentences unconstitutional but outlines the court's discretion when meting out such sentences.Accordingly, she contends that the petitioner doesn't stand a chance to benefit from it. Further, she submits that the petitioner is not automatically exonerated from the death penalty just because he has quoted and relied on the **Muruatetu** decision.

Analysis and determination

17. I have noted that Ms. Gakumu has repeatedly referred to the 'mandatory death sentence'. It is noteworthy that while the death penalty was never declared unconstitutional, the Supreme Court of Kenya, in the Muruatetu case, declared the mandatory aspect of the death sentence unconstitutional *(emphasis mine)*.In other words, the death sentence is still legal but not mandatory and this essentially gives discretion to Judicial officers to mete out alternative sentences besides the death sentence to convicts of capital offences.

18. Further and contrary to the submissions by the State, the decision in the Muruatetu case is meant to benefit convicts of capital offences whose cases were finalized before the decision was made. That is why despite exhausting all their appeals, such convicts are allowed to apply for sentence re-hearing so that the Judicial officers can check whether the death penalty/life imprisonment was deserved or otherwise. Accordingly, the State should acknowledge that the Muruatetu decision paved way for convicts sentenced to death to have their matters remitted to the High court for sentence rehearing in deserving cases.

19. According to The *Sentencing Policy Guidelines, 2016* ("*theGuidelines*") published by the Kenya Judiciary, 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.

20. The guidelines were published before the decision in the Muruatetu case and so on they did not provide for mitigating circumstances for offences which attracted the mandatory death sentence. To avoid a *lacuna,* the Supreme Court in the **Muruatetu case** gave the following guidelines to be considered by courts as mitigating factors during sentence re-hearing in a murder charge.

"*[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 bound 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."

21. Although the Supreme Court referred to a murder charge, the guidelines are applicable to other cases where the mandatory death sentence *(as it was)* had been imposed. This is in line with the Court of Appeal judgment in **William Okungu Kittiny –vs- Republic ([2018]**

eKLR) where it was stated:

> *"...The Appellant was sentenced to death for robbery with violence under Section 296 (2). The punishment provided for murder under Section 203 as read with Section 204 and for robbery with violence and attempted robbery with violence under Section 296 (2) and 297 (2) is death. By Article 27(1) of the Constitution, every person has inter alia, the right to equal protection and equal benefit of the law. Although the Muruatetu's case specifically dealt with the death sentence formurder, the decision broadly considered the constitutionality of the death sentence in general...From the foregoing, we hold that the findings and holding of the Supreme Court particularly Paragraph 69 applies mutatis mutandis to Section 296 (2) and 297 (2) of the Penal Code. Thus the sentence ... is discretionary ..."*

22. In the spirit of uniformity and fairness, emerging jurisprudence suggests that when dealing with sentence re-hearing in robbery with violence cases, the starting point should be 14 years. This is informed by the fact that the felony of robbery, which is a lesser offence than robbery with violence, attracts a term of imprisonment for 14 years. I have looked at sentences which have been imposed by other courts following the decision in the Muruatetu case.

23. In **Nairobi Misc. Cr. Application No. 430 of 2015; Simon Kimani Maina –vs- Republic [2019] eKLR**, the Applicant was convicted for the offence of attempted robbery with violence and sentenced to life imprisonment. The court considered that he was 18 years at the time of his arrest and the victims were not injured during the failed robbery attempt. It also considered the fact that he was a first offender, that he was not the one with the AK-47 rifle and that he appeared remorseful. He was resentenced to the time served of 14 years.

24. In **Nairobi Misc. Cr. Application No. 393 of 2018; Joseph Kaberia Kainga –vs- Republic [2019] eKLR** the Applicant was convicted for the offence of attempted robbery with violence and sentenced to death. He was 27 years old at the time of his arrest and had been in custody for 16 years. In resentencing him to the time served, the court noted that the victims were not injured during the failed robbery attempt, that the probation officer's report was positive, that the Appellant appeared to have been rehabilitated during his period of incarceration and that he was remorseful.

25. In **Nrb Misc Criminal Appeal No.s 81 & 82 of 2009; Martin Bahati Makoha &Another vs Republic [2018] eKLR**, the Appellants were convicted for the offence of robbery with violence and sentenced to death. The victim sustained a cut wound on the left thumb and throat and his injuries were classified as harm. The court was of the view that the circumstances under which the offence was committed were not so grave to warrant a death penalty. The Appellants were resentenced to the time served of 10 years and 2 days

26. A summary of the case before the trial court is that the victim (Pw1) was at her place of work when she was accosted by the Petitioner and another demanding for money. Her screams attracted people who came and beat the Petitioner. His companion escaped. A hammer (EXB1) was recovered from the Petitioner as per the evidence of Pw3. He was rescued by the police who included Pw2 the Makueni deputy OCS.

27. The prosecutor stated that the Petitioner was a first offender.In mitigation, the Petitioner stated as follows; *"I pray that this court shows mercy."*

28. I have noted that the petitioner lied on oath before the trial court by stating that he owned a retail shop yet his submissions before this court are that he committed the offence because he was young, had responsibilities and lacked an occupation. I have also noted that the certificate in Muslim education is not attached to his submissions as claimed. Be that as it may, I have considered the petitioner's age at the time of his arrest and the fact that he was a first offender. I have also noted that the victim was not injured during the failed robbery attempt and that the Petitioner is remorseful. It is also probable that he has gone through some form of rehabilitation during his period of incarceration. He has been in jail for 11 years and 8 months which is approximately 12 years.

29. Taking all these factors into consideration, I find the Petition to have merit. I set aside the death sentence and substitute it with a sentence of the period already served. He will be released forthwith unless lawfully held under a separate warrant.

Orders accordingly.

Delivered, signed & dated this 24th day of September 2020, in open court at Makueni.

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H. I. Ong'udi

Judge