REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CONSTITUTIONAL PETITION NO. 52 OF 2019

JOHN KARIUKI NDICU.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Petitioner in person

Mr. Alenga for the state

RE-SENTENCING

In 1997, the petitioner herein was initially charged, convicted and sentenced to life imprisonment for the offence of Robbery with violence contrary to Section 296 (2) of the Penal Code. He was aggrieved by the decision of the lower court and subsequently appealed to both appellate courts where the same was dismissed and the death sentence was therefore confirmed. In 2009, the death sentence was commuted to life imprisonment by an administrative fiat.

The petitioner has now come for re-sentencing pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another –Vs- Republic Petition No. 15 of 2015 (2017) eKLR** whereby the mandatory death sentence for the offence of murder was declared unconstitutional. As a corollary, in the case of **William Okungu Kittiny –Vs- Republic Kisumu Criminal Appeal No. 56 of 2013 (2018) eKLR**, the Court of Appeal applied the Muruatetu decision **Mutatis Mutandis** to the provisions of Section 296 (2) of the Penal Code which imposes a mandatory death penalty for the offence of robbery with violence. The petitioner is seeking that the life imprisonment sentence meted out on him be set aside and for the court to impose an appropriate sentence.

The Court is informed that the record of the trial proceedings cannot be located and the facts extract of the factual matrix of the case is unavailable. On the 12th of September 2019, the orders were made by **Lady Justice Njoki** directing the petitioner to file a fresh petition due to the lack of the commissioner of oaths stamp on the supporting affidavit and unavailability of the trial records. The Petitioner averred that he has done everything within his scope to trace **Criminal No. 1124 of 1997 (Malindi)** which has proved futile.

I have noted that spirited and extensive efforts to trace the trial record were made, but the file has not been found. As observed in the Malawian Case of **Mtambo & Others v. The Republic, MSCA Criminal Appeal No.1 of 2012** (unreported), which I am inclined to associate myself with, the mere fact that the whole record is missing ought not to deprive an applicant of an opportunity of the hearing of the sentence re-hearing in respect of that convict. The petitioner's petition is therefore allowed despite the lack of the record of proceedings.

In sentencing an offender, the sentence meted out on an accused person must commensurate to the moral blameworthiness of the offender and that the court should look at the facts and the circumstances of the case in its entirely before settling for any given sentence**. (See Ambani Vs R)**. The Court of Appeal **Thomas Mwambu Wenyi Vs Republic (2017) eKLR** cited the decision of the Supreme Court of India in **Alister Anthony Pereira Vs State of Mahareshtra** at paragraph 70-71 where the court held the following on sentencing:-

> ***"Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including***

social interest and consciousness of the society for award of appropriate sentence."

In **Francis Karioko Muruatetu & Another –Vs- R (Supra)** the Supreme Court stated the following guidelines as mitigating factors 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 and

(h) any other factor that the court considers relevant.

These factors are also applicable in a re-sentencing for the offence of robbery with violence. The Judiciary Sentencing Policy Guidelines lists the objectives of sentencing at page 15 paragraph 4.1 as follows:

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

2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

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

4. Restorative Justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims, communities' and offenders' needs and justice demand that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.

5. Community protection: To protect the community by incapacitating the offender.

6. Denunciation: To communicate the community's condemnation of the criminal conduct.

The petitioner has been behind bars for approximately 23 years for the offence of robbery with violence. I have had occasion to go through the several cases reviewed by several judges of the high court on sentencing and re-sentencing in robbery with violence cases, which affords meaningful guidance as to the sentencing trends in cases such as the one at hand.

In **Benjamin Kemboi Kipkone –Vs- Republic (2018) eKLR** where 3 robbers armed with an AK 47 rifle robbed the complainant of Ksh.250,000/= and a mobile phone, Chemitei J. substituted the death sentence with 20 years imprisonment. In **Paul Ouma Otieno –Vs- Republic (2018) eKLR** where the accused being armed with an AK 47 rifle and a kitchen knife robbed the complainant of Ksh.450,000/= and 3 mobile phones. **Majanja J.** substituted the death sentence with 20 years imprisonment. In **Wycliffe Wangugi Mafura –Vs- Republic Eldoret Criminal Appeal No. 22 of 2016 (2018)** the Court of Appeal imposed a sentence of 20 years imprisonment where the appellant was involved in robbing an Mpesa shop agent with the use of firearm.

In **Benson Ochieng & France Kibe –Vs- R (2018) eKLR, Joel Ngugi J.** re-sentenced the petitioners to 20 years imprisonment upon considering that the offence was aggravated by the use of multiple guns by an organized gang to commit armed robbery.

The Petitioner has been in prison for approximately 23 years. Having compared the petitioner's case with other matters of the same nature, I hereby set aside the life imprisonment imposed upon him and substitute it with a sentence of the period already served. I think to that extent the petition has merit for me to exercise discretion to grant the substantive reliefs in favour of the petitioner.

As a consequence, the petitioner is to be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF OCTOBER 2020

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R. NYAKUNDI

JUDGE

<u>In the presence of</u>:

1. Mr. Alenga for the state

2. The petitioner