



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HC.CONT.PET NO. 3 OF 2019

ERICK KALOLU KAVELENGE.....PETITIONER

-VERSUS-

REPUBLIC.....RESPONDENT

AS HEARD TOGETHER WITH

PET NO 4 OF 2019

RAPHAEL YULU MUTUA VS REPUBLIC

JUDGEMENT

INTRODUCTION

1. The petitioners were accused no.2 and 3 in Kilungu CRC NO. 7 of 2011 where they were with others charged with offence of robbery with violence contrary to Section 296(2) of the Penal Code.
2. The particulars being that on 08/01/2011 at Kilome slaughter house, Kilome market Mukaa District of Makueni County while armed with dangerous weapons namely knives and iron bar jointly with others robbed Joseph Mwangela Kalii of a motor cycle registration no. KMCK 365N make Kinrod valued at Kshs.123,000/=, one mobile phone make Nokia 2100 valued at Kshs.3,500, a black jacket valued at Kshs.2,500, a pair of canvass shoes valued at Kshs.1,000/= and cash Kshs.500/= and immediately before the time of such robbery threatened to use such violence to the said Joseph Mwangela Kalii.
3. The Appellants pleaded not guilty and the matter went into full trial. The trial court found the petitioners guilty and convicted them accordingly.
4. They were allowed to mitigate wherefore the petitioner Eric kalulu kivengele told court that "He was the sole bread winner of his family. He was taking care of his late brother's children. He begged that the period he was in custody be considered. Raphael Yulu mutua told court that, he was sole bread winner of his family , that he took care of his late brother children and sought his period in custody be considered.
5. In sentencing on 29/11/2011, the trial court stated that; though the accused were 1st offenders who were remorseful, the offence committed was serious and had become prevalent in the area. Thus a deterrent sentence was necessary. The court said the sentence provided for by the law was only one. Thus the court sentenced Petitioners to death as provided by the law.
6. The Appellants lodged **Criminal Appeal No.230 and 231/2011** in the High Court sitting in Machakos which after they were heard, the learned judge Makhandia and Dullu J.J dismissed the same for want of merit.
7. The Petitioner via appeal to **Court of Appeal No. 18 of 2013** challenged the hearing in court verdict but on 08/07/2016 and the matter was heard, dismissed same for want of merit.
8. The petitioners have now moved court via a new invention called "**re-sentencing**" procedure whereof the mandatory death sentence is impugned with an objective of substituting it with a lesser sentence after consideration of the mitigation rendered by the petitioners in the trial court.
9. The petitions is based on the facts that:

i. The Petitioners was charged with an offence of Robbery Contrary to Section 296/2 of the Penal Code Cap 63 Laws of Kenya vice Cr. Case file No. 7/2011 at Kilungu Law Courts.

ii. The Petitioners moves the court on regard to the decision of the Supreme Court, which found Section 203 and read with 204 of the Penal Code Cap 63 Laws of Kenya unconstitutional. Which also extends to all Capital Offences; 296/2 of Penal Code included.

iii. The Petitioners urge this Hon. Court to revisit the said Supreme Court decision in the Supreme Court of Kenya, Petition no. 15 of 2015 (as consolidated with petition no. 16 of 2015) – Francis Karioko Muruatetu and apply order “B” which states ...” *This matter is hereby remitted to the High Court for rehearing on sentencing only.*” The same was breath to life (admitted in Meru High Court vide Misc. Cr. App. No. 4 of 2015 by Hon. Justice Chitembwe, and Criminal Appeal No. 150 of 2016 where the court held six years served is enough punishment for robbery with violence.

iv. That the application is based on the concept implied by appropriate regime for sentencing offenders under Section 296 (2) of the Penal Code as demonstrated by the Supreme Court judgment; Francis Karioko Mutruatetu & Wilson Therimbu Mwangi Petition No. 15 and consolidated with Petition No. 16 of 2015 (By CJ & P, Mwilu DCJ & V.P. Ojwang, Wanjala, Njoki and Lenaola

10. The Petitioners seek the following relieves: -

a. ***THAT*** the court determines whether the Petitioners are entitled to the guaranteed remedy under the said judgment of Francis Karioko Muruatetu & Wilson Therimbu Mwangi Petition No. 15 of 2015 and consolidated with Petition No. 16 of 2015; judgment delivered by the Supreme Court dated on 14th day of December 2015.

b. ***THAT*** the court be pleased to observe violation of Section 216 and 329 of the Criminal Procedure Code Cap 75 which vitiated the whole original trial; declared unconstitutional and grant a resentencing to the Petitioners and replace their indefinite life sentence with a term that commensurate to their criminal responsibility.

c. ***THAT*** the court be pleased to consider the time already served; other mitigating factors and acquit the Petitioners herein.

d. ***THAT*** in the interest of justice; the court to exercise its inherent powers to do justice to the Petitioners taking into account the period spent in custody.

e. ***THAT*** the petitioners wish to be present during the hearing of the Petition.

f. ***Such other orders or further orders as this humble court may fit to grant***

11. The matter came for hearing and the Petitioners tendered their submissions and relied on same entirely.

12. The Respondent did not oppose the Petitions.

ISSUES

13. After going through material before the court, I find the issues are; ***whether this is appropriate case for resentencing? If so whether the same be meted out in this court or in the lower court?***

ANALYSIS AND DETERMINATION

14. The Petitioners herein were arraigned in court on a charge of Robbery with violence Contrary to Section 296(2) of the Penal Code. Whereby, they were found guilty of the charge. Consequently, they were convicted and sentenced to suffer death as the laws by then provided. The have been incarceration since 2011.

15. The Petitioners submit that they had exhausted all appeals and currently serving life sentence; after his Excellency the president-commuted death sentence to life sentence in the year 2016.

16. It is the Petitioners’ submissions that the mandatory death sentence denied them their fundamental right as enshrined under Section 216 and 329 of the Criminal Procedure Code.

17. As a result, their mitigations were not put into consideration when the conviction and sentence was arrived at. Pursuant to **Section 216 and 329 of the Criminal Procedure Code, Chapter 75, Laws of Kenya**, mitigation is a part of the trial process. **Section 216 provides**; The court may, before passing sentence or making an order against an accused person under **Section, 215** receive such evidence as it thinks fit in order to inform itself as to the sentence or order to be passed or made.

18. **Section 329 of the Criminal Procedure Code** provides: The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.

19. That Appellants expression of grief bore support from the Supreme Court of Kenya decision (Coram: **Maraga C.J & P. Mwilu DCJ**

and V.P. Ojwang, Wanjala, Njoki and Lenaola SCJJ.) petition no. 15 of 2015, whereby, the Supreme Court declared mandatory death sentence unconstitutional thus giving discretion powers to the Subordinate and Superior Courts to give the appropriate sentence depending with the circumstances of the case.

20. Moreover, the court made further observation that if a prisoner is incarcerated without any prospect of release and without the possibility of having his life sentence reviewed, there is the risk that he can never atone for his offence: whatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment becomes greater with time: the longer the prisoner lives, the longer his sentence.

21. Thus, even when a whole life sentence is according to the punishment at the time of its imposition, with the passage of time it becomes – to paraphrase Lord Justice Laws in Wellington – a poor guarantee of just and proportionate punishment....

22. In that respect the Supreme Court in agreement that **Section 296/2 of the Penal Code violates Article 50(2)(q) of the Constitution** as convicts under it is denied the right to have his sentence reviewed by a higher court – his appeal is in essence limited to conviction only.

23. There is no opportunity for a reviewing by a higher court to consider whether the death sentence was an appropriate punishment in the circumstances of that particular offence or offender. They also observed that the right to justice is also fettered. **Article 48 of the Constitution** on access to justice provides that: *“The state shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”* it is an indicator or clear demonstration that justice should never be defeated or compromised in any way.

24. The Supreme Court held that death sentence meted without due respect to mitigation is unfair trial and thus unconstitutional. Consequently, the Apex Court vide **Petition No. 15 of 2015** in respect of **FRANCIS KARIOKO MURUATETU and ANOTHER at paragraph 112 (b)** give the order that this matter is hereby remitted to the High Court for re-hearing on sentence only, on a priority basis, and in conformity with this judgment.

25. Following the Supreme Court decision dated and delivered at Nairobi on 14th day of December, 2017, various Courts have given life and breath to **Section 216 and 329 of the Criminal Procedure Code**, not only to fresh cases but also to finalized cases.

26. By dint of **Article 163(7) of the Constitution**, the decision of the Supreme Court has immediate and binding effect on all other courts. The decision of the Supreme Court opened the door for review of death sentences even in finalized cases.

27. In the case of **WILLIAM OLUNGU KITTINY –V- REPUBLIC (2018) eKLR** the court only discouraged persons from filing petitions to the Supreme Court. However, the decision does not prohibit courts below it from ordering sentence re-hearing in a matter pending before those courts.

28. On the same footing, the High Court at Meru **Misc. Criminal Appeal No. 4 of 2015** in respect of Douglas Muthaura Ntoribi (before Hon. S. Chitembwe J. the Court remarked that a good and working prison system should be able to reform convicts. There is no research, which leads to the conclusion that capital offenders cannot be reformed.

29. The circumstance of this case does not call for death sentence or life sentence. The decision of the Supreme Court on the death sentence is quite commendable and it is the duty of the lower courts to breathe life to it. This can be done by imposing sentences, which are appropriate to the offence. Given the circumstances of the case, the Judge went on to find that the death sentence is not ideal.

30. The Hon. Judge further emphasized that it is the duty of the court to consider the appropriate sentence. The Hon. Judge found it reasonable to impose the appropriate sentence instead of waiting for another application by the convict. As results, the case set aside the death sentence and replaced it with fifteen (15) years imprisonment.

31. In addition, the case of **Moses Kinyua Muchai Criminal Appeal No. 142 of 2017** at Kiambu, Hon. D.S Majanja J. citing the Supreme Court Decision, **Petition No. 15 of 2015** (Francis Karioko Muruatetu) called upon the accused to mitigate.

32. Consequently, the Appellant sentenced to fifteen (15) years besides prosecutions having proved its case beyond reasonable doubt.

33. The same findings bore support from **John Nganga Gacheru and another in Criminal Case No. 31 of 2016**, where Hon. Joel Ngugi J. observed that death sentence should be preserved for the highest-level murder. He commented further that there are a number of extenuating circumstances, however, which should reduce the sentence imposed on the accused persons.

34. In addition, in the case of **Mulamba Ali Mabanda Criminal Case No. 12 of 2013** court of Appeal at Mombasa (judgment dated 1st February, 2018). The Court held *“We observe that the Appellant had fully mitigated before the trial court and relying on the mitigation address, we are able to impose the sentence which in our view is appropriate to the offence committed by the Appellant, and the circumstances surrounding the same.”*

35. The Supreme Court decision is further given life and breath by **Constitution Petition No. 24 of 2015** at Malindi in respect of Aden Abdi Simba before Hon. Chitembwe J. judgment signed by Hon Weldon Korir J. The court cited the case of **Kahinga Joseph Kaberia and Others –vs- The Attorney-General, Constitutional petition No. 680 of 2010, (2016) eKLR**, Which determined that, it would amount to the violation of accused persons’ right to fair trial as provided under Article 50(2) of the Constitution if the court does not receive and consider mitigating factors and other statutory and policy pre-sentencing requirements, the court held that the death sentence is not appropriate in the circumstances.

36. The court observed that the Appellant has been in custody since 2003. He has undertaken several courses while in prison. It cannot be held with finality that he cannot be reformed. The court went ahead and set aside the death sentence and replaced it with 15 years' imprisonment from the date of conviction.

37. This court is in agreement with the cited cases herein above and as resenting is not opposed and taking to account appellant mitigated in the trial court. The court has also taken into consideration the circumstances of the offence, weapons used and the fact that that only threat to violence was used. Further the court has considered the value of property stolen and period served in custody. The court thus makes the following orders;

i. -The death sentence and subsequent life sentence meted out thereafter are set aside.

ii. -In lieu the court substitutes the same with the period served such that the petitioners shall be set at liberty forthwith unless otherwise lawfully held.

iii. The judgement herein applies to petition no 4 of 2019.

SIGNED, DATED AND DELIVERED THIS 31ST DAY OF MAY, 2019, IN OPEN COURT.

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C. KARIUKI

JUDGE