REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

MISC. CRIMINAL APPLICATION NO.39 OF 2018

MUSTAFA ABDIRAHMAN ALI..APPLICANT

VERSUS

REPUBLIC...RESPONDENT

JUDGEMENT

BACKGROUND:

1. The Applicant, **MUSTAFA ABDIRAHMAN ALI** was charged and convicted at the Magistrates Court at Garissa for the offence of **attempted robbery with violence** contrary to **Section 297(2**) of the **Penal Code**. The particulars of the offence were that on 3rd September, 2001 at Garissa Municipality in Garissa District within North Eastern Province jointly with others not before court while armed with a weapon a maasai sword attempted to rob Henry Gakiria Gachuri and immediately after the time of such attempted robbery did grievous harm to the said Henry Gakiria Gachuri.

2. The Applicant was sentenced to death by the trial court and his appeal to the High Court was dismissed on 25th April, 2017 vide a Judgment delivered by Hon. Justice Dulu. The death sentence meted on the Applicant was commuted to life imprisonment.

3. The applicant has approached this Court for resentencing pursuant to the Supreme Court decision in the matter of **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR**. The Applicant application came up for hearing on 24th June, 2019 where the applicant agued his application based on the above case of **Francis Karioko Muruatetu & Another vs Republic.**

4. The applicant told the court that he was arrested in the year 2001 and charged with the offence of attempted robbery and was convicted and sentenced to death in the year 2002. In addition, he told the Court that his appeal to the High Court was dismissed and the conviction and sentence upheld. Further, he stated that while in Prison he has been undertaking courses and has attained certificates, however the same got lost in prison.

5. In his mitigation, he stated that when he was charged he only had a mother who has since died, and that he was 27 years old when he was arrested and charged and that he has since reformed. In sum, the applicant is seeking resentencing based on the above Supreme Court decision. Mlati for the State was not opposed to the application for review of sentence and urged the court to give a befitting sentence.

ISSUES AND ANALYSIS:

6. The Supreme Court in the **Francis Karioko Muruatetu** decision gave the following guidelines when this court will be considering the applicants' application for re-sentencing:

> **"[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 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. It is apparent from the Judgment that although the Supreme Court referred to murder, the same can also be applied in other cases where the law provides for a mandatory sentence, including the instant case of Robbery with Violence where a mandatory death sentence was imposed. This was confirmed by the Court of Appeal 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 for murder, 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 a discretionary ..."

8. According to The *Sentencing Policy Guidelines, 2016* ("*the Guidelines*") 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 communicates the community's condemnation of the criminal conduct.

9. This court has also taken into consideration the nature of the offence that the Applicant was convicted of. It was an **attempted robbery** where the victim was grievously injured. The Applicant while being arrested is alleged to have violently confronted the arresting police officer. The Applicant states that he is remorseful and has learnt his lesson in the period that he has been in prison. He regrets the offence that caused his incarceration. The State was not opposed to this court reviewing the Applicant's sentence.

10. Taking into consideration the above **Francis Karioko Muruatetu** case and the attendant legal principles to the instant applications, it is apparent to this court that the degree of gravity of the offence that the applicant committed and the mitigation of the applicant on re-sentencing establishes that the offence committed by the applicant was serious, as the victim suffered grievous harm and also he attacked the police officer in the process of arrest. However, the applicant was arrested and charged aged twenty-seven (27) years and now forty-three (43) years old and has paid his just debt to the state for the crime.

11. In the spirit of uniformity and fairness, it is important to consider the emerging jurisprudence from other courts on the issue of resentencing in respect to attempted Robbery. In **Joseph Kaberia Kainga vs Republic [2019] eKLR** where the applicant was arrested and was in custody from the year 2002, the court sentenced him to the time served. The applicant was 27 years when he was arrested just like the applicant herein, however the distinguishing fact is that during the said attempted robbery no one was injured, however in the instant case the victim sustained grievous harm.

12. Similarly, the court reached the same finding in **Simon Kimani Maina vs Republic [2019] eKLR taking** into considering the circumstances of the attempted robbery and the fact that no one was injured in the incident. The court sentenced the applicant to time served.

13. In the premises therefore, this court ought to finds favour with the Applicant's application for re-sentencing in view of his mitigation. The applicant seems remorseful and has learnt his lesson during the period of his incarceration and has been in prison for Eighteen (18) years. The life imprisonment sentence therefore ought to be set aside and substituted by a sentence of this court.

14. Thus court makes the following orders;

> ***(i) The death sentence and subsequence order substituting it with life sentence is set aside and substituted with a sentence of 20 years to run from the date of arrest 3/9/2001.***

DATED, SIGNED AND DELIVERED AT GARISSA THIS 25TH DAY OF SEPTEMBER, 2019.

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C. KARIUKI

JUDGE