



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL MISC. APPLICATION NO. 30 OF 2018 AND 15 OF 2019 (CONSOLIDATED)

BETWEEN

ADEN SHARIFF ABDI.....1ST APPLICANT

ARTE ABDI WITO.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

A. Background

1. The two applicants, **Aden Shariff Abdi** and **Arte Abdi Wito** were jointly charged and convicted of the charge of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on the 1st October, 1998 at Bulla Mzungu in Garissa Township jointly with others not before court while armed with dangerous weapons to wit a firearm, robbed Haji Omar Ibrahim of Kshs. 132,945/= cash, shop goods and personal property valued at Kshs. 10,000/= and at or immediately after the time of such robbery shot dead the said Haji Omar Ibrahim.

2. The applicants were sentenced to death, which sentence was commuted to life imprisonment. Their respective appeals to the High Court and Court of Appeal were dismissed.

3. The applicants have approached this Court pursuant to the Supreme Court decision in the matter of **Francis Karioko Muruatetu & Another –vs- Republic [2017] eKLR**. The applications came up for hearing on 24th June, 2019 where the applicants agued their applications based on the above case of Francis Karioko Muruatetu & Another –vs- Republic.

4. **Aden Shariff Abdi** told court that he was arrested and charged with robbery with violence in October 1998, convicted and sentenced in March 1999. He filed an appeal to the High Court and the same was dismissed on 25/6/2004, subsequently he went to the Court Appeal which equally dismissed his appeal on 9/7/2010. He seeks this Court to re-sentence him and that he has served over 20 years in Prison.

5. In his mitigation, including the filed submissions on the same, he told court that he is a first offender and was 25 Years old when he committed the offence and was not married. He states that he is deeply remorseful and highly regrets the consequences of his actions and that he has undergone rehabilitation for the last over 20 years in Prison. In addition, he urged the court to consider his filed Certificates in Islamic Studies issued by Umma Foundation as a demonstration that he has since reformed and is determined to earn honest livelihood and a lifestyle of dignity. He urges the court to find that he has sufficiently paid his debt to the state and acquit him on the time served.

6. **Arte Abdi Wito** , on his part told the court that he was the 1st Accused in the robbery in which he was jointly charged with the 1st Applicant and that the life imprisonment sentence is severe and he is seeking resentencing.

7. In his mitigation, he told court that at the time of commission of the offence he was a young boy aged 18 years and the same was due to influence from peer group and engaging with bad company ruining his life and that he has been in custody for 21 years and regrets and atones for his mistakes.

8. In addition, he states that he was married with two kids and seeks the court to consider the same. Further, he states that he has been rehabilitated and learned skills such as tailoring and trained on how to live in the community if given a chance. Furthermore, he submits that the 21 years served is enough punishment for a young man in his prime and promises not to engage in such offences or felonies and promises to be a good example to others and contribute in reforming the community.

B. Issues and Analysis

9. In **Francis Karioko Muruatetu** case the basis of the applicant's application, the Supreme Court gave the following guidelines for consideration of applications 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.”

10. Although the Supreme Court hereinabove 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 ...”

11. The Sentencing Policy Guidelines, 2016 (“the Guidelines”) published by the Kenya Judiciary, provide 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 communicate the community's condemnation of the criminal conduct.**

12. Considering the Supreme Court decision in **Francis Karioko Muruatetu** case above and the attendant legal principles, it is apparent to this court that the applicants herein circumstances is merited for consideration and therefore the court is inclined to consider their mitigation and issue appropriate sentence.

13. In view of the many applications filed in the aftermath of the Supreme Decision in **Francis Karioko Muruatetu** case, the 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. Further, it is imperative to also consider sentences that have been imposed by other Courts pursuant to **Muruatetu** case.

14. In **Ibrahim Ali Halake v Republic [2019] eKLR** and **Eldoret Court of Appeal Criminal Appeal No. 22 of 2016 [2018] eKLR: Wycliffe Wangusi Mafura –vs- Republic** the applicants in committing the robbery used firearms causing grievous injuries to their victims, the Courts in both cases sentenced the applicants to 20 Years imprisonment factoring the time served.

15. In **Cyprian Ingira Ikobwa v Republic [2019] eKLR** the applicant was in custody for 14 years and the circumstances of his Robbery with violence was that there was aggravated use of a firearm. The robbers fired at their victims. Two of the petitioner's colleagues lost their lives during the robbery, the court sentenced him to 20 years.

16. The court is required to consider the period that a convicted person has spent in custody prior to the sentence as provided under Section 333(2) of the Criminal Procedure Code.

C. Conclusion

17. Considering the above principles of sentencing stated above in and precedent from other Judges and the court, is obligated to consider the commensurate sentence for each of the two applicants.

18. **Aden Shariff Abdi** was 25 years of age when he was sentenced and that he has served 21 years of the sentence. He was arrested in October, 1998 and sentenced in March, 1999. During the commission of the robbery he was armed with a crowbar as per the testimony of PW1 whereas his co accused the second applicant was armed with a rifle.

19. From the evidence of the witnesses, I note that the victim was shot dead and since the 1st Applicant was not the one with the rifle, this court finds favour in his application and finds that the death sentence imposed on him is not fair. Further the court takes into account his remorse and atonement, and in the circumstances, the court sets aside the death sentence and refers case back to chief magistrate court for resentencing.

20. **Arte Abdi Wito** alleges that he was 18 years Old when he committed the offence therefore It is apparent to this court that he was an impressionable youth at the time he committed the offence, the chance that he was influenced by others is not beyond the realm of possibility. However, I take note that he was the one with a rifle during the robbery as identified by the witnesses and probably the one who fired the fatal shot that killed the victim of the robbery.

21. His mitigation was not considered as by then the trial magistrate hands were tied by law. Thus the court sets aside the death sentence and refers case back to chief magistrate court for resentencing. Thus court makes the following orders ;

i) Thus the court sets aside the death sentence and refers case back to chief magistrate court for resentencing.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 24TH DAY OF SEPTEMBER, 2019.

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CHARLES KARIUKI

JUDGE