



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

PETITION 177 OF 2018

DAVID GICHURU M'ARITHI.....APPLICANT

VERSUS

REPUBLIC..... RESPONDENT

R U L I N G

1. The applicant, **David Gichuru M'Arithi** was charged in the Senior Principal Magistrates' Court at Nkubu with several charges including two counts of robbery with violence contrary to *section 296 (2) of the Penal Code* and rape contrary to *section 3 (1) (9) (b) as read with Section 3 (3) of the Sexual Offences Act*.
2. The particulars of the offence in count 1 were that, on 10/1/2009 in Imenti South District within Eastern Province, the applicant with another jointly while armed with dangerous weapons namely a gun and a panga robbed **LM** Kshs.14,000/- and nine mobile phones of unknown value and at or immediately before or immediately after such robbery threatened to use actual violence on the said **LM**.
3. On count 2, it was alleged that, while armed with the same weapon, the applicant and another robbed **Philip Kirianki** of Ksh. 5,500/- and a mobile phone make Nokia worth Kshs. 4,000/- and at or immediately before or immediately after such robbery used actual violence to the said **Philip Kirianki**.
4. On count 3, it was alleged that on the same date and place, the applicant and another intentionally and unlawfully had sexual intercourse with **LM** having acquired consent by means of threats. On count 4, it was alleged that on the same date and place, the applicant and another intentionally and unlawfully had sexual intercourse with **EG** with the consent of the said **EG** which consent was obtained by means of threats.
5. After trial, the applicant was found guilty on all four counts and was sentenced to death. Being aggrieved by the said decision, the applicant appealed to this Court. In their judgement of 28/11/2013, Lessit and Gikonyo JJ upheld the applicant's conviction and sentences on count 1 and 2 and ordered that the sentence in count 2 be held in abeyance in view of the mandatory death sentence. They found that the offence in count 4 was not proved and acquitted the applicant on the same and set aside the same. However, they affirmed both the conviction and sentence in count 3.
6. Thereafter, the applicant appealed to the Court of Appeal but his appeal was dismissed on 17/12/15. On 3/5/2018, the applicant applied by a Motion on Notice to this Court, that the death sentence be set aside and he be re-sentenced afresh. He told the court that he has been in incarceration for the last 9 years and that during his trial, mitigating factors were not considered due to the mandatory nature of the sentence in section 296 (2) of the penal code. That since he was imprisoned he has been rehabilitated through various programs. He has studied for the 9 years and is ready to contribute to the nation's development.
7. I have considered all the foregoing. I have considered the applicant's mitigation as contained in the submissions filed in Court. I have considered the circumstances under which the offence was committed; that the applicant was in the company of another, that violence was meted out to the victims and that dangerous weapons were used.
8. The applicant is a first offender who was arrested when he was only 35 years and is now 46 years old. He is a father of three children. He is remorseful and states that the commission of the crime was misguided. He has pleaded that this court orders the sentences run concurrently.
9. In **Francis Karioko Muruatetu & Another –vs- Republic [2017] eKLR**, the Supreme Court held as follows:-

“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.

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."

10. Although the Supreme Court was dealing with the offence of murder, I am of the view that the same principle applies in other cases where the law provides for a mandatory sentence, including the instant case of robbery with violence. In William Okungu Kittiny vs. Republic [2018] eKLR, the Court of Appeal 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. 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 communicate the community's condemnation of the criminal conduct".**

12. I have considered that notwithstanding the violence meted out to the victims, the applicant raped his victim, violated her up to the point of ejaculating unto her. That must have been no only humiliating but must have had long lasting effect on the victim. There can be no possible reason why one would violently rob another and rub the injury with a humiliating act of rape! The perpetrator is not deserving of any leniency in such circumstances.

13. I am satisfied that this is a proper case where the death sentence was properly meted out. I dismiss the application.

DATED and DELIVERED at Meru this 31st day of October, 2019.

A. MABEYA

JUDGE