REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

HIGH COURT CRIMINAL PETITION NO. 8 OF 2019

JANE WANJIKU MURIUKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The petitioner Jane Wanjiku Muriuki (Petitioner/Applicant) filed a chamber summons on 18.7.2018 in Petition No. 20/2018 at High Court of Kenya at Nyeri. The Petition was later on 4.3.2019 transferred to this court for hearing and determination. The petition is filed pursuant to the decision of the ***Supreme Court in the Constitutional Petition No. 15 & 16 of 2015 Francis Kioko Muruatetu and Another -V- Republic 2017 eKLR*** on the issue of Mandatory Death Penalty.

2. In her supporting affidavit the petitioner depones that she was charged, convicted and sentenced to suffer death for the offence of Robbery with Violence Contrary to ***Section 295 as read with section 296 (2) of the Penal Code.***

She was convicted on 1.12.2008. She appealed to the High Court vide High C ourt Criminal Appeal No. 47/2008. The High Court upheld the conviction and sentence. She then filed another Appeal to the Court of Appeal in Criminal Appeal No. 364/2009 and again the conviction was upheld. She has therefore exhausted the process of appeal. She is now praying the court to exercise its discretion and order that a fresh sentencing process for a lesser sentence than the one for death be considered.

3. In the chamber summons she prays that the court be pleased to receive the mitigation from her for consideration of an appropriate sentence other than the mandatory death sentence which has since been declared unconstitutional by the Supreme Court of Kenya.

4. So, basically what the applicant is seeking is an order for re-sentencing re-hearing.

5. This petition is one among many others which has been filed in this court following the decision of the Supreme Court in the case of ***Francis Kioko Muruatetu & Another -V- R (Supra).***

The state, through Mr. Obiri, Assistant Director of Public Prosecutions, urged the court to give a ruling in the matter and opted not to submit.

6. I have considered the petition. The decision of the Supreme Court in the case of ***Francis Kioko Muruatetu Supra*** was dealing with issue of the constitutionality of the mandatory death sentence under ***Section 296 (2) and Section 204 of the Penal Code***. In the case, the Supreme Court of Kenya declared the mandatory death sentence under the Sections unconstitutional. It stated:

> ***"(112) Accordingly, with regards to the claims of the petitioners in this case, the court makes the following orders:***
>
> ***a) The mandatory nature of death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional.***
>
> ***For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26 (3) of the Constitution.***
>
> ***b) This matter is hereby remitted to the High court for re-hearing on sentence only, on a priority basis, and in conformity with this judgement.***

7. The Supreme Court envisaged a process of sentencing, re-hearing for a person who had already been sentenced to death and stated as follows:

(111)" ……For the avoidance of doubt, the sentencing re-hearing we have allowed, applies only for the two petitioners herein. In the meantime, existing or intending petitioners with similar cases ought not approach the Supreme Court directly <u>but await appropriate guidelines for disposal of the same</u> (emphasis mine). The Attorney General is directed to urgently set up a framework to deal with sentence re-hearing of cases relating to the mandatory nature of the death sentence – which is similar to that of the petitioners in this case.

(112) (c) The Attorney General, and the Director of Public Prosecutions and other relevant agencies, shall prepare a detailed professional review in the context of this Judgement and Order made with a view to setting up a framework to deal with sentence re-hearing cases similar to that of the petitioners herein. The Attorney General is hereby granted twelve (12) months from the date of this Judgement to give a progress report to this Court on the same.

8. No guidelines on sentencing rehearing have been given so far although the Attorney General initiated the process by putting in place a Task Force which was Gazetted on 15.3.18 Gazette Notice 2160. Be thus as it may the High Court and the Court of Appeal has gone ahead and dealt with the issue of sentencing re-hearing and not withstanding that the guidelines on resentencing have not been provided. The Court of Appeal <u>*In the case of* ***William Okungu Kittiny -v- R (2018) eKLR stated:***</u>

"The decision of the Supreme Court only discouraged persons from filing petitions to the Supreme Court but the decision does not prohibit court below it from ordering sentence re-hearing in a matter pending before the courts. By Article 163 (7) of the Constitution, the decision of the Supreme Court has immediate and binding effect on all the other courts. The decision of the Supreme Court opened the door for review of death sentences even in finalized cases".

9. The Court of Appeal was stating that since the decisions of the Supreme binds the courts below, nothing prevents the court from applying the decision and ordering sentence rehearing in a matter pending before those courts.

10. In the High Court, in ***<u>Stephene Kimathi Mutunga -v- Republic (2019) eKLR</u>*** while holding that the High Court has unlimited jurisdiction in both Civil and Criminal matters and the mandate of enforcing fundamental rights and freedoms as enshrined in the Constitution, stated that the High Court has jurisdiction to deal with the petition for sentencing rehearing.

In ***<u>Michael Kathewa Laichena & Another -v- Republic (2018) eKLR Justice Majanja stated:</u>***

"by re-sentencing the petitioner the High Court is merely enforcing and granting relief for what is in effect a violation caused by the imposition of the mandatory death sentence".

11. The High Court has the mandate under ***<u>Article 165 (3) of the Constitution</u>*** to hear and determine as well as to enforce matters of rights and fundamental freedoms enshrined in the constitution. The record of the Lower Court has not been availed to this court mainly because the state wished the court to give directions as to whether it would deal with the matter or refer it back to the Lower Court for the petitioner to mitigate before the trial magistrate.

12. In the above cited decisions of the High Court, the Judge proceeded to consider the sentence re-hearing and imposed a sentence.

13. Considering that there are no re-hearing guidelines issued as yet, my view is that this court has jurisdiction under ***<u>Article 165 (3)</u>*** of the constitution. I agree with Justice Majanja in the case cited above where he stated:

"Although the Supreme Court direction would seem to suggest that all petitioners would have to wait the outcome of the Task Force, the Court of Appeal in the <u>Kittiny Case</u> (Supra) thought otherwise……The tenor and effect of the Court of Appeal decision is that the High Court may review and re-sentence petitioners who come before way of petition or appeal as the Supreme Court did not foreclose that avenue of re-sentencing. Further, the Supreme Court underlined the fact that sentencing is a judicial task hence a Task Force of the kind appointed by the Attorney General cannot review and re-sentence petitioners. Since the High Court has unlimited jurisdiction in civil and criminal matter and is also the court imbued with jurisdiction to enforce fundamental right and freedoms under Article 165 (3) of the Constitution, it is the proper forum for re-sentencing".

14. The Supreme Court in the case of Muruatetu though not interfering with the discretion of the trial Judge on sentencing gave the following guidelines:

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 relation 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.

15. In the above cited case in the High Court, ***Stephene Kimathi Mutunga -v- Republic and Michael Kathewa Laichena & Another -v- Republic.***

The court relied on the Judiciary Sentencing Policy Guidelines 2016 which state that the sentence imposed must meet the following objectives in totality. These are: -

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 offence.

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.

16. The judgement of the trial magistrate P.T. Nditika, S.R.M gives the brief circumstances of the case that the applicant with two other boys attacked the complainant.

The applicant is the one who removed his mobile phone. The complainant was injured during the robbery. The complainant was robbed cash Ksh.11,200/= a wrist watch and mobile phone all valued at Ksh. 13,200/=.

17. Evidence tendered by the clinical officer indicated that the complainant sustained injuries which were, a swelling on the head and bruises on the neck. They were caused by a blunt object.

18. At the sentencing the applicant had pleaded for leniency and that she had children who depended on her. The court without much ado proceeded to pass the death sentence as provided under the Law. The mitigation was not considered due to the mandatory nature of the sentence.

19. The applicant submits that she is remorseful. She was a young girl then who had very few worries of life and walked blindly.

When she was arrested the blinds were lifted off her eyes and she coming to realization, regrets and question what she has done. She is now sorry to the victim. She urges the court to consider the factors considered in ***Michael Kalewa -v- Republic***. She submits that she has engaged in rehabilitative programs.

She further urges the court to consider the time she has spent in custody as provided under ***Section 333 (2) of the Criminal Procedure Code Cap 75 Laws of Kenya.***

20. I have considered the petitioner's mitigation. It portrays a person who has over the years come to realize the folly of her past conduct and is ready to change. She is remorseful.

21. The petitioner has been in remand from the year 2008 a period of eleven years. I have considered various persuasive decisions where convicts for robbery with violence were re-sentenced after the decision of Muruatetu case.

In Benjamin Kemboi Kipkone -Vs- Republic 92018) 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 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 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 agent with the use of a firearm.

In ***Benson Ochieng & France Kibe -Vs- Republic (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.

22. The circumstances of this case are different. From the circumstances of this case, the offence was not aggravated. The applicant does not seem to have been armed. The injuries inflicted on the victim are not serious. The sentence for simple robbery is 14 years and for a person to be given a maximum sentence there must be aggravating factors. The applicant would be sentenced to 14 years and above.

From the judgement she was arrested on 31.12.07 and has been in custody ever since, a period of twelve years.

23. ***Section 333 (2) of the Criminal Procedure Codes*** requires the court to consider the period spent in custody awaiting trial. I am not able to tell from the record how old the applicant was at the time she committed the offence but it seems to me she was very young. Having considered the mitigation and the fact that the circumstances of the offence were not aggravated, I feel I should give the applicant a new lease of life. To this end I find that the period the applicant has spent in custody is adequate sentence in the circumstances of this case.

24. In conclusion:

1. The death penalty imposed on the applicant is set aside.

2. The applicant is sentenced to imprisonment for twelve years which she has already served in custody.

3. She will be set at liberty unless otherwise lawfully held.

Dated at Kerugoya this 31st day of October, 2019

L.W. GITARI

JUDGE