



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

PETITION 24 OF 2018

IN THE MATTERS IMPUGNED UNDER ARTICLES 23(1), 165(3), (b) (d) (i), 50(2)

25(c)(d) 51(1) AND 163 (7) OF THE CONSTITUTION OF KENYA 2010

AND SECTION 296 OF THE PENAL CODE

JOSEPH MWENDA KIREMA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

1. The applicant, **Joseph Mwenda Kirema** was charged in the Senior Resident Magistrates' Court at Maua with two counts of robbery with violence contrary to **section 296 (2) of the Penal Code**. The particulars of the offence were that on 14/8/2009 at Kangeta Market, at Kangeta Location in Igembe District (as it was then known) jointly with others, while armed with runigus and pangas the applicant and those others at two different instances robbed **Andrew Mutea and Jacob Karwamba** a mobile phone valued at Kshs.1200/ and cash totaling Kshs.14,800/- and at or immediately before or immediately after such robbery threatened to use actual violence on their victims.
2. After trial, the applicant was found guilty on both counts and was sentenced to death on the first count while the sentence on the 2nd count was held in abeyance. Being aggrieved by the said decision, the applicant appealed to this Court. In their judgment of 28/11/2013, Lessit and Makau JJ upheld the applicant's conviction and sentences. He appealed for to the Court of Appeal but his appeal was dismissed on 22/11/2017
3. On 3/5/2018, the applicant applied by a Motion on Notice seeking that, by dint of the declaration that the mandatory nature of the death sentence was unconstitutional by the Supreme Court, the death sentence meted on him be set aside and he be re-sentenced afresh. He told the court that he has been in custody for 10 years and that during his trial, mitigating factors were not considered for reason that under **section 296 (2) of the Penal Code**, the death penalty was mandatory. That ever since he was imprisoned, he has been rehabilitated through various programs. That he is ready to contribute to the nation's development.
4. The applicant is a first offender. When called upon to mitigate, he told the Court to consider the period he had been in custody and that he had been rehabilitated. Mr. Maina the Prosecutor insisted that the death penalty be retained or a sentence of not less than 20 years be meted out.
5. 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.”

6. 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 ...”

7. 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”.**

8. I have considered the foregoing. I have considered the applicant’s mitigation. I have considered the circumstances under which the offence was committed; that the applicant was in the company of 3 others; that they were armed with pangas and rungas. I have also considered the nature of the violence meted out to the victims. In addition, I have considered that what was stolen was a phone valued at Kshs.1,200/ and cash totaling Kshs.16,800/-.

9. In view of the foregoing, I set aside the death sentence and substitute therefor with imprisonment for 20 years on each count. Both sentences to run concurrently. The sentence is to run from the first time the applicant was sentenced.

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

A. MABEYA

JUDGE