



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT CHUKA**

**CRIMINAL REVISION NO. 226 OF 2018**

**(FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL**

**CASE NO. 713 OF 2007 IN THE PM'S COURT AT CHUKA)**

**PATRICK NYAGA MURATHA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. **PATRICK NYAGA MURATHA**, the Applicant herein was charged and convicted of the offence of Robbery with violence contrary to **Section 292(2)** of the **Penal Code** vide **Chuka Principal Magistrate's Court Criminal Case No. 713/2008**. He was sentenced to death. His subsequent appeals to **Meru (CRA No. 194/2008)** and **COA Nyeri (131/2010)** were dismissed.
2. He has now applied vide his Notice of Motion dated 27<sup>th</sup> November, 2018 to this court to review the sentence handed over to him and re-sentence him in line with the recent Supreme Court's decision in the case of **Francis Karoki Muruatetu & 5 Others [2017] eKLR**.
3. The State had earlier opposed this application but later through learned counsel Mr. Momanyi, it changed its mind and left the matter to this court to determine.
4. The applicant has moved this court for re-sentence with reference to the now famous Supreme Court's decision in the **Muruatetu's case [supra]** which decision dealt with the unconstitutionality of the mandatory nature of the death penalty in murder cases. The Supreme Court held *inter alia* that the mandatory death penalty was arbitrary and unconstitutional as it did not take into consideration mitigation and varying degrees of gravity and culpability.
5. In his application the Applicant states that he has reformed after spending years in custody. He submits that while in prison he has gone through several rehabilitation programmes and has annexed copies of references from prison authorities. He says he has been in jail from 2007 when he was arrested. He says the trial took 1 1/2 years and asks this court to factor in that period in considering an appropriate sentence.
6. This court has considered this application and the grounds upon which it has been brought. It is true that following the Supreme Court's decision in **Muruatetu (supra)** the trial court's hands or discretion are no longer tied by mandatory nature of death sentence in murder cases and other cases as well. In the case of **Willian Okungu, Kittiny -vs- Republic [2018] eKLR**, the Court of Appeal sitting in Kisumu held as follows:-  
  

***" ..... we hold that the findings of the Supreme Court particularly in paragraph 69 applies "Mutatis Mutandis" to Section 296 (2) and 297(2) of the Penal Code. Thus the sentence of death under Section 292(2) and 297(2) of the Penal Code is a discretionary punishment. To the extent that Section 292(2) and 297(2) of the Penal Code provides for mandatory death sentence, the Sections are inconsistent with the Constitution."***
7. The present application to the extent that it seeks to have the death penalty revised, is merited. I have considered the grounds relied upon by the Applicant and I find them to merit consideration by this court. He was said to have been first officer and he has appeared to have done positive work in self-improvement in prison.
8. The principles of sentencing as per the sentencing police guidelines 2016, provided by Kenya Judiciary are *inter alia*;
  - a) Proportionality (actual foreseeable and intended impact of the offence)

- b) Uniformity - similar offence to carry similar sentences
- c) Accountability- reasons and consideration for the sentence.
- d) Age of the offender
- e) Character and record of the offender.

9. The objective of sentencing are listed as *inter-alia*;

- a) Retribution - just punishment for the wrong committed
- b) Deterrence - To discourage other offenders and others.
- c) Rehabilitation - For the offender to reform and be law abiding citizen.
- d) Community protection- To incapacitate the offender for the society to be safe.
- e) Renunciation - To communicate community condemnation of conduct.

The sentencing policy guidelines has not replaced judicial discretion. They are only meant to promote transparency, consistency and fairness in sentencing.

9. Taking everything into consideration, I note that the Applicant herein was armed and was in a company of an armed gang. They attacked and robbed passengers of a motor vehicle after placing spikes on the road which deflated the vehicle's tyres forcing it to stop. In simple robber case under **Section 296(1)** of the **Penal Code** the maximum sanction provided is 14 years imprisonment and so given that in this instance violence was actually visited on innocent passengers traveling to various destination, the penalty has to be commensurate.

10. In the case of ***Paul Ouma Otieno alias Collera & Another -vs- Republic [2018] eKLR***, the Court of Appeal sentenced Appellants to 20 years imprisonment where the robbery was aggravated by the use of a firearm.

The Applicant cited a decision in the case of ***Francis Kamwitu -vs- Republic (Pet No. 55 of 2018 in Meru High Court)*** where **Hon. Majanja J** resented a Petitioner to 15 years for the offence of robbery with violence. The victim in that case was however tied on a rope and robbed and no actual violence was closed to rob him unlike the present case where actual violence was visited upon the victims. The Applicant herein was also a serving police officer who should have known that he had responsibility to provide security not insecurity. Taking everything into consideration; I will allow this application, set aside of death sentence imposed on the Applicant and in its place sentence him to 16 years imprisonment. The period he has already served plus one year he spent on trial shall be factored in computing the remaining time he has to serve for the interest of justice.

**Dated, signed and delivered at Chuka this 30<sup>th</sup> day of October, 2019.**

**R.K. LIMO**

**JUDGE**

**30/10/2019**

Ruling signed, dated and delivered in the open court in presence of Applicant in person and Momanyi for Respondent.

**R.K. LIMO**

**JUDGE**

**30/10/2019**