REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

MISCELLANEOUS CRIMINAL APPLICATION NO.550 OF 2018

JACKSON KIBUBUKI.....1ST APPLICANT

KERUBA OLE SUPEYO.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicants, Jackson Kibubuki and Keruba ole Supeyo were 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 26th November 2002 at Ongata Rongai in Kajiado District, the Applicants, jointly with others not before, while armed with dangerous and offensive weapons, robbed Allan Gachiri Ragi of his computer, five mobile phones and assorted household goods and clothings, cash Kshs.30,000/- and 340 US dollars and at or immediately before or immediately after the time of such robbery, used actual violence to the said Allan Gachiri Ragi. The Applicants were sentenced to death. Their appeals to the High Court and to the Court of Appeal were dismissed. The death sentence imposed on them was later commuted to life imprisonment by Presidential decree. That would have been the end of the matter but for the window opened to the Applicants by the Supreme Court decision of **Francis Karioko Muruatetu –vs Republic [2017] eKLR**. The Applicants made an application before this court to be resentenced.

In their application, they stated that they were reformed during the period of incarceration. They had been in lawful custody since 13th January 2003 when they were arrested. The 1st Applicant told the court that he was pleading to be given a second chance at life. He regrets what he did. He sought for forgiveness from the court. He stated that he was a changed man. He attached his testimonials from prison which indicated that he was reformed and in fact was being considered for the position of trustee due to his good behaviour and long experience in serving other prisoners while in prison. On his part, the 2nd Applicant similarly pleaded for leniency from the court. He told the court that he regrets the decision that led him to commit the crime. He was a first offender and was a model prisoner during his period of incarceration. He pleaded with the court to favourable consider his application on resentencing.

Ms. Chege for the State opposed the application. She submitted that the Applicants have not made a case for this court to favourably consider their application for resentencing. She was of the view that the Applicants were not remorseful and therefore they should continue to serve the sentence that was imposed on them.

Prior to the hearing of the application, this court ordered for a probation report on resentencing to be prepared. From the two reports that were filed in court, it indicated that the 1st Applicant was 58 years old while the 2nd Applicant was 66 years old. Both reports were favourable and recommended to the court for the Applicants to be favourably considered for resentencing. The community was ready to receive them. There were no negative reports about them that could persuade this court not to favourably consider their application for resentencing.

The Supreme Court in the **Francis Karioko Muruatetu** decision gave the following guidelines when this court will be considering the Applicant's application on 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.""

In the present application, it was apparent that in the period of 17 years that the Applicants have been in lawful custody, they have learnt their lesson. They are model prisoners and have been even considered for the conferment of the position of trustee. It was clear to this court that the Applicants have indeed been rehabilitated during their time in prison. They have been reformed. They have undertaken courses which will serve them well upon their release from prison. This court has also considered the respective ages of the Applicants. It was apparent to the court that they are no longer in an age where they can make impulsive decisions that would act to their detriment unless they deliberately choose to do so. At their age, it is hoped that they have learnt their lesson and would not be tempted to return to a life of crime.

In the premises therefore, this court formed the view that the Applicants made a case for this court to favourably consider their application for resentencing. The Applicants have been sufficiently punished in the 17 years that they have been in lawful custody. The sentence of life imprisonment imposed upon them is set aside. It is substituted by a sentence of this court commuting their respective custodial sentences to the period already served. They are ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROB THIS 18TH DAY OF DECEMBER 2019

L. KIMARU

JUDGE