REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

CRIMINAL REVISION NO. 110 OF 2018

JOSEPH MWANGI NGANGARI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No. 452 of 2015

of the Principal Magistrate's Court at Marimanti)

R U L I N G

1. **JOSEPH MWANGI NGANGARI**, the applicant herein, was charged and convicted of 2 counts of robbery with violence contrary to **Section 295** as read with **Section 296(2**) of the **Penal Code** vide ***Marimanti Principal Magistrate's Court Criminal Case No.452 of 2015***. He was sentenced to serve death sentence in the 1st count while the sentence in the 2nd count was held in abeyance due to the nature of the sentence in the first count.

2. The applicant has now moved this court with an application dated 13th April, 2018 asking for review or re-sentencing in view of the Supreme Court's decision in the case of ***Francis Muruatetu and Another -vs- Republic [2017] eKLR***. The grounds for the application is that the applicant has been in custody for 4 years and that his mitigation was not considered due to the mandatory nature of the sentence under **Section 296(2)** of the **Penal Code**. He has further contended that he is rehabilitated and has reformed/undertaken unspecified studies in prison.

3. The respondent through the office of Director of the Public Prosecution has opposed this application and their main bone of contention is that the Supreme Court while rendering itself in the cited case barred other existing or other intending petitioners with similar cases from approaching the Supreme Court directly but await appropriate guidelines for disposal of such matters after the Attorney General sets up a legal framework to deal with sentence re-hearing of cases relating to mandatory death sentence. The respondent has contended the formulation of guidelines and enactment of the statute to give effect to the decision of the Supreme has not yet been done and therefore the application is premature. The state has also argued that the decision of the Supreme Court was about the unconstitutionality of death sentence provided under **Section 204** of the **Penal Code** and had nothing to do with the office of robbery with violence under **Section 296(2)** of the **Penal Code.**

4. This court has considered this application and the response made by the State. It is true that the decision of the Supreme Court in ***Francis Karioko Muruatetu & Another -vs- Republic [2017] eKLR*** was in respect of the constitutionality of the death sentence provided under **Section 204** of the **Penal Code** in regard to persons found guilty of murder. The Supreme Court was pronouncing itself in respect to that section but this court finds that the ratio decidendi in the Supreme Court applies to persons convicted and sentenced under **Section 296 (2)** of the **Penal Code**. The Supreme Court determined that a trial process does not stop at conviction of an accused person but that principle of a fair trial must be accorded to the sentencing stage too. It was further held that it is imperative for a trial court to afford an accused person opportunity to mitigate and the mitigating circumstances should be recorded because ***"mitigation is an important congruent element of fair trial."*** The Supreme Court found that recording mitigating factors for the sake of it in view of a set sentence fails the tenets of fair trial and that the mandatory nature of sentence deprives the trial court of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. That holding in my view applies to all mandatory death sentences provided by the law and though the Supreme Court was dealing with **Section 204** of the **Penal Code** in my considered view the decision is also relevant to the mandatory death sentence provided under **Section 296(2)** of the **Penal Code.**

5. The other issue of whether a person should ventilate for his rights now or wait for guidelines to be developed, is that because development of guidelines and policies are beyond his control, he cannot be told to wit and has every right to come to court and ventilate for his rights. This court has a duty and mandate to determine the merits of such cases notwithstanding the fact that the Attorney General and parliament are yet to enact a statute or policy to address the issues raised in **Muruatetu's case.**

6. Having found that the applicant is properly before this court the next issue is whether this application has merit or competent. The applicant has told this court that he has preferred an appeal in the Court of Appeal about his conviction and sentence and that the same is pending in the Court of Appeal vide ***Criminal Appeal No. 16 of 2018***. In that regard this court finds that this application is bad in law and incompetent because under the provisions of **Section 364(5)** of the **Criminal Procedure Code** this court cannot entertain leave alone rendering a decision over a matter where an appeal lies. The applicant is therefore advised to pursue his appeal to its logical end. For now the application dated 13th April, 2018 is disallowed because it is improper and bad in law.

Dated, signed and delivered at Chuka this 28th day of November, 2018.

R. K. LIMO

JUDGE

28/11/2018

Ruling is dated signed and delivered in the open court in presence of the applicant in person and Machirah for Respondent.

R.K. LIMO

JUDGE

28/11/2018