Manare & another v Republic (Criminal Petition 39 & 40 of 2020 (Consolidated)) [2024] KEHC 5060 (KLR) (15 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5060 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL PETITION 39 & 40 OF 2020 (CONSOLIDATED)

JRA WANANDA, J

MAY 15, 2024

BETWEEN

ERICK MUSUNGU MANARE .... 1ST PETITIONER

SAMUEL MUYONGA CHIMWANI .... 2ND PETITIONER

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. There are two Applications herein, each filed, respectively, by each of the two Petitioners. They are both dated 11/03/2020 and filed on the same date and both are filed on the basis of the now famous case of *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR (commonly referred to as Muruatetu 1). Since the two Applications arise from the same criminal transaction and both seek the of re-sentencing as pertains to the sentence of death imposed upon them, the two were consolidated.

2. The background of the matter is that Petitioners and a third accused person were charged in Kapsabet Chief Magistrate's Court Criminal Case No. 454 of 2008 with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on 5/02/2005 at Chepsonoi Village in North Nandi District within the then Rift Valley Province, jointly with others not before the Court, while armed with dangerous weapons, namely pangas, rungus, swords, iron bars and stones robbed one Mohamed Burae Osman of one mobile phone and unknown amount of money and at or immediately after the time of such robbery, killed the said Mohamed Burae Osman. Being accused of staging various other acts of robbery on the same night against other complainants, the accused persons (including the Petitioners) were also charged with 4 other counts of the same charge.

3. The 3 accused persons, including the two Petitioners, all pleaded not guilty and the matter then proceeded to full trial. Upon considering the testimonies of the witnesses and the evidence tendered

in Court, the trial Magistrate, on 23/05/2008, convicted each one of them for the offence of robbery with violence and sentenced each to death.

4. From the record, I gather that aggrieved with the decision of the trial Court, the third accused person and the 1st Petitioner, instituted respective Appeals to this High Court, namely, Eldoret Criminal Appeal No. 27 and 28 of 2008 against both conviction and sentence. The Appeals were consolidated and by the Judgment delivered on 23/05/2011 by the a 2-Judge bench (Azangalala and J.K. Karanja, JJ), the conviction and sentence were upheld and the appeals dismissed in entirety. Unfortunately, although both the Appeal files have been availed to this Court, no copy of the Judgment is in either of the files. All I have found are the Petitions of Appeal, Record of Appeal and respective Notices of Appeal demonstrating intention to file Appeals to the Court of Appeal.

5. I am also unable to ascertain, from the record, whether the 2nd Petitioner also filed an Appeal.

6. Ordinarily, it would be prudent for this Court to have sight the of the Judgment delivered in the said Appeal before determining this Petition. However, considering the age of this matter and other relevant factors, my view is that it will be a dereliction of the duty of this Court to insist on waiting indefinitely for the copy of the Judgment. In the interest of justice, and to save the Petitioners from the agony of uncertainty over their fate, I will therefore proceed to determine the Petition nevertheless.

7. The Respondent did not file a response to the Application nor Submissions thereon. On their part, the Petitioners filed respective handwritten Submissions.

8. In their Submissions, the Petitioners basically urged that they are first offenders, are remorseful and that the Court needs to consider their mitigation.

Determination

9. The issue for determination herein is "whether this Court should review the death sentence imposed by the trial Magistrate's Court."

10. The offence or robbery is defined under Section 295 of the *Penal Code* as follows;

> " Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery."

11. Section 296(2) of the *Code* then defines "robbery with violence" and also sets out the sentence to be meted out to the offender as follows;

    (2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

12. It is therefore clear that the prescribed mandatory maximum sentence for the offence of "robbery with violence" as per the provisions of Section 296(2) of the *Penal Code* is therefore the death sentence. Although she did not state so, it is evident that the trial Magistrate, although he stated that he had considered the mitigation presented, imposed the death sentence in the belief that the same was the only sentence available upon conviction for the offence of robbery with violence, thus mandatory sentence.

13. It is now however, generally agreed that in spite of the mandatory language employed by the statute, the Courts nevertheless still possess discretion in sentencing of offenders convicted of the offence. It is on this basis that in the case of *Francis Karioko Muruatetu & Another v Republic [*2017] eKLR, although dealing with a case of murder, and not robbery with violence, the Supreme Court of Kenya declared the mandatory death sentence unconstitutional. This is how the Supreme Court put it:

> " (66) It is not in dispute that article 26(3) of the *Constitution* permits the deprivation of life within the confines of the law. We are unconvinced that the wording of that article permits the mandatory death sentence. The pronouncement of a death sentence upon conviction is therefore permissible only if there has been a fair trial, which is a non-derogable right. A fair hearing as enshrined in article 50(1) of the *Constitution* must be read to mean a hearing of both sides. A murder convict whose mitigation circumstances cannot be taken into account due to the mandatory nature of the death sentence cannot be said to have been accorded a fair hearing."

14. I am also guided by the Court of Appeal decision in the case of *Paul Ouma Otieno v Republic* [2018] eKLR where the Court applied the *Muruatetu* decision mutatis mutandis to the provisions of Section 296(2) of the Penal Code which imposes the mandatory death penalty for the offence of robbery with violence and substituted the death sentence for a similar offence with a sentence of 20 years imprisonment.

15. Closer home, the High Court, too, in the case of *James Kariuki Wagana v Republic* [2018] eKLR, Prof. Ngugi J (as he then was) observed that while the death sentence is the maximum penalty for both murder and robbery with violence, the Court has the discretion to impose any other penalty that it deems fit and just in the circumstances. He further observed that the death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder.

16. Regarding sentence, Majanja J, quoting *Muruatetu 1*, in the case of *Michael Kathewa Laichena & another v Republic* [2018] eKLR, stated as follows:

> " The *Sentencing Policy Guidelines, 2016* ("the Guidelines") published by the Kenya Judiciary provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. Since the Guidelines did not take into account the fact that the death penalty would be declared unconstitutional, the Court in the *Muruatetu Case* (*Supra*, para. 71), considered that in re-sentencing in a case of murder, the following mitigating factors would be applicable;
>
> (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.

17. Applying these guidelines, the Court of Appeal has on several occasions reduced sentences imposed on convicts for the offence of robbery with violence. For instance, in *Wycliffe Wangusi Mafura v Republic* ELD CA Criminal Appeal No. 22 of 2016 [2018] eKLR, the Court of Appeal set aside a death sentence and substituted it with a prison sentence of 20 years. The Court noted that the robbery was at a Mpesa shop, considered the circumstances of how the robbery was committed and took into account the fact that although the Appellant was armed with a gun, with which he threatened the Mpesa attendant, he was subdued before he used it.

18. It should however be recalled that the decision of the Supreme Court in *Francis Karioko Muruatetu & another v Republic* (supra) [2017] eKLR only faulted the mandatory nature of the death sentence in Section 204 of the Penal Code and which it termed inconsistent with the *Constitution*. The Court did not therefore outlaw the death sentence but held that the Court has the discretion to impose a sentence other than death in accordance with the circumstances of the case. The he death penalty is therefore still prescribed in Kenyan law and can still, in appropriate cases, be imposed.

19. Coming back to this case, having been sentenced on 23/05/2008, the Petitioners are now serving their 16th year in prison, that is a long time. I however also note that in executing the series of robberies on the material night, the Petitioners were armed with dangerous weapons, they were brutal and injured their victims, one of whom is said to have later died. I note that in *Paul Ouma Otieno alias Collera and Another v Republic* (*supra*), as aforesaid, the Court of Appeal set aside a sentence of death on a conviction for the charge of robbery with violence and substituted it with one of 20 years imprisonment. This is despite the Court observing that the Appellants were armed with guns.

20. In the circumstances, and having taken into account of all the factors mentioned hereinabove, I am of the view that the sentence of death ought to be reduced as I believe, the Petitioners have suffered sufficient retribution for their actions.

Final Orders

21. In the circumstances, the sentence of death imposed by the trial Court against the Petitioners upon conviction for the offence of robbery with violence, is hereby set aside and substituted with a prison sentence of twenty (20) years.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 15TH DAY OF MAY 2024

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WANANDA J. R. ANURO

JUDGE

Delivered in the Presence of:

Ms Limo for the State

Both Applicants/Petitioners in person