



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J)

MISCELLANEOUS CRIMINAL APPLICATION NO. 80 OF 2019

PETER WAHOME KINGARA.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT ON RE-SENTENCING

1. The applicant was tried and convicted in Naivasha PMCRC No. 1120 of 2000 with the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. The particulars were that on 24th day of June 2000 at Naivasha town in Nakuru District within Rift Valley Province jointly with others not before court, he robbed Isaac Thumbi Njuguna one wallet containing Identity Card a driving licence and cash of Kshs 135/= all valued Kshs 700/= while armed with a toy pistol and at or immediately before or immediately after the time of such robbery used actual violence to Isaac Thumbi Njuguna.
2. On 6th September 2000, he was sentenced to suffer *death* as per law provided.
3. According to the applicant, he lodged a first appeal in HCCRA No. 129 of 2003 in Nakuru High Court. The appeal was dismissed. In 2009 he filed another appeal against both conviction and sentence in the Court of Appeal in CA No. 226 of 2008. That appeal has never been heard.
4. In 2009, however, the applicant's death sentence was commuted from death to a life sentence by the President. He is therefore serving a life imprisonment sentence.
5. The applicant, following the Supreme Court decision in **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR** filed an application for re-sentencing on 7th August, 2019. This Court declined to consider the application given that there was pending appeal in the Court of Appeal in C.A. No. 226 of 2008.
6. By a letter dated 9th February, 2020 to the Deputy Registrar Court of Appeal, the applicant withdrew the appeal in the Court of Appeal, stating that he had instead filed an application for sentence review. The Court of Appeal acknowledged receipt of the said application for withdrawal which was stamped 13th May, 2020. The said withdrawal letter was filed in the High Court on 1st October, 2020.
7. The appeal in the Court of Appeal having been withdrawn, the applicant sought to proceed with the pending application for re-sentencing. The grounds relied upon for the re-sentencing application are as follows:

“1. That, the provision of the constitution, other written laws and regulation thereto did not contemplate sentencing of death without consideration of the accused mitigation as held by the decision in the Supreme Court of Kenya, Petition No. 15 of 2015 (as consolidated with Petition No. 16 of 2015) - Francis Karioko Muruatetu.

2. That, the Honourable court be pleased to review orders regarding Section 296(2) of the Penal Code Cap 63 Laws of Kenya as Supreme Court found Section 296(1), 296(2), 297(1) and 297(2) ambiguous due to lack of distinct aggravating of each offence but shared the same definition. Hence, declared unconstitutional since it occasioned prejudice to the applicant.

3. That, the applicant to be granted appropriate relief and directions pursuant to the findings of the court in Petition No. 618 of 2020 Joseph Kaberia and others vs Attorney General and others (2016) dated 15th September, 2017.

4. That, the applicant to be granted relief through the order number B of the Supreme Court judgment dated on 14th day of December 2017 at Nairobi.

5. That, the court be pleased to observe violation of Article 47 and 48 of the Constitution.

6. That, in the interest of justice this court be pleased to allow petition and considering the prolonged period the applicant had been in the incarceration acquit the petitioner.

7. That, it is in the interest of justice that this application be granted as prayed herein.”

8. The prosecution indicated that they had no objection to the resentencing of the applicant.

9. The court ordered that the Prisons Service and the Probation Officer do file reports to enable the Court consider the application for re-sentencing. The Probation Officer’s Report was filed on 19th October 2020, and the Prisons Report was filed on 23rd October, 2020.

10. I have perused the lower court file relating to the applicant’s case but not the High Court file which is still held by the Court of Appeal. From the lower court proceedings it is clear that there was no mitigation tendered by the applicant. The proceedings show that after judgment was read out, the following was recorded:

“Prosecutor : Accused may be treated as a first offender.

Mitigation : Nil.

Court : Accused is not remorseful, however there is only one sentence provided for capital offences.

The accused is sentenced to suffer death as per law provided.”

11. From the aforesaid proceedings, it is clear that the applicant/accused did not offer any mitigation at the time, and further, the court held that there was only one mandatory sentence that it could mete. Looking at that situation in light of the principles established by the Supreme Court in the **Muruatetu** case, the applicant did not get the benefit of having his mitigation considered by the court. The applicant would thus be entitled, *ipso facto*, to a finding that he was prejudiced in the failure to consider mitigation.

12. I have also perused the Prison’s Report on the applicant. It indicates, inter alia, that the applicant is highly disciplined, has achieved the special stage of trustee who is a role model and can work without supervision, and can also assist in training others. The report states that:

“The inmate is fully reformed to the level of achieving the special stage and he is ready to join society with the level of training he has achieved the skills if put in practice help to family and to the large society. He is assured of soft landing by his members of the family, he is highly recommended for consideration.”

13. The Probation Officer’s Report indicates that in respect of the attitude of the family and community, there is no objection to his continuing his rehabilitation from within the community. Having served a prison sentence of twenty years, they believe that he is reformed. His family is also ready to receive him, accommodate him, and give him the necessary tools and support to empower him to carry on the work of carpentry.

14. The Probation Officer’s Report concludes with the recommendation that:

“.....the offender [is] fit for a non-custodial sentence. This will be beneficial as he will be supervised to ensure resettlement and reintegration within the family and community. The necessary interventions will be put in place to ensure that he complies with court orders.”

Disposition

15. Taking into account all the foregoing, and keeping in mind the principles in the **Muruatetu** case and the **Judiciary Policy on Sentencing**, I consider this to be a proper case in which resentencing ought to be done. I note that the applicant has been in prison custody since his arrest on 24th June 2000, which is a period of 20½ years.

16. I would sentence the applicant to a determinate period of twenty five (25) years imprisonment with effect from 24th June 2000, and impose the following conditions thereon:

1. Twenty and a half (20½) years already spent in prison custody shall be deemed to be the prison custodial years of his term.
2. Fifteen (15) months of the remaining term of his sentence shall be served with immediate effect as a non-custodial sentence during which time the applicant shall be under a rehabilitation programme designed and managed by the Probation Officer.
3. Should the applicant successfully complete the aforesaid rehabilitation programme without being convicted for any offence, he shall be set at liberty immediately upon completion of his probation period.
4. Should the applicant commit and be convicted of any offence during his probation period he shall serve the remaining term of his

sentence.

Administrative directions

17. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

18. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

19. Orders accordingly.

Dated and Delivered in Naivasha by teleconference this 10th Day of February, 2021.

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Ms Maingi for the DPP
2. Peter Wahome King'ara - Applicant in Person in Naivasha Maximum prison
3. Court Assistant - Quinter Ogutu