REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

MISC CRIMINAL PETITION NO. E005 OF 2020

(CORAM: F.M. GIKONYO J.)

Revision of Original Conviction/Sentence in NAROK SRMCCRC No. 136 Of 2013 and NAIVASHA HCCRA 89 of 2015

KAMULAK SHUMA.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

Re-sentencing

[1] The Applicant moved this court vide an undated petition and application forwarded vide letter dated 28/10/2020 seeking for orders of a rehearing and resentencing pursuant to the Supreme Court decision in the matter of ***Francis Karioko Muruatetu & Another –vs- Republic [2017] eKLR.***

[2] The applicant was convicted for the offence of robbery with violence contrary to section 296 (2) of the penal code and was sentenced to death. He filed **appeal**; Naivasha **HCCRA 89 of 2016 which appeal was dismissed.** The appellate court upheld the death sentence **on the ground that** it is authorized by law.

Applicant's submission

[3] The applicant's case is that his mitigation was not as well as the circumstances of his case were not considered by the court in sentencing him to suffer death. According to hi, were these mitigating factors been considered, there was a possibility of a lesser sentence being imposed.

[4] The Applicant claims that he is now born again and skilled to work in the Community. That he has taken full advantage of the rehabilitative programs offered in the correctional facility and has attached diploma in AFCM, certificates; in celebrate recovery, completion in prisoners' journey and training of trainers in prisoner's journey as evidence of his reformation.

[5] He urged the court to consider the period he has served in Prison in accordance with section 333(2) and section 38 of the CPC and article 27(1) and (2), 50(2) (p) (2) when considering the time spent in custody prior to conviction. He relied on the case of ***Muruatetu and Another Vs Republic and William Okungu Kitting Vs Republic (Kisumu).***

[6] He therefore only pleads for re-sentencing. However, during submissions, he tended to move away from his original Petition for re-sentencing and instead alleges that there is new evidence to the effect that he now has a birth certificate to prove his age- Certificate of Birth number 0290029255. He submits that he was aged 14 years and relies on ***A.O.O And 6 Others Vs Attorney General and Another 2017(eKLR)*** for relief.

[7] The Applicant submitted that he was a minor at the time of commission of the offence and should be protected by Article 53 (1) (d) of the constitution. That the court should consider provisions of section 2001 of the sentencing policy guidelines when sentencing him since he is a child. That the sentence meted on him being a child is a contravention of section 20(2).

Prosecution's submission

[8] Ms. Koina for the Respondent in her submission opposed the application and urged that the applicant got reprieve in 2016 when the president of the Republic of Kenya commuted his sentence to life imprisonment.

[9] Therefore, this court lacks the requisite jurisdiction to handle the petition as it is *res judicata*. That the applicant should file an appeal at the Court of Appeal and persuade the court on the basis of ***Muruatetu Case*** for a favorable sentence. She has relied on the cases of ***Joseph Waititu Kago V Republic [2020] eKLR , Benson Njeru Nyaga V Republic [2020] eKLR***.

[10] The prosecution counsel questioned the intention of the applicant in relation to the birth certificate. She submitted that the birth certificate was issued six years after conviction. The applicant never raised the issue of having been a minor at the High court in Naivasha. The applicant has not given reasons why the birth certificate was not produced during trial. She therefore submits that the allegation that the applicant was a minor is an afterthought. She insists the applicant was an adult at the time of trial and that his rights were never violated. She proceeded to urge the court to dismiss the application on its entirety for lack of merit.

ANAYSIS AND DETERMINATION

[11] From the outset, I do note that, the application herein is a twinning of request for a new trial and re-sentencing.

Of new trial

[12] According to article 50(6) of the Constitution: -

> **(6) A person who is convicted of a criminal offence may petition the High Court for a new trial if—**
>
> **(a) the person's appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and**
>
> **(b) new and compelling evidence has become available.**

[13] Such petition should be made where new and compelling evidence has become available. I take the phrase *''new and compelling evidence has become available''* to denote evidence which was not available or could not have been adduced at the trial or at appellate level even after due diligence. The evidence must also be relevant, credible and capable of belief, and one capable of creating a doubt as to the guilt of the accused. The test of admitting new evidence under the article should follow after the test stated in the case of ***Elgood Vs. Regina (1968) E.A. 274,*** to wit: -

> ***a. That the evidence that is sought to be called must be evidence which was not available at the trial.***
>
> ***b. That it is evidence that is relevant to the issues.***
>
> ***c. That it is evidence that is credible in the sense that it is capable of belief.***
>
> ***d.That the court will after considering the said evidence go on to consider whether there might have been a reasonable doubt created in the mind of the court as to the guilt of the appellant if that evidence had been given together with other evidence at the trial."***

[14] The Court should therefore caution itself in admitting new evidence under the article. Accordingly, the decision to come under this article should be a conscientious one and backed by appropriate and credible evidence thereto. The applicant did not raise the issue of age at the trial or appellate stages. I also do note that, the Certificate of Birth being relied upon was issued six years after conviction. No reason was advanced as to why; (a) the question of age was not raised at the trial or at appellate stages, or (b) the Certificate of Birth was procured six years after the conviction. It is incumbent upon the person seeking to have a new trial to give cogent and credible evidence to show the evidence was not available or could not have been adduced at the trial even after due diligence, is credible and capable of belief, and is capable of creating doubt as to his guilt. The circumstances of this case are quite ominous- and this was expressed by the prosecution counsel- especially as to how and why the Certificate of Birth was obtained six years after conviction; and why it is being used to seek for new trial or re-sentencing on the basis that the applicant was a child at the time of the commission of the offence. Credibility of the evidence is put to question. I therefore, reject the bid for a new trial,

Re-sentencing: nature and scope

[15] Perhaps resentencing may be potent. Re-sentencing is neither a hearing *de novo* nor an appeal. It is a proceeding undertaken within the court's power to review sentence only. The court will ordinarily check the legality or propriety or appropriateness of the sentence. The relevant considerations in the proceeding *inter alia*, are the penalty law, mitigating or aggravating factors, and the objects of punishments. In re-sentencing proceedings, conviction is not in issue.

[16] However, a challenge to the jurisdiction of this court to conduct a re-sentencing has been raised by the respondent.

[17] Thus, there are two issues for determination;

> ***1. The jurisdiction of this court to hear the application; and***
>
> ***2. Whether the sentence imposed is harsh or excessive in the circumstances***

Jurisdiction

[18] Jurisdiction is the judicial power given to the court to adjudicate upon a dispute. Without jurisdiction, a court cannot adjudicate the case before it. Jurisdiction is therefore everything and is of such preliminary importance. See quite apt expression of the centrality of jurisdiction in adjudication of cases by **Nyarangi, J.A**. in the often-cited case of ***The Owners of Motor Vessel Lilian "S" vs. Caltex Oil (Kenya) Ltd [1989] KLR 1*** at page 14:

> ***"Jurisdiction is everything. Without it, a court has no power to take one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending the evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."***

[19] The Supreme Court of Kenya buttressed this question in ***Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Ltd & 2 Others, Application No. 2 of 2011***, where it pronounced that:

> ***"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law…"***

[20] In this case, the Applicant filed appeal number **HCCRA NO. 89 of 2015** which was heard and dismissed. The Applicant has filed the application herein before me for resentencing and consideration of new evidence. The prosecution counsel argued that this court pronounced itself on the sentence and so it is *functus officio*. does this court have jurisdiction to hear the application?

[21] The Court of Appeal in the case of ***William Okungu Kittiny -v- R (2018) eKLR stated:***

> ***"The decision of the Supreme Court only discouraged persons from filing petitions to the Supreme Court but the decision does not prohibit court below it from ordering sentence re-hearing in a matter pending before the courts. By Article 163 (7) of the Constitution, the decision of the Supreme Court has immediate and binding effect on all the other courts. The decision of the Supreme Court opened the door for review of death sentences even in finalized cases".***

[22] Accordingly, this court has jurisdiction to review sentence in this case.

[23] But more digging of jurisprudence on this subject will not harm The High Court, in ***Stephene Kimathi Mutunga -v- Republic (2019) eKLR*** while holding that the High Court has unlimited jurisdiction in both Civil and Criminal matters and the mandate of enforcing fundamental rights and freedoms as enshrined in the Constitution, stated that the High Court has jurisdiction to deal with the petition for sentencing rehearing.

[24] In ***Michael Kathewa Laichena & Another -v- Republic (2018) eKLR Justice Majanja stated:***

> ***"by re-sentencing the petitioner, the High Court is merely enforcing and granting relief for what is in effect a violation caused by the imposition of the mandatory death sentence".***

[25] The High Court has the mandate under ***Article 165 (3) of the Constitution*** to hear and determine as well as to enforce matters of rights and fundamental freedoms enshrined in the constitution.

[26] Under article 50(2)(p) of the Constitution: -

> ***50(2) Every accused person has the right to a fair trial, which includes the right—***
>
> ***(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing***

[27] I should state also that; a subtle judicial hint emerges when ***Muruatetu*** decisional law is interposed to article 50(2)(p) of the Constitution. Arguably, the decisional law in ***Muruatetu*** changed the law on mandatory punishments; now appropriate sentence should be imposed by courts in all instances which may be less severe than the mandatory sentence. Therefore, persons who suffered mandatory sentences were deprived the right to appropriate sentence and may claim the benefit of article 50(2)(p) of the Constitution to remedy the injustice and the violation of the right to fair trial arising therefrom.

[28] Such violation of right is to be remedied under article 23 of the Constitution. The article confers upon the High Court the authority to redress the violation of a right, uphold and enforce a right. See the article below: -

> ***23. Authority of courts to uphold and enforce the Bill of Rights***
>
> ***(1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights***

[29] I should think that, with this authority, where a violation of right is claimed, there may be no necessity of an appeal for redress. This court has jurisdiction under article 165 of the Constitution to hear and determine applications for redress of denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Re-sentencing hearing on the basis of denial or violation of a right or freedom in the Bill of Rights is in the nature of application for redress of denial or violation of right and fundamental freedom in the Bill of

Rights envisioned in article 23 of the Constitution. This is one such application.

Sentence

[30] The emerging jurisprudence is that the principle in the decisional law in the Supreme Court's decision in ***Muruatetu* (supra)** on mandatory nature of death sentence apply to mandatory sentences in all other category of cases other than murder cases. 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."***

[31] I have perused the decision by this court (Meoli J.) and it is apparent that the death penalty was imposed because it was the only sentence prescribed in law at the time. Such law is inconsistent with the Constitution and I declare it as such. I am aware that the President commuted his death sentence to life imprisonment. But, in my view, it is the court that has judicial authority and duty to re-sentence. On the basis of the decisional law in Muruatetu case, I set aside the death sentence imposed upon the applicant.

[32] What therefore is the appropriate sentence given the circumstances of this case? Discretion of the court in sentencing answers to the facts and the circumstances of the case so as to arrive at appropriate sentence. The Court of Appeal **Thomas Mwambu Wenyi Vs Republic (2017**) **eKLR** cited the decision of the Supreme Court of India in **Alister Anthony Pereira Vs State of Mahareshtra** at paragraph 70-71 where the court held the following on sentencing:

> ***"Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.***

[33] See also **Francis Karioko Muruatetu & Another –Vs- Republic (Supra)** where the Supreme Court stated the guidelines and mitigating factors in a re-hearing sentence. These factors are also Applicable in a re-sentencing for the offence of robbery with violence.

[34] The Judiciary Sentencing Policy Guidelines lists the objectives of sentencing at page 15 paragraph 4.1. Among others; the gravity of the offence, the threat of violence against the victim, the nature and type of weapon used by the Applicant to inflict harm. What are the relevant circumstances of this case?

[35] I do note that, in **Peter Maina Kimani v Republic [2019] eKLR** the Petitioner jointly with others while armed with a panga and metal rod robbed a complainant of Kshs.4000/- and itel Phone valued at Ksh 3,500/=. During resentencing the court took into account the fact that Appellant was a first offender and that the sentence imposed on an offender must be commensurate to his moral blameworthiness. The Court set aside the life imprisonment, sentencing the Appellant to serve 20 years imprisonment.

[36] In the case before me, the evidence shows that the applicant robed Daniel Mwiti Buantai of his motorcycle KMCG 254S and wallet all valued at Kshs. 90,000/=. The applicant was armed with rungu and knife. The victim was also killed. The manner the offence is committed is relevant consideration. In this case it was cruel and involved death of the victim. The offence is also serious; a robbery with violence. And, the weapons used were also dangerous weapons; rungu and knife. In the circumstances of this case, deterrent sentence is most appropriate.

[37] The Prison life has not been wasteful for the Applicant as he has learnt trades that can make him a useful person in society. I have also considered letter dated 23.11.2020 from Rev. Daniel K. Langat the Chaplain Narok Main Prison, which states that the Applicant is a reformed person from the heart. He enrolled in correspondences courses and attained certificates and diploma. He can employ himself and others as well as being an ambassador for the rule of law for those involved in crime to change. In my view and from my own observation of the Applicant in Court, he appears remorseful and ready to reintegrate back to society. He has been in custody for nearly 8 years. The Court has taken all the mitigation into account and the fact that Robbery with violence traumatizes not only the victim but also the community at large as it could result in harm or death of the victim besides robbing of hard-earned property. The Courts in meting out sentence after considering mitigations are guided by principles of deterrence and rehabilitation or reformation of the offender.

[38] For the above reasons, I am persuaded that there is need for a deterrent sentence but which also allows an opportunity to come back to society and be productive; life sentence commuted by the President does not serve this purpose.

[39] Accordingly, I hereby set aside the life sentence imposed on the Applicant through commutation by the President and substitute it with a Prison term of 35 years. Being guided by the provisions of Section 333 (2) of the Criminal Procedure Code the sentence shall run from the date when the Applicant was first arraigned in the trial **Court in Narok SRM Cr. Case No.** ***136 Of 2013***. Right of appeal explained. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 11TH DAY OF MARCH 2021

F. GIKONYO

JUDGE

In the Presence of:

1. Mr. Kasaso – CA

2. Ms. Torosi for DPP

3. Appellant in person

F. GIKONYO

JUDGE