



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**MISCELLANEOUS CRIMINAL APPLICATION NO. 90 OF 2019**

**HILLARY CHEDI MMBOI.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RE-SENTENCING**

[1] The applicant herein, **Hillary Chedi Mmboi**, moved the Court vide his Notice of Motion dated **1 April 2019** for Sentence Rehearing following the decision of the Supreme Court of Kenya in **Francis Karioko Muruatetu & Others vs. Republic** [2017] eKLR. He relied on **Articles 19, 22, 25, 26, 27, 28, 29, 50, 159, 160, 165** of the **Constitution of Kenya** and **Section 261** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya** in praying for orders that:

[a] the Court be pleased to determine his application for re-hearing of the sentence imposed on him.

[b] That it is within the rules of law for the same to be re-considered.

[2] In his Supporting Affidavit filed with the application, the applicant deposed that he was charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code, Chapter 63** of the **Laws of Kenya**; and that, though he was sentenced to death which has since been commuted to life imprisonment, the Supreme Court has since declared the mandatory death penalty unconstitutional in **the Muruatetu Case** (supra). He therefore averred that, in the circumstances, he is entitled to a reconsideration of his sentence in line with the decision of the Supreme Court.

[3] There appears to be no response to the application by the State. Nevertheless, the lower court record for **Eldoret Chief Magistrate's Criminal Case No.3185 of 2009: Republic vs. Hillary chedi Mmboi and 2 Others** was called for and it confirms that the applicant was one of three accused persons who were therein charged with robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The particulars were that on **17<sup>th</sup> day of May 2009** at Majengo Village in Lugari District within Western Province, jointly being armed with dangerous weapons, namely panga, slasher and timber, robbed **Pius Chibaso Kibao** of six cushions, one head of swan sewing machine, three mattresses, one Panasonic radio, one mobile phone make motorolla C 113, two thermos flasks, two bags of dry maize, 16 kgs of dry beans and one chicken all valued at **Kshs. 24,850/=** and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said **Pius Chibaso Kibao**.

[4] The applicant also faced a second charge of handling stolen property contrary to **Section 322(2)** of the **Penal Code**. It was alleged that on **18 May 2009** at Matunda Township in Lugari District within Western Province, otherwise than in the course of stealing he dishonestly received or retained 10 kgs of dry maize and one mattress, while knowing or having reason to believe them to be stolen goods.

[5] The applicant denied those charges and upon trial was found guilty and convicted of both the charge of robbery with violence and the charge of handling stolen property. He was sentenced to death on Count I and imprisonment for 10 years in respect of the 2<sup>nd</sup> charge. On appeal this Court (**Hon. Karanja and Hon. Mshila, JJ**) upheld his conviction and sentence in respect of the charge of robbery with violence; but quashed the conviction and set aside the sentence in respect of the 2<sup>nd</sup> charge of handling stolen property on the ground of duplicity.

[6] The applicant urged his application by way of written submissions, and thereby contended that the sentence imposed on him is no longer tenable. He also submitted that he has spent 12 years in prison and has benefited from the rehabilitation programs offered to in-mates. He added that he is remorseful and has successfully reached out to the complainant for reconciliation. He annexed several documents to his Supporting Affidavit to buttress his averments. They include various certificates given to him for the rehabilitation programs attended as well as correspondence between him and the complainant, involving the area assistant chief, to demonstrate that he has been forgiven by the complainant.

[7] Other than **the Muruatetu Case**, the applicant cited the following decisions in support of his application:

- [a] **William Okungu Kittiny vs. Republic** [2018] eKLR;
- [b] **Michael Kathewa Laichena & Another vs. Republic** [2018] eKLR;
- [c] **Benjamin Kemboi Kipkone vs. Republic** [2018] eKLR;
- [d] **Paul Ouma Otieno vs. Republic** [2018] eKLR
- [e] **Wycliffe Wangugi Mafura vs. Republic** [2018] eKLR
- [f] **Benson Ochieng & Francis Kibe vs. Republic** [2018] eKLR

[8] Counsel for the State, **Mr. Mugun**, opposed the application. He made reference to Paragraph 4 of the Applicant's Supporting Affidavit where it was averred that an appeal had been filed to the Court of Appeal from the decision of the High Court. He was therefore of the posturing that this Court is *functus officio*, since this Court had already pronounced itself on the applicant's appeal; and that the applicant should patiently await the decision of the Court of Appeal. He accordingly prayed for the dismissal of the applicant's application.

[9] It is noteworthy that, although the applicant indicated that he had filed an appeal to the Court of Appeal, he vehemently denied this in his oral submissions before the Court. As this aspect was pertinent for an effectual determination of the application, an order was made for the Deputy Registrar to ascertain whether there is a pending appeal by the applicant before the Court of Appeal. The Deputy Registrar has since filed a report to confirm that no appeal had been filed by the applicant to the Court of Appeal as at **3 June 2021** when the report was given. In the premises, the applicant is indeed entitled to sentence rehearing and therefore his application is competently before this Court.

[10] Whereas the appellant averred that his death sentence was commuted to life imprisonment, the object of the application for review is, not the commuted sentence but the original death sentence imposed by the trial court. In this regard, I am in agreement with the position taken by **Hon. Majanja, J.** in **John Gitonga alias Kadosi vs. Republic** (supra), that:

**"...this petition is one for resentencing not clemency. The petitioner has already had the benefit of his death sentence commuted to life imprisonment by His Excellency the President under the Power of Mercy conferred under Article 133 of the Constitution. In this case, the court is being called upon to re-consider the facts as they existed at the time of sentencing and impose an appropriate sentence in light of the fact that the mandatory death penalty has been declared unconstitutional."**

[11] The sentence re-hearing has been necessitated by the decision of the Supreme Court in **the Muruatetu Case** wherein the Supreme Court declared unconstitutional the mandatory nature of the death sentence. That decision was made on **14 December 2017**, long after the dismissal of the applicant's appeal to the High Court. Here is what the Supreme Court had to say in regard to the death sentence:

**"[58] To our minds, any law or procedure which when executed culminates in termination of life, ought to be just, fair and reasonable. As a result, due process is made possible by a procedure which allows the Court to assess the appropriateness of the death penalty in relation to the circumstances of the offender and the offence. We are of the view that the mandatory nature of this penalty runs counter to constitutional guarantees enshrining respect for the rule of law."**

**[59] We now lay to rest the quagmire that has plagued the courts with regard to the mandatory nature of Section 204 of the Penal Code. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the Penal Code, unfair thereby conflicting with Articles 25 (c), 28, 48 and 50 (1) and (2)(q) of the Constitution."**

[12] The Supreme Court then added at paragraph 69 of its Judgment that:

**"Consequently, we find that Section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment."**

[13] As a corollary to **the Muruatetu Case**, the Court of Appeal made its pronouncement in respect of **Section 296(2)** of the **Penal Code**, which has a similar penalty, in **William Okungu Kittiny vs. Republic** (supra) and held as follows:

**"...The appellant was sentenced to death for robbery with violence under Section 296 (2). The punishment provided for murder under Section 203 as read with Section 204 and for robbery with violence and attempted robbery with violence under Section 296 (2) and 297 (2) is death. By Article 27(1) of the Constitution, every person has inter alia, the right to equal protection and equal benefit of the law. Although the Muruatetu's case specifically dealt with the death sentence for murder, the decision broadly considered the constitutionality of the death sentence in general...From the foregoing, we hold that the findings and holding of the Supreme Court particularly Paragraph 69 applies *mutatis mutandis* to Section 296 (2) and 297 (2) of the Penal Code. Thus the sentence of death under Section 296(2) and 297(2) of the Penal Code is a discretionary maximum punishment. To the extent that Section 296(2) and 297(2) of the Penal Code provides for**

**mandatory death sentence the Sections are inconsistent with the Constitution...as the Supreme Court did not outlaw the death penalty. It follows that the main ground of appeal – the unconstitutionality of Section 204, 296(2) and 297(2) of the Penal Code on the death sentence fails.”**

[14] In the premises, what is required of the Court is to consider what would have been an appropriate sentence in the circumstances. The approach suggested at **Paragraph 23.9** of the **Judiciary Sentencing Guidelines**, which are guidelines formulated to ensure objectivity and uniformity in sentencing, is that:

**“The first step is for the court to establish the custodial sentence set out in the statute for that particular offence. To enable the court to factor in mitigating and aggravating circumstances/factors, the starting point shall be fifty percent of the maximum custodial sentence provided by statute for that particular offence. Having a standard starting point is geared towards actualizing the uniformity/impartiality/consistency and accountability/transparency principles set out in paragraphs 3.2 and 3.3 of these guidelines. A starting point of fifty percent provides a scale for the determination of a higher or lower sentence in light of mitigating or aggravating circumstances.”**

[15] Additionally, in **the Muruatetu Case**, the Supreme Court proffered the following guidelines for consideration in respect of a sentence re-hearing:

- [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.

[16] The key findings of the lower court were that the applicant was in the company of two other persons, and that they were armed with a panga, a slasher and a piece of timber with which they threatened the complainant. The proceedings and judgment of the lower court also show that the applicant herein was a first offender; and that he has been in custody since **18 May 2009** when he was arrested; a period of 12 years now. He has likewise not only shown that he has benefitted from his incarceration and received training on life skills, but also that he had made efforts to reach out to the complainant for reconciliation through the office of the area assistant chief.

[17] With the foregoing in mind I have taken into account the authorities cited by the applicant; and note that they involved more aggravated circumstances. The picture painted by the authorities cited by the applicant is as hereunder:

[a] In **Benjamin Kemboi Kipkone vs. Republic** [2018] eKLR, the three offenders involved were armed with an AK 47 rifle when they robbed the complainant of **Kshs. 250,000/=** and a mobile phone. **Hon. Chemitei, J.** substituted the death sentence with 20 years' imprisonment.

[b] In **Paul Ouma Otieno vs. Republic** [2018] eKLR, the offenders were armed with an AK 47 rifle and a kitchen knife when they robbed the complainant of **Kshs. 450,000/=**. Their death sentence was substituted with 20 years' imprisonment by the Court of Appeal;

[c] In **Wycliffe Wangugi Mafura vs. Republic**, Eldoret Criminal Appeal No. 22 of 2016, the appellant's death sentence for robbery with violence was substituted with 20 years' imprisonment by the Court of Appeal.

[d] In **Benson Ochieng & Another vs. Republic** [2018] the offenders were armed with multiple guns and were re-sentenced to 20 years' imprisonment.

[18] In this case, the facts show that though the applicant was in the company of two other persons and that, though armed with a panga, slasher and timber, they did not wound or inflict any sort of force on the complainant. I therefore find the following decisions more comparable for purposes of re-sentencing:

[a] In **Douglas Muthaura Ntoribi vs. Republic** (supra) the Appellant had been sentenced to death for the offence of robbery with violence under **Section 296(2)** of the **Penal Code**. The death sentence was set aside on appeal and substituted with 15 years' imprisonment on **25 January 2018**. The Court took into account that the Appellant therein had been in custody from the time of his arrest on **10 June 2004**, and had therefore been incarcerated for 14 years.

[b] In the case of **Robert Mutashi Auda vs. Republic, Nairobi Criminal Appeal No. 247 of 2014**, the Appellant had been convicted on a charge of robbery with violence contrary to **Section 296(2)** of the **Penal Code** and sentenced to death. His appeal to

the High Court against conviction and sentence was unsuccessful. In a second appeal, the Court of Appeal was urged to consider the sentence and the mitigating factors in accordance with the Muruatetu Case. The view of the Court of Appeal on the matter was thus:

**"We have considered the said mitigation and sentiments of the prosecution counsel. We have considered the circumstances in which the offences were committed and noted that there were no injuries inflicted on the victims. We also appreciate the fact that the appellant has already served 13 years in prison which in our view is sufficient retribution on his part. Taking all these issues into account, we are persuaded to interfere with the death sentence imposed on the appellant and reduce the same to the term already served. The appellant's appeal therefore succeeds in part only as far as the sentence is concerned as the conviction remains undisturbed. We order that the appellant be set at liberty unless he is otherwise lawfully held."**

[19] In the premises, having taken into account all the factors mentioned herein above, I am of the view that the period so far served by the applicant herein is sufficient retribution for the subject offence. I would therefore allow his application, and order, which I hereby do, that the applicant's death sentence be substituted with imprisonment for the period served; and that he be released forthwith unless otherwise lawfully held.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 10<sup>TH</sup> DAY OF JUNE 2021**

**OLGA SEWE**

**JUDGE**