

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCR REV. NO. 2 OF 2020

PATRICK MUINDE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. Before me is an application by way of Chamber Summons for review of sentence in a criminal matter – Makindu Magistrates’ Criminal Case No. 421 of 2007, which became Machakos High Court Criminal Appeal No. 145 of 2010 and which finally became Nairobi Criminal Appeal No. 30 of 2018, wherein the Applicant having been convicted of two counts of robbery with violence contrary to section 296(2) of the Penal Code, the sentence of death imposed by the trial court was upheld all the way to the Court of Appeal.

2. The Applicant has now come to this court for review of sentence citing the directives of the **Supreme Court in Petition No. 15 &16 of 2015 Francis Karioko Muruatetu & Another –vs- Republic.**

3. I note that in the application, the Applicant did not provide any mitigation factors but merely stated that the trial court in sentencing him relied on erroneous principles in view of the Supreme Court reasoning in the Muruatetu case, and that the period he was in custody before sentence was not taken into account in sentencing him. I note that at the trial, in the Applicant, who was the 1st accused, said nothing in mitigation.

4. The application for review of sentence herein is opposed by the State and in this regard the Director of Public Prosecutions filed a replying affidavit sworn on 5th March 2021 by Ann Penny M. Gakumu Senior Principal Prosecution Counsel in which it was deponed that it was not true that the trial court contravened section 333(2) of the Criminal Procedure Code (Cap 75). According to counsel, the period spent by the Applicant in custody was considered by both the High Court and Court of Appeal which upheld the death sentence imposed by the trial court. Counsel added that the sentence of death provided under section 296(2) of the Penal Code was not declared unconstitutional by the Supreme Court, but was only declared by the apex court to be the maximum sentence.

5. When parties were asked by this court to file written submissions to the application, the Applicant elected not to file written submissions and relied on the application and affidavit filed. The Director of Public Prosecutions for the State, on the other hand, filed written submissions on 5th March 2021 in which they contended that the trial court, High Court and Court of Appeal took into account the law as well as the mitigating and aggravating factors in considering sentence imposed. The Director of Public Prosecutions, in particular, emphasized the fact that the Applicant was with another, at the time of incident, armed with weapons such as a pistol, bundled the victims into the boot of a car, robbed them and abandoned them in a desert area.

6. I have perused the proceedings of the trial court and the judgment. I appreciate that the sentence of death was confirmed all the way to the Supreme Court. On the reasoning of the Supreme Court in the case of Muruatetu (supra), this court or the trial court has jurisdiction to review sentences imposed by courts in situations of mandatory statutory death sentences, even if an appeal to the highest court has been dismissed. In other words, the Supreme Court allowed courts to consider mitigating circumstances and factors in determining the appropriate sentence to impose, instead of just handing down the mandatory death sentence.

7. I note that in this present matter, the Applicant decided to say nothing in mitigation before the trial court. Maybe it was because he knew that the death penalty was mandatory, maybe not. Whichever the case, he did not ask for leniency. He also chose not to file submissions in this application.

8. Considering the evidence on record however, none of the two Complainants was injured in any way. Secondly, luckily most of the robbed items and money were recovered at Emali town the same night of the robbery. In those circumstances in my view, the death penalty imposed though legal, was harsh and excessive. I will thus review the sentence imposed.

9. Though I have not been availed a pre-sentence report, in my view, the Applicant having been in custody since 2007 and most of the robbed items having been recovered and the Complainants not having suffered physical injuries, I set aside the death sentence imposed and order that the Applicant will instead serve twenty (20) years imprisonment from the date he was sentenced by the trial court.

DELIVERED, SIGNED & DATED THIS 21ST DAY OF JULY 2021, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE