



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC. CRIMINAL APPLICATION NO. 148 OF 2019

(Coram: Odunga, J)

DOMINIC NZANGI KIMEUAPPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The accused herein, **Dominic Nzangi Kimeu**, was charged before Makindu PM's Court in criminal case no. 1186 of 2012 with the offence of Robbery with Violence Contrary to Section 296(2) of the *Penal Code* was convicted thereof and sentenced to death. He appealed to this court in Criminal Appeal No. 84 of 2015. That appeal was heard by **Kemei, J** who on 31st July, 2017 set aside his conviction and sentence and substituted the same with a conviction for handling stolen goods contrary to section 322(2) of the *Penal Code* and sentenced him to 14 years' imprisonment with effect from 18th May, 2015, the date of his sentence.

2. In this application, the applicant seeks an order for resentencing pursuant to the decision of the Supreme Court in **Francis Karioko Muruatetu & Another vs. Republic**, Petition No. 15 of 2015. In that case, the said Court held that:

“[47]. Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal Declaration of Human Rights, and in the same vein Article 25(c) of the Constitution elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse.

[48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right.

[49] With regard to murder convicts, mitigation is an important facet of fair trial. In *Woodson* as cited above, the Supreme Court in striking down the mandatory death penalty for murder decried the failure to individualize an appropriate sentence to the relevant aspects of the character and record of each defendant, and consider appropriate mitigating factors. The Court was of the view that a mandatory sentence treated the offenders as a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death thereby dehumanizing them.

[50] We consider *Reyes* and *Woodson* persuasive on the necessity of mitigation before imposing a death sentence for murder. We will add another perspective. Article 28 of the Constitution provides that every person has inherent dignity and the right to have that dignity protected. It is for this Court to ensure that all persons enjoy the rights to dignity. Failing to allow a Judge discretion to take into consideration the convicts' mitigating circumstances, the diverse character of the convicts, and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence thereby treating them as an undifferentiated mass, violates their right to dignity.

[51] The dignity of the person is ignored if the death sentence, which is final and irrevocable is imposed without the individual having any chance to mitigate. We say so because we cannot shut our eyes to the distinct possibility of the differing culpability of different murderers. Such differential culpability can be addressed in Kenya by allowing judicial discretion when considering whether or not to impose a death sentence. To our minds a formal equal penalty for unequally wicked crimes and criminals is not in keeping with the tenets of fair trial.

[52] We are in agreement and affirm the Court of Appeal decision in *Mutiso* that whilst the Constitution recognizes the death penalty as being lawful, it does not provide that when a conviction for murder is recorded, only the death sentence shall be

imposed. We also agree with the High Court's statement in *Joseph Kaberia Kahinga* that mitigation does have a place in the trial process with regard to convicted persons pursuant to Section 204 of the Penal Code. It is during mitigation, after conviction and before sentencing, that the offender's version of events may be heavy with pathos necessitating the Court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness.

[53] If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualise the circumstances of an offence or offender may result in the undesirable effect of 'overpunishing' the convict."

3. Section 322(1) of the *Penal Code* provides as follows:

A person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not exceeding fourteen years.

4. It is clear that the said section does not provide for mandatory sentence. In fact, it provides for the maximum sentence but leaves the appropriate sentence at the discretion of the court. The court therefore has the power to mete any sentence up to 14 years. In this case the applicant was sentenced to the said maximum. Whether or not the same was proper in the circumstances, is not for this court to determine since this court has no power to supervise any superior court.

5. In the premises, I agree with **Ms Mogoi**, learned prosecution that in the circumstances of this case, this court is *functus officio* and the applicant's grievances can only be dealt with on appeal to a higher court.

6. In the premises, this application is incompetently before this court and is hereby struck out.

7. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 17th day of January, 2020.

G V ODUNGA

JUDGE

In the presence of:

Applicant in person

Mr Kimani for Miss Mogoi for the Respondent

CA Geoffrey