



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**PETITION NO. 87 OF 2018**

**BERNARD MUCHOMBA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**PARTIAL RULING ON RE-SENTENCING**

[1] The petitioner, **Bernard Muchomba**, was charged before the Chief Magistrate's Court Criminal Case No. 839 of 2009 at Tigania for the offence of robbery with violence contrary to **Section 296 (2) of the Penal Code**.

[2] After the trial, the applicant was found guilty and sentenced to death. Being aggrieved by that decision, the petitioner appealed to the High Court in HCCRA No. 238 of 2009, where the conviction and sentence were upheld on 31/3/2011. His appeal to the Court of Appeal in Criminal Appeal No. 63 of 2013, was dismissed on 5/2/2014.

[3] The petitioner has now petitioned this court to revise his sentence on the basis of the Supreme Court decision in the case of **Francis Muruatetu and Others vs Republic [2017] eKLR**.

[4] In that case, the Supreme Court of Kenya held that the mandatory nature of the death sentence under **Section 204 of the Penal Code** was unconstitutional as it denied the Court its discretion in sentencing. The Supreme Court also set out some of factors or the principles that should guide a Court in sentencing. Some of the considerations are *age of the offender, being a first offender, whether the offender pleaded guilty, the character and record of the offender, commission of the offence in response to gender-based violence, remorsefulness of the offender, the possibility of reform and social re-adaptation of the offender and any other factor that the Court considers relevant*.

[5] Though the Supreme Court was dealing with the offence of murder, I take the view that the same arguments considered in the Muruatetu case apply in all other cases where the law has set a fixed sentence such that the discretion of the court is taken away. Such fixed sentences may be in form of mandatory death sentence or minimum sentence. Such law offends the very core of justice; the violation is in the denial of the offender of the discretion of court to mete out appropriate sentence. I am not alone in this thinking which was prophesied in the case of **Godfrey Ngotho Mutiso v R [2010] eKLR (Criminal Appeal 17 of 2008)** which was affirmed by the Supreme Court, the Court of Appeal. Although the Court of Appeal attempted to confine its decision to section 204 of the Penal Code, it heard echoes of wisdom and so they stated the following:

**“We have confined this judgment to sentences in respect of murder cases, because that was what was before us and what the Attorney General conceded to. But we doubt if different arguments could be raised in respect of other capital offences such as treason under section 40 (3), robbery with violence under section 296 (2) and attempted robbery with violence under section 297 (2) of the Penal Code. Without making conclusive determination on those other sections, the arguments we have set out in respect of section 203 as read with section 204 of the Penal Code might well apply to them.” [Underlining mine]**

[6] See also the Court of Appeal decision in **William Okungu Kittiny vs. Republic [2018] eKLR**.

[7] On 21/11/2019 the State stated that the death sentence be maintained but if the sentence is to be set aside then let the petitioner serve twenty (20) years or more. The petitioner asked for forgiveness and that the sentence be reduces as he did not understand what he did as he was young and will never repeat it again.

[8] I have perused the record and the judgment of the Court of Appeal and none reveals the particulars of the offence so as to establish how the offence was committed, the value of what was stolen and how serious the injuries inflicted on the victim. There is no information on character of the appellant or possibility of reform. Nothing that can assist the court in making its determination as justice demands. The court has called for the proceedings and original record but that has not been done.

[9] Accordingly, I direct that the ruling herein is arrested for now and the lower court record be availed. I also order the correctional service of prison to file their report on the appellant. The filings ordered to be filed in 14 days.

Dated signed and delivered in open court at Meru this 3<sup>rd</sup> February, 2020.

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F. GIKONYO

JUDGE

In presence of

Maina for state

Petitioner- present

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F. GIKONYO

JUDGE