REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

MISC. CRIMINAL APPLICATION NO. 87 OF 2019

ABDIHAKIM OMAR ALI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant was charged, convicted and sentenced to serve life imprisonment for the offence of defilement contrary to Section 8 (1) (2) of Sexual Offences Act in Criminal. Case No.356/013 in Garissa.

2. He appealed in High Court at Garissa No. 168/013 which was dismissed after same was heard fully.

3. He now moves this court for re-sentencing relying on ***Muratetu case*** and subsequent superior court decisions which have declared that the mandatory nature/aspect of the sentence is unconstitutional.

4. The trial court in her sentence order did not consider mitigations tendered by the applicant as she stated that the law tied her hands to only let out one sentence i.e. the life sentence.

5. The Supreme Court in the ***Francis Karioko Mutuatetu*** decision gave the following guidelines when this court will be considering the applicant's application on resentencing:

> **"We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process. This notwithstanding, we are obligated to point out here that paragraph 25 of the 2016 Judiciary Sentencing Policy Guidelines states that:**
>
> > **"25. GUIDELINES JUDGMENTS**
> >
> > **25.1 Where there are guideline judgments, that is, decisions from the superior courts on a sentencing principle, the subordinate courts are bounded by it. It is the duty of the court to keep abreast with the guideline judgments pronounced. Equally, it is the duty of the prosecutor and defence counsel to inform the court of existing guideline judgments on an issue before it.'"**

6. Although the Supreme Court referred to the case of murder, this court is cognizant of the fact that the *ratio decidenti* equally applies in the case of the applicant who was sentenced to what was stated then to be a mandatory death sentence. In ***Joseph Kaberia Kahinga & 11 Others vs Attorney General [2016] eKLR,*** the High Court sitting as a constitutional bench held thus (at page 27) when considering the question whether the petitioners' conviction under section 296(2) and 297(2) of the Penal Code met the threshold of fair trial:

> **"[71]. As a consequence of this decision, paragraph 6.4 – 6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:**
>
> **age of the offender;**
>
> **being a first offender;**
>
> **whether the offender pleaded guilty;**

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-adaption of the offender;

any other factor that the court considers relevant.

"Having considered the submission by both parties, the authorities cited in this judgment, together with the comparative laws we find and hold that the petitioners have a case when they argue that the sub-sections of section 296 and 297 of the Penal Code are ambiguous and not distinct enough to enable a person charged with either of the offences to prepare and defend himself due to lack of clarity on what constitutes the ingredients of either charge. Article 50(2) of the Constitution proclaims what constitutes *"a fair trial"* when a person is charged with a criminal offence. We have already set it out herein above. We find and hold that all the persons that have been charged with and convicted of the offences of robbery and attempted robbery under sections 296(1) and (2) and 297(1) and (2) of the Penal Code did not have the full benefit of the right to fair trial as provided under Article 50(2) of the Constitution (and) section 77(1) of the repealed Constitution."

At page 36 the court further held that:

"Having taken into consideration the above factors, we are of the considered view that the sections of the Penal Code upon which the petitioners were charged and convicted, insofar as they did not allow the possibility of differentiation of the gravity of the offences in a graduated manner in terms of severity or attenuation, and the failure to give an opportunity for the consideration for the circumstances of the offence, rendered those sections i.e. section 204, 396(2) and 297(2) of the Penal Code deficient in terms of assisting those administering the justice system to be able to charge the offenders with the appropriate offences that will ultimately attract a proportionate sentence. It (is) in that context that the complaints by the petitioners that the imposition of the death sentence as a one-stop contravened their fundamental rights to fair trial."

7. This court has been mandated via the ***Muruatetu case*** and subsequent superior court's decision on mandatory sentences to deal with the issue of re-sentence in the instance case.

8. The prosecution does not oppose but proposes the matter to be deferred back to the Lower Court for mitigation and sentencing.

9. Thus, the court makes the following orders;

(i) The life sentence in Criminal Case No. 356/013 in Garissa Senior Principal Magistrate's Court is set aside.

(ii) Matter is referred to the Chief Magistrate's Court at Garissa for sentencing after mitigation.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 16TH DAY OF APRIL, 2020.

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C. KARIUKI

JUDGE