



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

CRIMINAL DIVISION

MISC.CR. APPLICATION 285 OF 2019

ELIUD OLE MBARIA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant is seeking a review of the resentencing decision of the trial court. It was his prayer that his mitigation be considered and a more favourable sentence be imposed. The trial court substituted death sentence with life imprisonment. He has sought that this court reviews the decision by the trial court.

2. The manner of review falls under **Section 362 of the Criminal Procedure Code**. It provides as follows:

"The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court."

3. The matter herein arising from a resentencing decision, this court is merely conferred with the power to determine whether the trial court properly considered the criterion set out in the Supreme Court decision of **Francis Kariokor Muruatetu v Republic [2017]eKLR**. The same set out guidelines that should inform a court on the suitability of an Applicant in resentencing. The Court set out the following guidelines:

- (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.***

4. The genesis of this matter was the conviction and sentence by the trial court at the Chief Magistrate's Court in Nairobi where the Applicant was charged with the offence of robbery with violence under **Section 296(2) of the Penal Code**. The particulars were that on the 21st February, 2001 he alongside a co-accused, now deceased with others not before court while armed with dangerous and offensive weapons namely pistols robbed George Kuria Njuguna of property valued at Kshs. 1 985 015/-, namely;

- a. tank lorry make mitsubishi valued at Kshs. 1, 500 000/-

- b. mobile super 3000 litres valued at Kshs. 148, 590/-
- c. mobile Diesel 6000 liters valued at Kshs. 244, 080/-,
- d. 10 13-kilogram mobile gas valued at Kshs. 7683/-
- e. 16 6-Kilogram Mobile gas cylinders valued at Kshs. 5769.60/-
- f. 11 Mobile gas cylinders valued at Kshs. 14025/-
- g. Assorted paints valued at Kshs. 5080/-
- h. 16 pairs of shoes valued at Kshs. 2848/-
- i. Assorted electronics valued Kshs. 20840/-
- j. 2 dozen padlocks valued at Kshs. 1320/-
- k. Cash Kshs. 3400/-

and at or immediately before or immediately after such robbery used actual violence to the said George Kuria Njuguna. At the conclusion of the trial he was sentenced to suffer death. Both appeals in the High Court and Court of Appeal were dismissed.

5. He then pursued a rehearing of the sentence. The trial court substituted the death sentence with life imprisonment. It behooves this court to consider the circumstances of the case so as to determine whether the learned magistrate properly applied the Muruatetu decision in imposing the life sentence.

6. It is clear that the Applicant robbed the complainant of property worth Kshs. 1,985,015/-. He was armed with a pistol and robbed the complainant in the company of another. However, I note that despite numerous opportunities to injure the complainant the Applicant and his co-accused exercised a measure of restraint.

7. I am further alive to the fact that the Applicant was arrested in possession of the recently stolen property. The property was restored to the complainant in clearly good condition. This is a factor that the Applicant should benefit from.

8. The sentencing objectives of retribution, denunciation and rehabilitation must be considered. In this regard, I set aside the life imprisonment sentence and order that the Applicant serves 20 years imprisonment which will commence from the date of taking plea which was 7th March, 2001. It is so ordered.

Dated and Delivered At Nairobi This 9th Day of April, 2020.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Applicant in person.*
2. *Miss Chege for the Respondent.*