



REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

PETITION NO. 22 OF 2019

ENOS MUNENE ANN.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

A. Introduction

1. In the petition dated 28th May 2018 seeking re-hearing on sentencing following the decision of the Supreme Court in the case of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR.**

2. The petitioner herein was charged with robbery with violence contrary to section 296 (2) of the Penal Code before Senior Resident Magistrate Siakago was convicted and sentenced death. He states that his sentence was later commuted to life imprisonment on 3/08/2009. He was together with his co-accused Duncan Ndegwa. Only the petitioner herein appealed to the High Court as revealed by the record but his appeal was dismissed.

3. It is the petitioner's case that the Supreme Court decision in the Francis Muruatetu Petition comprises new and compelling evidence warranting resentencing. The petitioner also stated that the complainant in the case against him in the trial court was not injured during the incident.

4. Ms. Mati for the respondent stated that the respondent was not opposed to the review of the sentence but urged the court to look at the circumstances under which the offence was committed as an injury was inflicted on the complainant and that the petitioner was armed.

B. Analysis & Determination

5. I have considered the application herein as well as the submissions of the petitioner and the respondent.

6. This petitioner has already benefited from commutation of the death sentence to life imprisonment. In this case, the court is being called upon to re-consider the facts as they existed at the time of sentencing and impose an appropriate sentence in light of the fact that the mandatory death penalty has been declared unconstitutional.

7. The ***Sentencing Policy Guidelines, 2016*** ("the ***Guidelines***") published by the Kenya Judiciary provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. Since the ***Guidelines*** did not take into account the fact that the death penalty would be declared unconstitutional, the Court in the ***Muruatetu Case (Supra, para. 71)***, considered that in re-sentencing in a case of murder, the following mitigating factors would be applicable;

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.

8. The Supreme Court emphasized that the *Guidelines* do not replace judicial discretion. They are intended to promote transparency, consistency and fairness in sentencing. In addition, the court noted the importance of guideline judgments of superior courts which promote an understanding of the process of sentencing.

9. In the instant case, the petitioner and another one not before court while being armed with crude weapons namely swords, robbed one Niceta Igoki Njiru of Kshs. 3,000 and in the course of the robbery threatened to use actual violence on the complainant. In mitigation before the trial court, the petitioner stated that he took care of his younger siblings.

10. In terms of sentence, the sentence for robbery with violence is the death penalty. The same was commuted to a life sentence in 2009 by the then president. It is true that pursuant to Muruatetu case, the courts now can exercise discretion when considering and passing sentence.

11. I have considered other cases where convicts for robbery with violence have been heard and re-sentenced after the *Muruatetu* case. In Benjamin Kemboi Kipkone v Republic (2018) eKLR where 3 robbers armed with an AK 47 rifle robbed the complainant of Kshs. 250,000/= and a mobile phone, Chemitei J. substituted the death sentence with 20 years imprisonment.

12. In Paul Ouma Otiemo v Republic (2018) eKLR where the accused being armed with an AK 47 rifle and a kitchen knife robbed the complainant of Kshs. 450,000/= and 3 mobile phones. Majanja J. substituted the death sentence with twenty (20) years imprisonment.

13. Section 333 (2) of the Criminal Procedure Code requires a sentencing court to consider the period spent in custody awaiting trial. The charge sheet brought against the petitioner in the trial court reveal that the accused was arrested on the 6/07/2005 and had his trial conducted while in custody since capital offences were not bailable. The petitioner was convicted and sentenced on the 29/11/2005. The period the petitioner spent in custody ought to be taken into account in re-sentencing.

14. During mitigation in the lower court, the petitioner was not remorseful in that he only pleaded for mercy for the reason that he was the breadwinner of his younger siblings.

15. During the robbery, the complainant who was a lady got hold of the petitioner and struggled with him. He was armed with a knife and was disarmed by the worker of the complainant. It was because the complainant struggled to defend herself that she was not stabbed with a knife. During the time of the struggle the two accomplices of the petitioner had already taken Kshs. 3,000/= and disappeared from the scene. The petitioner was arrested, tied with ropes and handed over to the police together with the knife.

16. The circumstances of the offence were not so aggravated which factor ought to be considered in re-sentencing. I am of the considered view that the cases of Benjamin Kembo Kikone (supra) and Paul Ouma Otiemo are relevant to this case in regard to re-sentencing. I have also taken into consideration the principles of sentencing enumerated herein as well as all the circumstances of the case.

17. It is my considered opinion that this petition is successful and it is hereby allowed.

18. The death sentence is hereby set aside and substituted with twenty five (25) years imprisonment to run from the date of arrest 6th July, 2005.

19. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 7TH DAY OF APRIL, 2020.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for Respondent

Petition through video link