REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL PETITION 192 OF 2019

JAMES KIMATHI THIURU.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING ON RE-SENTENCING

Re-sentencing

1. The applicant herein was charged with the offence of robbery with violence contrary to section 296 (2) of the penal code. The particulars of the offence are that on 16/6/2009 at about 9.20 pm at Gakoromone –Thimangiri stage in Meru central district within eastern province while armed with a panga robbed Daniel Muthika Nabea of Cash Kshs. 5,000 a mobile phone nokia 1110 valued at Kshs. 3,500, a wallet containing national I.D Card, Equity Bank ATM card, Hawkers Association Card, a new phone battery and twelve automated padlocks all valued at Ksh. 20,700 and at or immediately after the time of each such robbery used actual violence to the said Daniel Mithika Nabea.

2. The trial magistrate found that the prosecution case was proved convicted him and sentenced him to death. The applicant lodged an appeal HCCRA No. 262 of 2014 but the appeal was dismissed.

3. Following the decision by the Supreme Court **in Francis Karioko Muruatetu & Another –vs- Republic [2017] eKLR** the applicant applied for re-sentencing. The applicant submitted that he has been in prison for the last 10 years and during his trial mitigating factors were not considered due to the mandatory nature of the sentence. He has since rehabilitated and gone through various rehabilitation programs and is ready to contribute to the nation's development through legal means.

4. **J. M. Kisusya, the officer in-charge Meru Main Prison** presented a favorable report with regard to the applicant where he stated that he had demonstrated good behavior while in custody, is obedient, disciple and has not been charged with any prison offence up to date. The officer went on to indicate that he strongly believes that he would be a good and productive citizen if he were to return to society.

5. The prosecution submitted to court that the court should not disturb the original sentence. However, if it does, it should be not less than 20 years in prison.

Analysis and Sentencing

6. I have held the view that the principle established in the Judgment by the Supreme Court in Muruatetu case, although the Court attempted to restrict it to murder cases, should also apply in other cases where the law provides for a mandatory sentence. Robbery with Violence is one such case. I will provide the constitutional philosophy and progressive jurisprudence thereto.

7. I am not alone in this thinking. When I dig the ancient wells, I find the case of **Godfrey Ngotho Mutiso v R [2010] eKLR (Criminal Appeal 17 of 2008)** which was affirmed by the Supreme Court; but of significance is the wisdom in what the Court of Appeal stated even after attempting to confine its decision to section 204 of the Penal Code, that-:

> **"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]**

8. See also **William Okungu Kittiny vs. Republic ([2018] eKLR** where the court considered the Muruatetu case vis a vis the decision in Geodfrey Mutiso and formed the following opinion;

"In the Mutiso case which was affirmed by the Supreme Court, the Court of Appeal said obiter that the arguments set out in that case in respect of Section 203 as read with Section 204 of the Penal Code might apply to other capital offences. Moreover, the Supreme Court in paragraph 111 referred to similar mandatory death sentences."

9. A robust debate has ensued on the scope of application of Muruatetu especially on mandatory sentences provided for offences other than murder, and also on other forms of sentences which take away or limit the discretion of the court in sentencing. A solid foundation is the Constitution as augment by local and contemporary jurisprudence; it has made it safe to state that arguments in Muruatetu applies to other provisions of the law which set sentences the effect of which takes away the discretion of the court in sentencing. Such provisions are unconstitutional. I should think, the way I understand it, that judicial discretion in sentencing is a fundamental and inseparable part of criminal justice and fair trial- which is a matter of the Constitution. Thus, a mandatory or other sentence which takes away or limits the discretion of the court to pass appropriate sentence is an affront to justice itself and the Constitution. I should also think that, offenders who are subject of such law which takes away discretion of court in sentencing suffer a set of ills: (1) denial of right to appropriate sentence; (2) pre-condemnation; and (3) discrimination.

10. One other important consideration; I have stated elsewhere and I will state it again; that, there is nothing in law which limits or justifies limiting application of the principle established in Muruatetu to only section 204 of the Penal Code. Better still, nothing prohibits application of the said principle to other sections of the law which takes away the discretion of the court in sentencing.

11. In addition, judicial precedent comes with a command; that a principle of law established by the Supreme Court should bind all other courts other than the Supreme Court. See article 163(7) of the Constitution that: -

(7) All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.

12. The above recapitulation of arguments on this subject is not merely an overall impression of good academic exposition, but provision of proper grounding of the standpoint I have propagated. I will so proceed.

Applying the Test

13. The applicant is entitled to apply for re-sentencing on the basis of Muruatetu principle. I will consider the circumstances of this case as well as the relevant factors in sentencing that were stated by the Supreme Court in the Muruatetu case in the following paragraphs: -

"[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:

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.

[72] 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:

GUIDELINE JUDGMENTS

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."

14. In **Isaac Kimanzi Musee & 2 others v Republic [2019] eKLR** a subtle suggestion: in the spirit of uniformity and fairness, emerging jurisprudence support the view that in sentence re-hearing in robbery with violence cases, the starting point should be 14 years. This is informed by the fact that the felony of robbery, which is a lesser offence than robbery with violence, attracts a term of imprisonment of 14 years.

15. In this case the appellant has been in custody for 10 years and is remorseful for the offence that he has committed. I therefore find this to be a suitable case for resentencing. Accordingly, I set aside the death sentence meted upon him. He is now sentenced to serve 25 years' imprisonment from the date of his initial sentence.

16. It is so ordered.

Dated, signed and delivered at Milimani this 21ST day of APRIL 2020

F. GIKONYO

JUDGE

Representation: -

1. **Petitioner acting in Person**

2. **DPP, Meru for the State**

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