



REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT MALINDI

CONSTITUTIONAL PETITION NO. 25 OF 2019

JOSPHAT MUSYIMI MAKAU.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONSRESPONDENT

Coram: Hon. Justice R. Nyakundi

The Petitioner

Ms. Sombo for the state

RE-SENTENCING

The Petitioner herein was charged with robbery with the offence of robbery contrary to Section 296(2) of the Penal Code. It was alleged that the Petitioner and 2 others robbed **Kazungu Randu Rashid** of a motor cycle make Suzuki, one alarm control and one knife all valued at KShs. 200, 000/=. In execution of this criminal act, the Petitioner and other perpetrators were armed with knives and threatened to visit violence on the complainant.

The Petitioner was convicted of the offence of robbery with violence on the basis of the doctrine of recent possession since they were found in recent possession of the stolen motorcycle. He was therefore sentenced to suffer death. He then appealed to the High Court and subsequently to the Court of Appeal where his appeals were all dismissed for lack want of merit.

In respect of the instant petition, credit is given to the recent jurisprudential developments which has the effect of clothing the petitioners with yet another chance to have their sentence varied. In that respect the Petitioners have now filed the instant petitions, seeking resentencing pursuant to the Supreme Court of Kenya's decision in **Francis Karioko Muruatetu & Another vs Republic, Petition No. 15 & 16 of (2017) eKLR** which declared the mandatory nature of the deaths sentence and the commutation of that sentence by an administration fiat to life imprisonment unconstitutional and therefore null and void.

The Supreme Court reasoned that the mandatory nature of death sentence as provided for under section 204 of the penal code deprived trial courts judicial discretion to consider aggravating and mitigating circumstances to enable the court to impose an appropriate sentence based on the peculiar circumstances of each case. Thus, a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution.

I now turn to the **Sentencing Policy Guidelines, 2016 ("the Guidelines")** published by the Kenya Judiciary, the sentence imposed must meet the following objectives in totality;

- a) Retribution: To punish the offender for his/her criminal conduct in a just manner.**
- b) Deterrence: To deter the offender from committing a similar offence subsequently as well as discourage other people from committing similar offences.**
- c) Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.**
- d) Restorative justice: To address the needs arising from criminal conduct such as loss and damages.**
- e) Community protection: To protect the community by incapacitating the offender.**

f) Denunciation: To communicate the community's condemnation of the criminal conduct.

In light of the foregoing, **Hon C. Kariuki** in **Stephen Kimanathi Mutunga v Republic [2019] eKLR**, stated as follows:

“23. The guidelines were published when the mandatory death sentence was still legal and as such, they did not provide for mitigating circumstances for offences which attracted the mandatory death sentence.

24. To avoid a lacuna, the Supreme Court in the Muruatetu case gave guidelines with regard to applicable mitigating factors during sentence re-hearing in a murder charge. Since the mandatory death sentence was also applicable to convicts of robbery with violence, the Supreme Court guidelines are also applicable to such cases. They are;

- 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.”**

The Supreme Court in the **Muruatetu Case** however clarified that the guidelines did not in any way replace judicial discretion and are geared towards promoting consistency and transparency in sentencing hearings. They are also geared towards the promotion of public understanding of the sentencing process.

I have considered precedents of other judges in re-sentencing cases involving robbery with violence as indicated above. I have noted that the Petitioner and his colleagues did not cause death or any serious harm on the complainant's person during the commission of the offence. I have also noted that the motorcycle that they stole was recovered. The propensity of them to revenge is neither here nor there.

In passing sentence the court will not lose sight of the pre-trial and during trial, incarceration period. I have also complied with the provisions of Section 333(1) which states that:

“subject to the provisions of section 38 of the penal code which states, every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this code, provided that where the person is sentenced under section (1) has, prior to such sentence, been held in custody, the sentence shall take into account the period spent in custody.”

I have noted that the Petitioner has been in custody for approximately 16 (sixteen) years including pre-trial custody. Considering the period that the Petitioner has already served, the probability of him having reformed is very high and he has exhibited to this court that he will live a crime free life if he was to be released. In light of deterring potential offenders, my view is that, a message was sent to the community at large that committing such crimes is never the way to go by the conviction of the Petitioners. I believe that lessons have been learnt by both the Petitioner and the community at large.

I hereby make the following orders;

- a. The sentence is hereby reviewed to the period already served in custody. (Approximately 16 years).**
- b. The petitioner be and are hereby set at liberty unless otherwise lawfully held.**

DATED, DELIVERED AND SIGNED AT MALINDI THIS 14TH DAY OF APRIL 2020

.....

R. NYAKUNDI

JUDGE