REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 8B OF 2016

KAHINDI FURAHA KAHAMBI.....1ST PETITIONER

KAINGU KAMBI MWAUZONGI.....2ND PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RE-SENTENCING

The petition before me was brought in terms of the Supreme Court decision in **Francis Muruatetu & Another v Republic (2017) eKLR**. It is the decision which declared the mandatory nature of death sentence unconstitutional, null and void. The commutation of the same to life imprisonment by an administrative fiat was also declared null and void in the same aforementioned decision. The Landmark decision clothed judicial officers with the discretion to mete out sentences in according to the individual circumstances of each case.

Prior to the decision in **Muruatetu** (supra), all the Honourable Magistrate or Judge had to do was merely to pluck out from the section, the prescribed minimum mandatory sentence and plant it in her own judgement without regard to the individual circumstances of the case. **Muruatetu Case** marked the beginning of a paradigm shift as far as sentencing of offenders is concerned.

It can also be said that **Muruatetu Case** (Supra) necessitated re-sentencing of all persons who were previously sentenced to a mandatory minimum sentence. In that case the court further addressed itself as follows:

> ***"(111) …For the avoidance of doubt, the sentencing re-hearing we have allowed, applies only for the two petitioners herein. In the meantime, existing or intending Petitioners with similar cases ought not approach the Supreme Court directly but await appropriate guidelines for disposal of the same. (emphasis mine) The Attorney General is directed to urgently set up a framework to deal with sentence re-hearing of cases relating to the mandatory nature of the death sentence - which is similar to that of the petitioners in this case.***
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> ***(112) (c) The Attorney General, the Director of Public Prosecutions and other relevant agencies shall prepare a detailed professional review in the context of this Judgment and Order made with a view to setting up a framework to deal with sentence re-hearing cases similar to that of the petitioners herein. The Attorney General is hereby granted twelve (12) months from the date of this Judgment to give a progress report to this Court on the same."***

I'm alive to the fact that pursuant to the Supreme Court's directive, the Hon. Attorney General was required to appoint a Taskforce on the Review of the Mandatory Death Sentence under Section 204 of the Penal Code Act and the same was done vide Gazette Notice No. 2160 dated 15th March 2018. It seems that the Supreme Court decision requires that the petitioner and all those in a similar position should wait a sentence re-hearing framework from the Attorney General and the taskforce. However, the Court of Appeal in **William Okungu Kittiny v R [2018] eKLR** expressed itself as follows;

> ***"The decision of the Supreme Court only discouraged persons from filing petitions to the Supreme Court but the decision does not prohibit courts below it from ordering sentence re-hearing in a matter pending before those courts. By Article 163 (7) of the Constitution, the decision of the Supreme Court has immediate and binding effect on all other courts. The decision of the Supreme Court opened the door for review of death sentences even in finalized cases."***

In view of the above provisions, it is abundantly clear that this court was clothed with jurisdiction to re-hear and resentence those that were convicted with capital offences whose sentence was mandatory death sentence.

Sentencing is a notoriously problematic exercise. It is a balancing act. From time to time jurists have espoused brilliant philosophies around it. Guidelines have been developed. The legislature sometimes weighs in with mandatory minimum sentences for certain offences. There are certain basics. The penalty must fit the crime. The interests of the offender must be balanced against those of justice. It is not right that someone who has offended society should go scot free, or escape with a trivial sentence. But at the same time he should not be penalized beyond what his misdeed befits. As a matter of principle, punishment should be less retributive and more rehabilitative.

There are more such philosophies or ideologies. But at the end of the day, after everything else has been considered and said, the judicial officer comes down to the hard facts before him; to the individual circumstances of the people before him – the offender and the victim. He cannot be dogmatic about anything. There is no room for an approach that is purely mathematical. A slavish adherence to precedence is manifestly injudicious. In sentencing, the ages of the accused and the victim are relevant. The younger the victim the harsher the sentence, and the older the accused the harsher the sentence.

In Criminal Case No. 186 of 2009, the Petitioners were charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. It was aid that, while they were armed with crude weapons, they jointly robbed the complainant of one motor cycle make Bajaj Boxer valued at Kshs. 85, 000/=. Further, it was also ascertained that during the execution of the offence they caused the death of John Dzombo Shume.

In mitigation, the Petitioners are first offenders, that the offence committed by the Petitioners was simple robbery since the deceased's body was not mutilated, the stolen properties were recovered and that the period already spent in custody and remand ought to be considered. They claim to have spent one year in remand custody and they were neither on bond nor bail until their conviction.

In aggravation, robbery with violence is a very serious offence. The offence herein was premeditated and well planned. There is contrition whatsoever on the part of the Petitioners. Their conduct reveals a high degree of moral blameworthiness. They employed violence upon the deceased in order to steal the motorcycle thereby showing determination in achieving the unlawful enterprise. The said violent led to loss of innocent blood. The deceased succumbed to the injuries caused by the robbers.

By its nature, robbery with violence traumatizes the victim physically and emotionally. It is indicative of lack of other people in the community. Robbery usually involves premeditation, criminal resolve and purpose. It requires brazen execution. It is an attack on a human victim with the attendant disregard of that person's right to personal security. It constitutes a forceful dispossession of the victim's property. For the victim is usually a terrifying and degrading experience. The sentence of the court must reflect the abhorrence with which the courts view this form of criminal behavior. A prison term is normally imposed for this sort of offence.

In casu, the violence visited upon the deceased by the resulted in his death. The offence was executed in a heinous manner. The offence is deserving of a custodial sentence. All these features call for a severe sentence. I have also looked at the pre-sentence report which recommends that the victim's family has not yet come to terms with the death of their son, hence he proposed a delayed release for the Petitioners. I therefore find that the sentence befitting the serious nature of the offence herein is 30 years imprisonment from the date of arrest.

It is so ordered.

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

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R. NYAKUNDI

JUDGE