REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.284 OF 2018

NABOCHI ATEKU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Nabochi Ateku was convicted of the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The trial court found as a fact that the Applicant, jointly with others not before court, while armed with pangas robbed Mula Musinde Mulange of his television set and mobile phone and at or immediately before or immediately after the time of such robbery used actual violence to the said Mula Musinde Mulange. The Applicant was sentenced to death by the trial court. His appeals to the High Court and to the Court of Appeal were both dismissed. The death sentence meted on the Applicant was commuted to life imprisonment by Presidential decree. That would have been the end of the matter but for the window opened by the Supreme Court decision of **Francis Karioko Muruatetu & Others vs Republic [2017] eKLR** where the court declared mandatory death sentences unconstitutional. The court held that the mandatory nature of the said sentence deprived a convict a chance to mitigate his sentence and thus denied the trial court the opportunity to exercise its discretion in sentencing.

The Applicant filed his application for resentencing before the Chief Magistrate's Court at Kibera. This was the court that tried his case. The trial court dismissed the Applicant's application for resentencing. At the material part of its judgment, the trial court held thus:

> **"In this regard, I find the accused is now 46 years of age having been convicted at the age of 34 years. He was mature then and although he says he has reformed, I find no need to adjust the sentence imposed. I am therefore not convinced of such circumstances as to warrant a resentence. I confirm the sentence imposed against the accused as was pronounced by the Court of Appeal."**

Aggrieved by this decision, the Applicant applied to this court for reconsideration of resentence. In the application, the Applicant, through Counsel Mr. Swaka, pleads with the court to consider the fact that in the period of his incarceration, he had reformed. He had been in lawful custody for a period of more than twelve (12) years. In his view, this was sufficient punishment. During his period of incarceration, the Applicant had undertaken various courses which has enabled him to gain various skills. He has also been built spiritually. He was of the view that the trial court did not appreciate the purport of the **Muruatetu** decision hence its determination. The Applicant concedes that during the robbery, the victims were injured. However, he pleads with the court to consider that during the period of his incarceration he had learnt his lesson and had reformed.

Mr. Momanyi for the State opposed the application. He noted that the victims of the robbery were injured. They were cut with pangas. The sentence imposed by the trial court was appropriate though learned prosecutor was of the view that the sentence may appear to be harsh and excessive.

This court has carefully considered the facts of this case and the mitigation of the Applicant. The Supreme Court in the **Francis Karioko Muruatetu** decision gave the following guidelines when this court will be considering the Applicant's application on re-sentencing:

> **"[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:

"25. GUIDELINE JUDGMENTS

25.1 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."

In the present application, it was clear to the court that taking into consideration the circumstances in which the robbery occurred, and other decisions by the High Court on resentencing, the sentence meted on the Applicant was harsh and excessive. The decision of the Court of Appeal which was rendered on 3rd October 2014 was made before the Supreme Court's **Muruatetu** decision. The decision of the Court of Appeal on sentence was not therefore informed by the above decision.

In the premises therefore, this court finds merit with the Applicant's application. The sentence of life imprisonment that he is currently serving is hereby set aside and substituted by an order of this court resentencing the Applicant to serve twenty (20) years imprisonment with effect from 10th July 2007 when he was convicted by the trial court. It is so ordered.

DATED AT NAIROBI THIS 9TH DAY OF APRIL 2010

L. KIMARU

JUDGE