



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

PETITION NO. 20 OF 2019

PETER MUIMI NZAANA.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

A. Introduction

1. This judgement is on the petition on the 2/07/2019 the gist of which the petitioner seeks re-hearing on sentence pursuant to the Supreme Court judgement in the Petition of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR**.

2. The petitioner and another not before this court was jointly charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. The petitioner and his co-accused were found guilty and convicted and sentenced to the mandatory sentence of death. The petitioner and his co-accused were aggrieved by the decision of the trial magistrate and lodged separate appeals in the High court which were consolidated heard and dismissed. On the second appeal, the Court of Appeal upheld the judgement of the High Court and the magistrate's court.

3. This application was argued by the petitioner through written submissions with rejoinder of oral submissions from the respondent.

B. Petitioner's Submission

4. The petitioner submitted that the cases of **Joseph Kaberia Kahinga & 11 others v Attorney General [2016] eKLR** and **Francis Karioko Muruatetu** (supra) amounted to new and compelling evidence that was not present during his trial in the magistrate's court which necessitated the review of his sentence. I do not find this argument relevant to this petition.

5. The applicant further submitted that the **Francis Karioko Muruatetu** case held that Sections 296 (2), 204, 297 (2) and 295 of the Penal Code were deficient and inconsistent with Article 50 (2) (b) of the constitution that made it mandatory for the court to explain in detail the charges to the accused. Again the relevance of Article 50(2) to this petition was not explained.

6. The petitioner further relied on the case of **Henry .O. Edwin v Republic Criminal Appeal No. 645 of 2010** as well as that of **Gacheri v Republic, High Court Criminal Case No. 31 of 2016** at page 1 – 4 of the judgement.

C. Respondent's Submission

7. The prosecution submitted that though they did not oppose the application to review the sentence, they asked the court to consider the serious nature of the offence that resulted in the complainant getting hurt during the robbery.

D. Analysis of the Law

8. The application by the applicants is grounded on the holding of the Supreme Court judgement in the Petition of **Francis Karioko Muruatetu** (supra) that declared the mandatory death penalty as unconstitutional. This was also the gist of the holding of the court in the case of **Joseph Kaberia Kahinga** (supra) in which the court held that it was not mandatory for the court to pass a death sentence against persons charged with capital offences.

9. The Supreme Court in **Muruatetu & Another** (supra) petition, affirmed the decision of the Court of Appeal in **Godfrey Ngotho Mutiso v R C.A. No. 17 of 2008**, and the High Court in **Joseph Kaberia Kahinga and Others v The Attorney General [2006] eKLR** regarding the

unconstitutional nature of the mandatory death sentence provided under Section 204 of the Penal Code.

10. The Supreme Court then made it clear exactly how the mitigation of the accused person should be applied by the court before the accused is sentenced. The Court stated that: -

‘it is during mitigation, after conviction and before sentencing, that the offenders’ version of events may be heavy with pathos necessitating the court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death penalty.’

11. The Supreme Court in the **Murwatetu** case sets out guidelines to assist the courts in the determination of the sentence where mitigation was not considered prior to the said case. The guidelines are as follows: -

“(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.

.....

GUIDELINE JUDGMENTS

Where there are guideline judgments, that is, decisions from the superior courts on a sentencing principle, the subordinate courts are bound 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”.

12. Thus the position is that pursuant to the **Murwatetu** petition (supra) the courts now may exercise discretion when passing sentence. However, in the case of **Republic v Ruth Wanjiku Kamande [2018] eKLR Lesiit J** stated that discretion to pass a sentence other than that of death in capital offences should only be exercised in the deserving cases.

13. In the instant case, the record reveals that the petitioner was charged with robbing one Celestino Gichoni Ileri of cash to the sum of Kshs. 2,300/=, a Nokia phone worth Kshs. 3,200/= and ended up injuring the complainant and causing trauma to the complainant.

14. The trial magistrate gave the petitioner a chance to mitigate whereas he stated that he had children in school and as such he prayed for leniency.

15. It is noteworthy that several courts have given varying sentences during hearing of resentencing petitions and depending on the particular circumstances of each case. For instance, In the case of **Benson Ochieng & France Kibe v Republic [2018] eKLR** the trial court where the applicants were convicted of robbery with violence, Justice Joel Ngugi re-sentenced both Applicants to twenty (20) years imprisonment commencing the date of sentencing. In the case of **Anthony Mutua Nzuki v Republic [2018] eKLR** the accused who had been charged and convicted of robbery with violence and sentenced to death had the same set aside and substituted with a sentence of fifteen (15) years.

16. The petitioner’s sentence like those of many other death row inmates, may have been commuted to life imprisonment since death sentence was not executed by the Kenyan authorities.

17. However, what the court requires to consider is the period of years the applicant has spent in prison since conviction, the circumstances of the offence, the mitigation of the petitioner and the sentencing guidelines.

18. Having considered all the relevant factors, it is my considered opinion that the petitioner’s sentence requires to be reviewed.

19. I hereby allow the petition by setting aside the death sentence imposed by the trial magistrate. It is hereby substituted with twenty (20) years imprisonment to run from 14th November 2012.

20. 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

Petitioner through video link