REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

CRIMINAL MISC APPLICATION NO. 8 OF 2018

PAUL NAKUA EYEN .....APPLICANT

VERSUS

REPUBLIC .....RESPONDENT

RULING

BACKGROUND

1. The Applicant was initially charged with the offence of Robbery with violence contrary to section 296(2) of the penal code in the SRM Criminal case No. 248/2005 Lodwar, where he was convicted and sentenced to suffer death on his own plea of guilty.

2. Being dissatisfied with the said conviction and sentence, he filed an Appeal to the High court at Kitale Criminal appeal No. 46 of 2005 which Appeal was dismissed on 14/2/2016. The Applicant was not deterred and lodged an Appeal to the Court of Appeal at Eldoret, Criminal Appeal No.241 of 2006 which Appeal was dismissed and the Court rendered itself as follows;

> **"The Superior Court ……. considered the entire proceedings of the trial court and made a definite finding that the appellant did infact understand Kiswahili. Indeed it is clear that the trial Magistrate took the plea with circumspection and made an elaborate record of the proceedings. He was entitled in law to record a plea of guilty for the offence punishable by death and convict on such plea of guilty so long as he followed the safeguards stipulated by this court in Bolt V Republic [2012] I KLR 815. The trial Magistrate in this case faithfully applied the safeguards. In the result, we are satisfied that the Superior Court reached the correct decision and that this appeal has no merit. The appeal is thus dismissed"**

3. That would have been the end of this matter until Muruatetu came; - By a Notice of Motion lodged in the Court, the Applicant sought for a fair trial in mitigation and resentencing on the following grounds:-

That the Petitioner argued for reduction of sentence under Articles 169 (1) (a) and 25 (a), (c) (d) in view of the decision in Petition No 15/16/2017 **FRANCIS KARIUKI MURUATETU & ANOTHER**

4. It was supported by his affidavit in which he deponed that he was charged with the offence of robbery with violence and sentenced to death which was later on commutted to life imprisonment having exhausted his first and second Appeals.

SUBMISSION

5. At the hearing herein, the Applicant filed amended grounds and written submissions, it was submitted that the Supreme Court had outlawed the mandatory aspect of death sentence thereby allowing courts to exercise discretion and that in the line with that decision, the Court of Appeal in **ROBERT MWANTHI AND ANOTHER –V – REPUBLIC CRIMINAL APPEAL NO. 247 OF 2014** had substituted death sentence with a term of twenty (20) years.

6. In compliance with the direction of the Supreme Court and the Judiciary sentencing policy Guidelines, the court called for presentencing report in which it was stated that the victim had no problem with the convict having forgiven him and thought that he had been released long time ago. In conclusion it was stated that the convict was 35 years old who at the time of his arrest was working as a mason. He admitted that he committed the offence due to his poverty and influence of a friend who had the AK47 rifle and told him to accompany him to go and rob the store so as to share the proceeds. They proceeded to the store where his friend fired two bullets to the air and people scattered. His friend then pointed the gun at the cashier commanding him to surrender all the money but in the process there was misunderstanding and his friend shot the cashier in the chest and the owner of the store in the process. They collected the money and ran away.

7. It was stated that he really regretted to have committed such offence and had since learnt his lesson after serving all the years. It was stated that the home environment was conducive for his rehabilitation and was found suitable for probation.

8. The Application was opposed by the State through grounds of opposition filed on 3/1/2019 in which it was stated;

> ***1. That no new facts and circumstance had arisen to warrant revision of the sentence which were not contested in the court of first instance. High Court and Court of appeal.***
>
> ***2. That his death sentence had been commutted to life imprisonment and therefore the application had been spent.***

DETERMINATION

9. Resentencing hearing is a new terminology rising from the Supreme Court determination in FRANCIS K MURUATETU & ANOTHER (Supra) where the court at paragraph (111) stated that:-

> **"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. 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".**

10. The Court of Appeal in **William Okungu Kiitany V Republic [2018] eKLR** added its voice to the Supreme Court and stated 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 rehearing in 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 sentence even in finalized cases"**

11. It is this door that the Applicant has now used to approach this court, it therefore follows that this court has the jurisdiction and mandate to re-hear the applicant on sentence. My understanding of the law is that the court has to put the Applicant at the position he was in at the time of the sentence and to look at an appropriate sentence including death, which would have been appropriate at that time, having taken into account his mitigation, the circumstances of his offence and The Sentencing Robbery Guidelines.

12. In this case the Applicant pleaded guilty to the charge and was convicted on his own plea of guilty. The items stolen was Kshs.100,000 which was a lot of money in the year 2005. The Applicant and his accomplish were armed with a rifle and Somali sword and one **JOSEPH WAMBUA** lost his life. The Applicant cooperated with the police and gave them the name of his accomplish who was and still at large.

13. In his mitigation, the Applicant stated that he had been in prison for fourteen (14) years, was remorseful and had reformed. During the period he was in custody, he had lost both parents and his only brother left school, while his wife got married to another man.

14. As I have stated hereinabove the position of resentencing hearing is to put the Applicant at the place he would have been at the time of sentencing if death penalty was not mandatory. Whereas the Applicant has blamed poverty and influence of friend, having looked at how this offence was committed, guided by the sentencing police Guidelines and the fact that the Applicant had one previous conviction offence of stealing a bicycle, I am of the considered view that a deterrence sentence would have been the most suitable in the circumstances herein which can only be adhered through appropriate imprisonment term.

15. I am therefore of the considered opinion and hold that an imprisonment period of twenty five (25) years would be the most adequate, appropriate and justifiable sentence and accordingly set aside the death sentence and substitute the same with an imprisonment period of twenty five (25) years with effect from 18/5/2005. I am alive to the fact that the said death sentence had been commutted to life imprisonment through a presidential decree. The Appellant is entitled to remission for the period served and it is ordered.

Dated, Signed and Delivered at Lodwar through Skype this 12th day of May, 2020

……

J WAKIAGA

JUDGE

In the presence of:-

Mr. Mwaura for the State

Applicant - present

Court Assistant: Maureen