



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

HCCR PETITION NO. 4 OF 2019

JEREMIAH MUTHENGI MATHINYO APPELLANT

V E R S U S

REPUBLIC RESPONDENT

JUDGMENT

1. This matter before me for what been referred as sentence rehearing following the decision of the **Supreme Court in Petition No. 15/2015 Francis Kioko Muruatetu & Another –v- R (2017) eKLR**. The decision of the Supreme Court was that the mandatory nature of the death sentence under **Section 204 and Section 296(2) of the Penal Code** is unconstitutional. The petitioner filed a notice of motion seeking an order for the reduction of the sentence.

2. The background of this matter is that the petitioner was charged with robbery with violence contrary to **Section 296(2) of the Penal Code and rape** contrary to **Section 140 of the Penal Code**. He was found guilty and convicted after a full trial. On the 1st count of robbery contrary to **Section 296(2) of the Penal Code** he was sentenced to death. On the second count of Rape Contrary to **Section 140 of the Penal Code** he was sentenced to life Imprisonment. His appeals to the High Court and the Court of Appeal were dismissed.

3. The petitioner has come to this court based on the Supreme Court decision in **Francis Kariuko Muruatetu & Another –v- Republic (supra)**. The petitioner seeks the reduction of the sentence. The State did not oppose the petition and left the matter to the Court to decided.

4. At the hearing I did ask the petitioner whether he had any objection with the matter proceeding before me as I am the one who convicted him when I worked at this station as a Principal Magistrate. The petitioner stated that I proceed and consider the application.

5. The petitioner did not have much to say as his only prayer was reduction of the sentence.

6. I have considered the application. On the issue of jurisdiction, I gave a ruling on 31/10/19 stating that this court has jurisdiction to entertain the petitioner. The Supreme Court of Kenya in the case of **Francis Karioko Muruatetu –v- Republic** Supra, it was stated that:-

“--- For the avoidance of doubts, the sentence 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 wait appropriate guidelines for the disposal of the same, The Attorney General is directed to urgently set up a frame work to deal with sentence re-hearing of cases relating to the mandatory nature of death sentence which is similar to that of the petitioners in this case.

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 frame work to deal with sentence rehearing cases similar to that of the petitioners herein. The Attorney General is hereby granted Twelve Months from the date of this Judgment to give a progressive report to this court on the same”.

7. However before the frame work to deal with sentence rehearing alluded to in the Judgment the Court of Appeal in **William Okungu Kuttiny –v- R (2018) eKLR** held that:-

“The decision of the Supreme Court only discouraged persons from filing petitions in Supreme Court but the decision does not prohibit courts below it from ordering sentence rehearing 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.

8. Since the mandatory nature of the death penalty has been declared unconstitutional by the Supreme Court the court has jurisdiction to deal with the application to review the sentence.

9. The facts of this case are that on 1/1/2003 at 2.00 a.m the complainant in the first count (PW-1-) was in her house with her two daughters who included EM (PW-2-) the 2nd Complainant in the second count. The door of the house was suddenly hit and caved in. PW-1- lit a lamp only to find that Four men had entered the house. Two men went to the children's bedroom. The Four men were all armed with pangas and axes. The Two men demanded money from PW-1-. They took a purse containing Kshs 3,500/- and a mobile phone make Siemens. The other two men went to the room of PW-2- and asked her if she was married. She answered in the negative and was then ordered to get out of the house. They had also asked her whether she goes to school. PW-2- was led outside and she was pulled upto [particulars withheld] Primary School where the men raped her in turns. They had put a dirty cloth in her mouth. After the ordeal PW-2- was left at the scene bleeding profusely as a result of the sexual assault. The petitioner was identified by PW-1- & 2 during the robbery as one of the robbers as he was a person they knew before. He was arrested and charged. He was tried, convicted and sentenced as stated above. There is what can be said to be an already emerging jurisprudence where the sentence for the offence of robbery with violence has to start at 14 years since the maximum sentence for a simple robbery is 14 years.

10. The Supreme Court gave guidelines to be considered during sentence rehearing.

This are:-

- a) Age of offender.**
- b) The person being a 1st offender**
- c) Whether offender pleaded guilty.**
- d) Character and record of offender.**
- e) Commission of offence in response to gender based violence.**
- f) Remorsefulness of the offender.**
- g) The possibility of reform and social adaptation of the offender.**
- h) Any other factor that the court considers relevant.**

11. The Supreme Court pointed out that despite these guidelines the trial Judge has discretion when passing sentence.

12. The petitioner was sentenced on 6/5/2004. He was treated as a first offender. The offence was serious. The petitioner and his accomplices were armed and used violence by gang raping the complainant. The petitioner has not filed mitigation and only prays that the sentence be reduced. Since the court has jurisdiction to consider the sentence rehearing I order as follows:-

- 1. The sentence is reviewed and set aside.**
- 2. The petitioner to serve Twenty years imprisonment to be computed from the date when the sentence was passed, that is 6/5/04.**

Dated at Kerugoya this 9th day of June 2020.

L. W. GITARI

JUDGE