



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**CRIMINAL MISC. APPLICATION NO. 62 OF 2019**

**MOHAMED ABDULLAHI MOHAMED.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The applicant was convicted and sentenced to death of robbery with violence contrary to section 296(2) of the Penal Code Laws of Kenya via a judgment of 11/9/2013.
2. He appealed in HCCRA No. 149 of 2013 Garissa where same was dismissed after hearing.
3. He finally appealed in the Court of Appeal via Criminal Appeal No. 124 of 2015 which dismissed appeal on conviction but set aside order on sentence and remitted the case to the High Court for resentencing after considering mitigations.
4. This court's role is therefore to consider the applicant's mitigations and mete out the appropriate sentence in the circumstances of the matter.
5. The matter came for hearing on 19/5/2020 and applicant tendered his mitigations to the effect that he has been in custody for over 8 years since 20/6/2013 when he was arrested then aged 22 years.
6. He says he has reformed and has been of good conduct. That he was a first offender and he is a refugee who intends to be returned to his country of Somalia. The prosecution confirmed that there were no previous records on applicant's account. The Court of Appeal directed that on sentencing herein, this court to take into account Supreme Court Case of **Muruatetu Petition No. 15 of 2015** holding on death sentence Sentencing Guidelines sentences which are as follows:-

**“On the issue of sentencing, we note that the same was not challenged. It would nonetheless be remiss of us; in view of the new jurisprudence from the Supreme Court in the Francis Karioko Muruatetu & Others vs Republic [2017] eKLR, not to interfere with the sentence. In the Muruatetu case (supra) the Supreme Court declared as unconstitutional the mandatory aspect of the death sentence. When the death sentence was imposed by the trial court and affirmed by the High Court, the Muruatetu case had not been determined. We also note that the appellant had not addressed the trial court in mitigation. In view of this, we feel that the appellant should be given the benefit of the recent development in our criminal jurisprudence. We therefore remit the matter to the High Court for rehearing on mitigation and sentence to enable the High Court take into account the Muruatetu's judgment (supra) and also the sentencing policy guidelines which came into force after the judgment appealed from.”**

7. 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:

**“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.

**“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.”**

8. In the spirit of uniformity and fairness, emerging jurisprudence suggests that when dealing with sentence re-hearing in robbery with violence cases, the starting point should be 14 years. This is informed by the fact that the felony of robbery, which is a lesser offence than robbery with violence, attracts a term of imprisonment for 14 years. Further, it is imperative to also consider sentences that have been imposed by other Courts pursuant to **Muruatetu** case.

**“22. In Ibrahim Ali Halake v Republic [2019] eKLR I the Petitioner jointly with others while armed with dangerous weapon including a gun robbed a complainant of Kshs.60,000/-, and during resentencing the court took into account the petitioner age and the fact that he appears to have been rehabilitated during his period of incarceration, including going to school. The Court set aside the life imprisonment and sentencing the Petitioner to serve five (5) years imprisonment from the day of the ruling in consideration of the fact that the petitioner had already served 15 years.**

**23. Additionally, in Eldoret Court of Appeal Criminal Appeal No. 22 of 2016 [2018] eKLR: Wycliffe Wangusi Mafura –vs- Republic the appellant was involved in robbing an Mpesa shop with the use of a firearm with which he threatened the attendant but was caught before he inflicted any violence on her. The Court of Appeal imposed a 20-year sentence.**

**24. Further, in Kisumu Court of Appeal Criminal Appeal No. 616 of 2010 [2018] eKLR, Paul Ouma Otieno alias Collera and Another –vs- Republic, the Court of Appeal sentenced the appellants to 20 years imprisonment where the robbery was aggravated by the use of a firearm.”**

9. In the instant case, the robbery was executed without user of firearm but a metal bar and the violence were bruises on upper arm. The property involved is of reasonably low value a phone worth Ksh 8000/- and same was recovered. The accused at the time of commission of the offence, he was 22 years and has been in custody for 8years.He was a first offender. He asserts that he is repentant and remorseful and that he has learned a lot in prisons.

10. Thus, relying on guidelines aforesaid and taking into circumstances of the case herein I find the applicant will get a more lenient sentence as hereunder;

***j) He will now serve 6 more years from the date of this ruling so that the total term from the date of conviction (11.9.2013) will be 14 years.***

**DATED, DELIVERED AND SIGNED AT GARISSA THIS 9<sup>TH</sup> DAY OF JUNE, 2020.**

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**C. KARIUKI**

**JUDGE**