



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

PETITION NO. 25 OF 2019

Consolidated with Petition No. 32 of 2019

PHARES MUNYI MUNGAL.....1ST PETITIONER

CHARLES MURIITHI NYAGA.....2ND PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

A. Introduction

1. The petitioners in petitions No. 25 of 2019 by the 1st petitioner and No. 32 of 2019 by the 2nd petitioner sought resentencing pursuant to the decision by the Supreme Court in **Francis Karioko Muruatetu & Another –vs- Republic [2017] eKLR**. Pursuant to the orders made on 10/06/2020, the two petitions were consolidated. With No. 25 of 2019 becoming the lead file.

2. The two petitions were based on similar facts being that the petitioners were convicted for the offence of robbery with violence contrary to Section 296(2) of the Penal Code before Runyenjes Court in Criminal Case No. 197 of 2008. The petitioners lodged an appeal at Embu High Court HCCR 230 of 2009 which was dismissed. Similarly, the second appeal to the Court of Appeal Nyeri Criminal Appeal No. 114 of 2012 was also dismissed.

3. The petitioners as well as the respondents argued the petition orally before the court. The 1st petitioner submitted that he was reformed and had learned new skills useful in life and that his family needed him at home. He further prayed that the time he had spent in custody be taken into account and prayed that he be placed on probation. On his part, the 2nd petitioner prayed for leniency and further submitted that in prison he had learned new skills to help him start a new life outside prison.

4. Ms. Mati for the respondent did not oppose the petition but urged that the court to take into account that the aggravated circumstances for the petitioners were armed with a pistol among other weapons.

B. Analysis of the law

5. The petitioners' petitions have been necessitated by the Supreme Court decision in **Francis Karioko Muruatetu & Another –Vs- Republic Petition No. 15 of 2015 (2017) eKLR** whereby the mandatory death sentence for the offence of murder was declared unconstitutional.

6. In this petition, the petitioners were sentenced for the offence of robbery with violence contrary to section 296(2) of the Penal Code. The *ratio* in **Muruatetu's decision** was applied to the provisions of section 296 (2) of the Penal Code which imposes a mandatory death penalty for the offence of robbery with violence by the Court of Appeal in the case of **William Okungu Kittiny –Vs- Republic Kisumu Criminal Appeal No. 56 of 2013 (2018) eKLR** where the court held as thus: -

“.....The appellant was sentenced to death for robbery with violence under Section 296 (2). The punishment provided for murder under Section 203 as read with Section 204 and for robbery with violence and attempted robbery with violence under Section 296 (2) and 297 (2) is death. By Article 27(1) of the Constitution, every person has inter alia, the right to equal protection and equal benefit of the law. Although the Muruatetu's case specifically dealt with the death sentence for murder, the decision broadly considered the constitutionality of the death sentence in general...From the foregoing, we hold that the findings and holding of the Supreme Court particularly Paragraph 69 applies mutatis mutandis to Section 296 (2) and 297 (2) of the Penal Code. Thus the sentence ... is a discretionary”

7. The trial magistrate in meting out the sentence on the petitioner herein observed: -

“The 1st and 2nd accused persons are sentenced to death as that is the only sentence prescribed in law in both counts I and II.”

8. It is clear from the pronouncement of the trial court did not exercise its discretion in meting out the sentences. As such the said sentences ought to be considered for resentencing in line with the principles in the Supreme Court and Court of Appeal decisions cited in the foregoing paragraphs.

9. The petitioners faced two counts of robbery with violence. The evidence of the complainant PW1 was to the effect that when the petitioners committed the offence, they were armed with a pistol and sticks. Upon conviction, the petitioners did not give any mitigation perhaps on the belief that the hands of the court were tied to hand in only death sentence as opposed to any other.

10. The **Judiciary’s Sentencing Policy Guidelines, 2016** obligates this court to take into account the aggravating and mitigating circumstances in determining the most suitable sentence. I note that the petitioners committed the offence on PW1 and PW2 (a couple), they were armed with dangerous weapons and were more than one in number. The Sentencing Guidelines recognizes the use of a weapon to frighten or injure a victim; multiple victims; commission of the offence in a gang or group; and previous convictions as aggravating factors. The effect of aggravating circumstances as per the said guidelines is for the court to met out a heavier sentence.

11. The **Muruatetu’s decision** allowed courts to exercise discretion when considering and passing sentence but this discretion should only be exercised in deserving cases. (See **Republic v Ruth Wanjiku Kamande [2018] eKLR**). The courts in exercising the said discretion must further have in mind the objectives of sentencing as laid down in the Judiciary’s Sentencing Policy Guidelines, 2016 (which includes: - *retribution, deterrence, rehabilitation, restorative justice, community protection and denunciation*) and the aggravating and mitigating circumstances in determining the most suitable sentence. The court must decide the sentence that would meet the ends of justice which will depend on circumstances of each case. The gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances must be considered as was held in the case of **Charles Ndirangu Kibue v Republic [2016] eKLR**.

12. As such, even taking into account the fact that the trial court did not exercise its discretion in sentencing, and appreciating the legal principles as was set out in **Muruatetu’s case** and their *mutatis mutandis* application in robbery with violence offences in **William Okungu Kittiny –Vs- Republic (supra)** and having considered all the factors, I am of the considered opinion that the petitioners herein still deserve a deterrent sentence.

13. However, I note that the 1st petitioner in his oral submissions pointed out the fact that he had already served twelve and half (12½) years in prison and had stayed for two years in remand during the pendency of the trial. The 2nd petitioner has served a similar period. Section 333(2) of the Criminal Procedure Code obligates a court in passing sentence to take into account the period spent in custody. (See **Bethwel Wilson Kibor vs. Republic [2009] eKLR** and the *Judiciary Sentencing Policy Guidelines*).

14. *I have perused the trial court records and I note that the 2nd petitioner was arrested on 13/12/2007 Further the evidence of PW8 is to the effect that the 1st petitioner was arrested on 19/12/2007 and which date is consistent with the date on the charge sheet. The petitioners were sentenced on 16/12/2009. There is no evidence on record to the effect that they were ever admitted to bail or bond which I note was not provided for by the law before promulgation of the new Constitution 2010. The period of two (2) years spent in custody ought to have been taken into account during sentencing.*

15. It is my considered opinion that the petition is merited and it is hereby allowed. The death sentence is hereby set aside.

16. The petitioners are hereby sentenced to serve twenty (20) years imprisonment to commence from 13th December 2007 being the earliest date of arrest on record.

17. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 1ST DAY OF JULY 2020.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for Respondent

Petitioner through Video Link