



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

PETITION NO. 34 OF 2018

MORGAN KIPLIMO WANANDA.....PETITIONER

VERSES

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Applicant's Notice of Motion dated 22nd May 2018 prays that this court do rehear his sentence again pursuant to the decision of the Supreme Court of Kenya in the now famous case of **FRANCIS MURUATE & OTHERS VERSES. REPUBLIC. PETITION NO. 15 OF 2015**.

2. The Applicant had been charged with the offence of robbery with violence as well as causing grievous harm. He was convicted on all the counts and sentence to suffer death. His appeal to this court failed. He appears according to his affidavit that he did not prefer an appeal to the Court of Appeal.

3. He therefore prays that the court should hear him afresh on sentence specifically.

4. The learned state counsel essentially did not resist the application and thus left it to the discretion of the court taking into consideration the Muruatetu case. The tenor and effect of the Supreme Court in the Muruatetu case essentially gave the courts an opportunity and a discretion to deal with matters which the statutes seemed to have left no alternative but to sentence an accused as provided. In other words, the statute left no room for any other option.

5. In the case at hand the offence of robbery with violence under section 296(2) of the penal code provided only one sentence, namely death. The trial court and by extension this court during the appeal had no option but to stand with what was provided by the statute. However, with the above decision of the Supreme Court and other current decisions by the Court of Appeal, it appears that the courts have been granted some leeway to make some discretionary sentencing.

6. The sentencing however must be seen from several fronts and specifically the circumstances of the offence, any aggravating issues as well as the character of the accused. The **Sentencing Policy Guidelines 2016** published by the Judiciary essentially gave some guiding parameters.

7. The Hon. Justice Majanja in the case of **MICHAEL KATHEWA LAICHENA & ANOTHER VERSES REPUBLIC (2018) e KLR** set out the above guidelines when he rendered himself, thus;

“The Sentencing Policy Guidelines, 2016 (“the Guidelines”) published by the Kenya Judiciary state (at para. 4.1) that the sentence imposed must meet the following objectives;

- **Retribution: To punish the offender for his/her criminal conduct in a just manner.**
- **Deterrence: To deter the offender from committing a similar offence subsequently as well as discourage other people from committing similar offences.**
- **Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.**
- **Restorative justice: To address the needs arising from criminal conduct such as loss and damages.**
- **Community protection: To protect the community by incapacitating the offender.**

- **Denunciation: To communicate the community's condemnation of the criminal conduct.**

As the *Guidelines* state at para. 4.2, “*These objectives are not mutually exclusive, although there are instances in which they may be in conflict with each other. As much as possible, sentences imposed should be geared towards meeting the above objectives in totality.*”

The *Guidelines* provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. Since the *Guidelines* did not take into account the fact the death penalty would be declared unconstitutional, the Court in the *Muruatetu Case* (Supra, para. 71), held considered mitigating factors that would be applicable in re-sentencing in a case of murder 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.*

Those factors would also apply to a case of re-sentencing in a case of robbery with violence. The Supreme Court emphasized that although the *Guidelines* do not replace judicial discretion, they are intended to promote transparency, consistency and fairness in sentencing. In addition, the court underlined the importance of guideline judgments of superior courts which promote an understanding of the process of sentencing.

8. In view of the above guidelines, the Supreme Court decision and the submissions by the Applicant, this court finds merit in the application. There was at least no death in the incident although the injuries were grievous. The applicant has been in custody since May 2013.

9. It is hoped that the seven years or thereabouts have served to teach the appellant a lesson. It is noted that the applicant was granted an opportunity to mitigate and the trial court noted that he was a first offender.

10. Taking into consideration the above factors, the sentence of death imposed against the Applicant is hereby set aside and substituted with a custodial sentence of **12 years from 22nd May 2013.**

11. Orders accordingly.

Dated, Signed and Delivered at Kitale this 15th day of October 2020.

H. K. CHEMITEI

JUDGE.

15/10/2020