REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. CRIMINAL APPLICATION 125 OF 2018

SKM ……..…… APPLICANT

VERSUS

REPUBLIC ……..……RESPONDENT

JUDGMENT UPON APPLICATION FOR RE-SENTENCING

1. The Applicant, SKM, was convicted by the Senior Principal Magistrate, Naivasha, of three counts of the offence of robbery with violence contrary to section 296(2) of the Penal Code. He was also convicted of one count of being in unlawful possession of military stones contrary to section 203 of the Armed Forces Act.

2. The Applicant was sentenced to suffer death with respect to the first three counts. He was sentenced to one year imprisonment with respect to the fourth count.

3. The convictions and death sentence were confirmed by both the High Court and the Court of Appeal. The High Court gave a brief but comprehensive summary of the circumstances in which the offence was committed thus:

> *On the 3rd day of May, 2002, at around 9:00pm at Murungaru Trading Centre, there was a spate of robberies. It was the Prosecution's case that the [Applicant] with two other persons while armed with a home-made gun, axes, and clubs, attacked several bars including "Jogoo Bar"; Check-Point Bar and Kenya Njeru Bar. In all these premises, they stormed in with a show of force brandishing the above-mentioned weapons and subjected the patrons into submission, beat those who indicated any sign of resistance, ransacked their pockets and stole some drinks from the Centre.*

4. The Applicant approached this Court for re-sentencing following the window opened up by the Supreme Court in ***Francis Karioko Muruatetu & Another v Republic [2017] eKLR***. He seeks for substitution of the death penalty he received with a prison term. In the ***Muruatetu Case***, the Supreme Court outlawed mandatory death penalty for murder as unconstitutional and struck down section 204 of the Penal Code to the extent that it prescribed mandatory death sentence upon conviction for murder.

5. The reasoning in ***Muruatetu Case*** respecting section 204 of the Penal Code (the penalty section for murder), has been extended by the Court of Appeal to the mandatory death penalty in robbery with violence cases and probably all other similar mandatory death sentences. That was in ***William Okungu Kittiny v R [2018] eKLR***.

6. In ***Benson Ochieng & Another v Republic (Nakuru High Court Misc. Application No. 45 of 2018)***, I reached the conclusion that the High Court can invoke its original jurisdiction bequeathed to it in Article 165(3)(a) of the Constitution to re-sentence persons on death row who were sentenced pursuant to the mandatory death penalty provisions which have been declared unconstitutional. Addressing the advisory by the Supreme Court to those on death row pursuant to the mandatory death penalty provisions the Supreme Court had just declared unconstitutional that they should await a Taskforce ordered by the Supreme Court and not approach the Supreme Court with individual petitions, I had this to say:

> *As I understand it, this Application is pivoted on Article 165(3)(a) of the Constitution. That clause gives the High Court unlimited original jurisdiction in criminal and civil matters. On the other hand, the Supreme Court adviced similarly-positioned would-be Petitioners to await the formation of the Taskforce which will recommend the way forward for the thousands of prisoners presently serving the death sentence. However, the position of the Supreme Court was quite specific: it indicated that it will not consider individual Petitions presented to it by the prisoners after enunciating the constitutionality of the mandatory death sentence.*
>
> *I have taken the position that the Supreme Court neither intended nor achieved the purpose of limiting the jurisdiction of this Court to consider applications for re-sentencing by individuals such as the Applicants who were sentenced to death under the then mandatory provisions of the Penal Code. A progressive and purposive reading of the constitutional provisions relied on by the*

*Supreme Court to reach its outcome in the **Muruatetu Case** would lead us to this conclusion. The Court, may, of course, determine for prudential reasons, to await the work of the Taskforce or other docket management considerations.*

7. It is for this reason that I take jurisdiction to re-consider the sentence imposed on the Applicant herein following the ***Muruatetu Case***.

8. In pleading his case to reduce the death sentence imposed to a prison term, the Applicant told the Court that he is very remorseful; that he was a youthful 34 years old when he was arrested; that he is now over 50 years old having been in prison for more than 17 years.

9. The Applicant told the Court that he is fully reformed; that he is now a "new creature", having found God in Prison even becoming a preacher. In part to substantial his claim to having reformed, the Applicant produced the following certificates:

a. Carpentry Grade II by NITA certificate

b. Carpentry Grade III certificate by NITA

c. Carpentry Grade I by NITA

d. Paralegal training by Kituo cha Sheria

e. Men of Honour certificate by Family transformation ministries

f. Kenya Institute of Management Certificate in self-empowerment and Business status course.

g. Various certificates in theological studies.

10. . In closing, the Applicant sought forgiveness. He informed the Court that he has a wife and a child and that he is living positively with HIV. .

11. Mr. Chigiti, the Prosecutor, conceded that the mitigating factors are "weighty." However, he pointed out that there were some aggravating factors that the Court ought to consider. In his view, they include the following:

a. The Applicant was a member of a gang which caused terror on members of the public;

b. The Applicant had a gun;

c. The judgment shows that one of the victims was injured;

d. The Applicant had military fatigues

12. Mr. Chigiti was of the view that the death sentence should be substituted with 25 years imprisonment to strike a balance between the needs of the members of the public and the Applicant.

13. On my part, I have considered the mitigating factors presented by the Applicant. I am persuaded that his remorse is sincere. I am also persuaded that he has reformed; and that there are extremely positive indications that he has capacity to live a crime-free life if released. In part, this is evidenced by his attitude and training, and in part by the willingness of his family to embrace him.

14. I have also considered the seriously aggravating factors present in the case including the fact that the Applicant was operating as part of an organized gang; he was armed with a rifle; one of the victims was injured; and that he had military fatigues. I also considered that this was a spate of terrifying robberies.

15. **In view of all the above, I have formed the view that the death penalty would be a disproportionate sentence in the circumstances. I hereby substitute it with a prison term. I further find that the prison term which balances the mitigating and aggravating circumstances and takes into account the essential nature of the charged crime – robbery with violence – is a prison term of twenty one (21) years. The prison term shall be computed beginning on 02/09/2002 when the Applicant was sentenced**.

16. Orders accordingly.

Dated and delivered at Nakuru this 17th day of January, 2019

…….…….

JOEL NGUGI

JUDGE