REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.385 OF 2018

AGGREY CHITERI……..……..…….APPLICANT

VERSUS

REPUBLIC……...RESPONDENT

RULING

The Applicant, Aggrey Chiteri was charged and convicted of the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. He was further charged of **being in possession of firearm and ammunition** contrary to **Section 4(2)** of the **Firearms Act**. In respect of the first count, he was sentenced to death. In respect of the second count, he was sentenced to serve ten (10) years imprisonment. The Applicant's appeal to the High Court was dismissed. This was on 19th December 2006. His further appeal to the Court of Appeal was dismissed on 3rd April 2010. The death sentence was later commuted to life imprisonment. That would have been the end of the matter but for the window opened by the Supreme Court in **Francis Karioko Muruatetu & Another –vs- Republic [2017] eKLR.**

The Applicant applied to this court for re-sentencing pursuant to this decision. He told the court that he was arrested on 29th May 2003. He has been in lawful custody for fifteen (15) years. He admits that he committed the offence. He was young and misguided at the time. The victim of the robbery was not injured. He told the court that he has regretted his action since the day he committed it. While in prison, he had undertaken several courses which will serve him well if the court favourably considers his application. He availed to the court certificates that he had obtained while in prison. He stated that he had positively applied himself while in prison. He was a first offender. He had reformed. He urged the court to consider the value of the item that was stolen and give him a second chance at life. Ms. Atina for the State was not opposed to the application. She however urged the court to take into consideration the period that the Applicant has been in prison and the fact that he appears to have been rehabilitated.

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:

> ***"[71]. As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable.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.

[72] 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.""

Although the Supreme Court referred to the case of murder, this court is cognizant of the fact that the ratio *decidendi* equally applies in the case of the Applicant who was sentenced to what was stated then to be a mandatory death sentence. In **Joseph Kaberia Kahinga & 11 Others –vs- Attorney General [2016] eKLR,** the High Court sitting as a constitutional bench, held thus (at Page 27) when considering the question whether the petitioners' conviction under **Sections 296(2)** and **297(2**) of the **Penal Code** met the threshold of fair trial:

"Having considered the submission by both parties, the authorities cited in this judgment, together with the comparative laws we find and hold that the Petitioners have a case when they argue that the sub-sections of Sections 296 and 297 of the Penal Code are ambiguous and not distinct enough to enable a person charged with either of the offences to prepare and defend himself due to lack of clarity on what constitutes the ingredients of either charge. Article 50(2) of the Constitution proclaims what constitutes "a fair trial" when a person is charged with a criminal offence. We have already set it out herein above. We find and hold that all the persons that have been charged with and convicted of the offences of robbery and attempted robbery under Sections 296(1) and (2) and 297(1) and (2) of the Penal Code did not have the full benefit of the right to fair trial as provided under Article 50(2) of the Constitution (and) Section 77(1) of the repealed Constitution."

At page 36 the Court further held that:

"Having taken into consideration the above factors, we are of the considered view that the sections of the Penal Code upon which the Petitioners were charged and convicted, insofar as they did not allow the possibility of differentiation of the gravity of the offences in a graduated manner in terms of severity or attenuation, and the failure to give an opportunity for the consideration for the circumstances of the offender, rendered those sections i.e. Sections 204, 396(2) and 297(2) of the Penal Code deficient in terms of assisting those administering the justice system to be able to charge the offenders with the appropriate offences that will ultimately attract a proportionate sentence. It (is) in that context that the complaints by the Petitioners that the imposition of the death sentence as a one-stop contravened their fundamental rights to fair trial."

Prior to the re-sentencing hearing, this court directed that a probation report be prepared. The report is favourable. This court has considered the mitigation of the Applicant. It is clear that in the period that the Applicant has been in prison, he has been rehabilitated. However, this court will weigh this mitigation with the circumstances in which the offence was committed.

From the facts of the case, it was clear that the Applicant while armed with a pistol robbed the complainants of their valuables. The pistol and some of the stolen items were recovered during the Applicant's arrest. This court formed the view that the Applicant was prepared to use lethal force to achieve his objective of robbing the victims. The circumstance of the robbery precludes this court from favourably considering the Applicant's plea for immediate release. This court takes into consideration the period that the Applicant has been in lawful custody.

However, the Applicant has partially established a case for his re-sentencing. In the premises therefore, the life imprisonment imposed on the Applicant is set aside and substituted by a sentence of five (5) years imprisonment with effect from today's date. It is so ordered.

DATED AT NAIROBI THIS 13TH DAY OF FEBRUARY 2019

L. KIMARU

JUDGE