REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.378 OF 2018

DANIEL KIOKO MBUVA...APPLICANT

VERSUS

REPUBLIC..RESPONDENT

RULING

The Applicant, Daniel Kioko Mbuva was originally charged with six (6) counts of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The charges arose from hijacking of a mini bus that was on 30th September 2004 ferrying passengers from Nairobi to Kitui. The Applicant with his accomplices, while armed with pistols, commandeered the mini bus, robbed the passengers, and in the course of the robbery, injured some of them. After trial, the Applicant was convicted of one count of robbery with violence. He was sentenced to death. His appeal to the High Court was dismissed on 22nd April 2008. Similarly too, his appeal to the Court of Appeal was dismissed on February 2009. 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 1st October 2004. Since his arrest, he has been in lawful custody for fourteen (14) years. He told the court that no one was injured during the robbery incident. No dangerous weapon was used. He was a first offender. He urged the court to consider the period that he has been in prison when re-sentencing him. He has been involved in music while in prison. He told the court that he was reformed. He was ready to be under supervision if the court formed the view that he needed such supervision to confirm that he was reformed. He pleaded with the court to give him a second chance at life. Ms. Atina for the State was not opposed to the application. She submitted that during his arrest, the Applicant was injured. He was in company of others when they robbed passengers in a bus. She urged the court to consider the Applicant's application, evaluate the circumstance of the case and make an appropriate decision.

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 As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable.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;***
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> ***(c) whether the offender pleaded guilty;***
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> ***(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 fact that the Applicant was a first offender. It has also considered that he has been in prison for fourteen (14) years. According to prison authorities, the Applicant is reformed and is ready to return back to the society as a useful member. In prison, the Applicant is a member of the prisoners' band. The extent of his rehabilitation is signified by the fact that the prison authorities trust him to mentor other prisoners on good behaviour. The Applicant is thirty-six (36) years old. At the time of the commission of the offence, he was twenty-two (22) years old.

This court will however consider this mitigation in light of the circumstances that the crime was committed. As stated earlier in this Ruling, the Applicant's conviction resulted from a hijacking incident. The Applicant and his accomplices posed as passengers in a bus that was travelling from Nairobi to Kitui. Along the way, they commandeered the bus and ordered the driver to drive into a bush. They robbed the passengers of their valuables. They injured some of them. Luckily for the victims of the robbery, the hijacking incident was witnessed by a vigilant member of the public. He made a report to the police. The police trailed the bus and found that it had stalled in a bush.

They followed the trail of the robbers. They were able to accost them. After an exchange of fire, two of the robbers were gunned down. The police officers formed the view that since the exchange of fire had taken some time, there was possibility that some of the robbers who managed to escape may have sustained gunshot injuries. True to their intuition, the Applicant presented himself to a local health centre within the locality with gunshot injuries. He was arrested. It was established the bullet that was extracted from his body was fired from the gun of one of the officers who responded to the robbery incident. This court forms the view that the circumstance that the robbery took place precludes this court from favourably considering the Applicant's view for review of sentence. The offence that was committed was heinous and deserves appropriate and commensurate sentence.

In the premises therefore, the Applicant's application shall be partially allowed. The sentence of life imprisonment that was imposed on him is set aside. He shall however serve ten (10) years imprisonment with effect from today's date. It is so ordered.

DATED AT NAIROBI THIS 13TH DAY OF FEBRUARY 2019

L. KIMARU

JUDGE