REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

PETITION NO.77 OF 2018

(CORAM: CHERERE- J.)

BETWEEN

FANUEL MAKENZI AKOYO.....PETITIONER

AND

REPUBLIC.....RESPONDENT

JUDGMENT

Introduction

1. **FANUEL MAKENZI AKOYO**, (hereinafter referred to as the petitioner) was convicted and sentenced to death for the offence of robbery with violence contrary to section **296(2) of the Penal Code** in **Kisumu Criminal Case No. 649 of 2003.** He subsequently they lodged an appeal **Kisumu High Court Criminal Appeal No. 10 of 2004** which was dismissed and the conviction and sentence were upheld in a judgment dated 30th June, 2005. The petitioner consequently appealed to the Court of Appeal in **Kisumu Criminal Appeal No. 45 of 2006**. The Court of Appeal in a judgment dated 16th June, 2006 similarly upheld his conviction and sentence.

2. By a petition filed on 5th October, 2018, the petitioner has petitioned this court for resentencing. The petition is supported by an affidavit filed on even date. The Petitioner avers that he has been in custody for 15 years and has reformed.

3. Mr Muia, learned counsel for the state submitted that the petitioner now aged 52 had indeed reformed and had been assigned the duties of a compound prefect which places him in authority over other prisoners. The state submitted that the crime was horrendous and proposed that the petitioner be resented to 20 years imprisonment.

Analysis and Determination

4. At the time of the petitioner's conviction, death was the only available sentence for robbery with violence.

5. The Supreme Court's decision in ***Francis Karioki Muruatetu & Another v Republic & 5 others [2016] eKLR*** declaring the mandatory death sentence unconstitutional has necessitated resentencing of all persons previously sentenced to the mandatory death sentence. In the case of ***William Okungu Kittiny v Republic KSM CA Criminal Appeal No. 56 of 2013 [2018] eKLR***, the Court of Appeal applied the ***Muruatetu Case* (Supra)** *mutatis mutandis* to the provisions of **section 296(2)** of the ***Penal Code (Chapter 63 of the Laws of Kenya)*** which imposes the mandatory death penalty for the offence of robbery with violence and held that death was a discretionary maximum sentence.

6. In the case of ***Michael Kathewa Laichena & another v Republic [2018] eKLR,*** Majanja J, précised the procedure that a court considering resentencing should take and stated as follows:

> ***"The Sentencing Policy Guidelines, 2016 ("the Guidelines") published by the Kenya Judiciary 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 that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. Since the Guidelines did not take into account the fact that the death penalty would be declared unconstitutional, the Court in the Muruatetu Case (Supra, para. 71), considered that in re-sentencing in a case of murder, the following mitigating factors would be applicable;***
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> ***(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.

7. The court further stated that the ***Guidelines*** do not replace judicial discretion but are intended to promote transparency, consistency and fairness in sentencing.

8. The maximum sentence for simple robbery is 14 years' imprisonment. The mitigating circumstances in this case are that the petitioner could be considered a first offender. The facts from the record shows that the offence took place at night and the robbers who numbered about 20 and who were armed with rungus and metal bars harassed and injured the 3 complainants and robbed them of a car communication radio and bullet proof jacket. The jacket was subsequently recovered from the petitioner.

9. Under the proviso to **section 333(2)** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***, the court is entitled to take into account the period the petitioner has spent in custody in determining the sentence. The court record shows that the petitioner was arrested on 1st September, 2003 and has remained in custody to date. He remained in custody for 4 months during the trial and has served a total of 15 years from the date of conviction.

10. The use of guideline judgments of Superior Courts has also been underlined to ensure consistency and fairness. In the case of ***Wycliffe Wangusi Mafura v Republic ELD CA Criminal Appeal No. 22 of 2016 [2018] eKLR*** and ***Paul Ouma Otieno alias Collera and Another v Republic KSM CA Criminal Appeal No. 616 of 2010 [2018] eKLR*** where the Court of Appeal sentenced the appellants to 20 years imprisonment where the robbery was aggravated by the use of a firearm. No firearm was used in this case. In the case of ***Moses Atela Othira v Republic [2018] eKLR***, I resentenced the appellant who had used a pair of shears during the robbery to an imprisonment term of 15 years.

11. After considering all the mitigating and aggravating factors, and especially the fact that the petitioner who has been in custody for slightly over 15 years has reformed, I re-sentence him to the period already served.

DATED AND SIGNED IN KISUMU THIS 14th DAY OF February, 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Petitioner - Present in person

For the State - Mr. Muia