REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.395 OF 2018

IBRAHIM ALI HALAKE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Ibrahim Ali Halake was charged and convicted of the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 17th December 2003 at Isiolo Barrier area in Isiolo District, the Applicant jointly with others not before court, while armed with dangerous weapon robbed Mariam Yatani Buko of Kshs.60,000/-, and during the course of the robbery, used personal violence to the said Mariam Yatani Buko. The Applicant was sentenced to death by the trial court. His appeals to the High Court and subsequent to the Court of Appeal were dismissed. His 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 has applied to this court for re-sentencing pursuant to the above decision. He told the court that he was arrested on 17th December 2003. Since then, he has been in lawful custody. Whereas he was illiterate before his incarceration, he had gone to school while in prison and became literate. At the time of his arrest, he was married with 8 children. He admits that he committed the offence. He attributes his criminality to the fact that he was misled by his friends. He regretted the decision that led him to commit the offence. He told the court that his children have suffered as a result of his incarceration. He pleaded with court to give him another chance at life. Ms. Atina for the State was not opposed to the Applicant's application. The Applicant has been in prison for fifteen (15) years. He had learnt his lesson. The victim's family indicates that they were living in fear because the Applicant's family had threatened revenge if the Applicant is released.

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 As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable.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;***
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> ***(b) being a first offender;***
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> ***(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 ordered a probation report to be prepared. The report is favourable though it notes that the victims of the robbery were apprehensive that the Applicant will exert revenge on them if he is released. The report notes that the Applicant's family and that of the victims are neighbours. The Applicant is fifty-six (56) years old. He has been in prison for fifteen (15) years. During his incarceration, he has improved is personal circumstances by going to school and becoming literate. This court however notes that the circumstances of the robbery preclude this court from immediately releasing the Applicant from prison. The Applicant used a firearm during the robbery. Although no one was injured, this court takes cognizance of the fact that if the victims had not obeyed the directions given by the robbers, most probably they would have been fatally or seriously injured. The fear that the victims of the robbery faced at the time are still fresh. This court did not have confidence that the Applicant would not revenge on the victims of the robbery if he is released. However, this court will set aside the life imprisonment that the Applicant was sentenced and sentence him to an appropriate prison term.

In the premises therefore, this court finds favour with the Applicant's application for re-sentencing. The court has taken into account the period that the Applicant has been in prison. It has also taken into account the age of the Applicant and the fact that he appears to have been rehabilitated during his period of incarceration. The life imprisonment sentence is therefore set aside and substituted by a sentence of this court sentencing the Applicant to serve five (5) years imprisonment from today's date. It is so ordered.

DATED AT NAIROBI THIS 12TH DAY OF FEBRUARY 2019

L. KIMARU

JUDGE