REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.383 OF 2018

MUSA OMOLLO OGOLLA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Musa Omollo Ogolla 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 5th July 1996 at Kasimba area along Kisii- Oyugis tarmac road in Rachuonyo District, the Applicant, jointly with others not before court, while armed with a pistol and pangas robbed Maurice Ogola Oloo of motor vehicle registration No.KAA 863E Toyota Land Cruiser, the property of Rural Water Development Sikri. In the course of the robbery, the said Maurice Ogola Oloo was severely injured. The Applicant was also charged and convicted of the offence of **kidnap with the intent to murder** contrary to **Section 258** of the **Penal Code**. The particulars of the offence were that on the same day and in the same place, the Applicant together with the others, kidnapped Maurice Ogola Oloo from Kenya to Tanzania without his consent. The Applicant was convicted of both counts. He was sentenced to death on the 1st Count of robbery and sentenced to serve seven (7) years imprisonment for the 2nd Count of kidnapping. His appeals to both the High Court and the Court of Appeal were dismissed. 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 9th January 1997. He has been in lawful custody since then. He admits that he committed the offence. He was asking for forgiveness from the court. He is sixty-one (61) years old. He is ailing. He was currently undergoing treatment in Nairobi which is very expensive for his family. He prays for leniency. He pleads with the court to give him a chance to be with his grandchildren. Ms. Atina for the State was not opposed to the application. She however pointed out that the Applicant is yet to serve the sentence of seven (7) years imprisonment for the offence of kidnapping that was suspended. However, she told the court that the Applicant should be given a second chance at life.

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. The report notes that the Applicant has been ailing. During his incarceration, he has undertaken several courses which will aid him to be a better member of the society. From the report, it was apparent that the Applicant has been rehabilitated. The court also took into account the Applicant's age and his mitigation during the re-sentencing hearing. It was clear to the court that the Applicant has been sufficiently punished. He has repaid his debt to the society. Although the victim of the robbery was seriously injured, from the evidence, it was clear that he recovered and was able to testify before the trial court. This court has also taken into account the period of twenty-two (22) years that the Applicant has been in lawful custody. That period is sufficient punishment taking into consideration all the circumstances related to the crime that was committed.

In the premises therefore, the order that commends this court on re-sentencing is to commute the custodial sentence of the Applicant to the period served. The Applicant is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 12TH DAY OF FEBRUARY 2019

L. KIMARU

JUDGE