



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.397 OF 2018

PETER MATIKU MUHIRU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Peter Matiku Muhiru 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 3<sup>rd</sup> October 2001, the Applicant, with others, robbed Peter Mburu Gikonyo of Kshs.2,750/-. This was at Naivasha Town. The Applicant was sentenced to death. The Applicant's appeal to the High Court was dismissed. His further appeal to the Court of Appeal was similarly dismissed. 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 a former Administration Police Officer. He was arrested on 5<sup>th</sup> October 2001. He was 28 years old at the time. Since his arrest, he has been in lawful custody. He regrets the decision that made him commit the crime. He admits that he committed the offence. He has been in prison for seventeen (17) years. During his incarceration, he had undertaken several courses which will make him a better person if his plea for re-sentencing is favourably considered. He told the court that his wife had died while he was in prison. He pleaded with the court to give him a second chance at life. No one was injured during the robbery. Ms. Atina for the State was not opposed to the application for re-sentencing. She submitted that the Applicant ought to 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 As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable.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 to be prepared to aid the court in arriving at a just determination. The report is favourable. This court has considered the circumstance in which the offence was committed. The Applicant, in the company of others, kidnapped the complainant from the streets of Naivasha Town and drove him towards the Mai Mahiu direction. The complainant had just deposited some amount in the bank. During the ordeal, the complainant was handcuffed and robbed of Kshs.2,750/-. He was abandoned at Mai Mahiu.

A vigilant member of the public saw the kidnap. He reported the incident to the police. The report included the number plate of the vehicle that the kidnappers used to kidnap the complainant. The Applicant admits that he committed the offence. He is remorseful. During the period of his incarceration, he has learnt that the crime does not pay. He has been in prison for seventeen (17) years. The victim of the crime was not injured. No dangerous or offensive weapon was used. This court is of the considered opinion that the Applicant has paid his just debt to the society.

In the premises therefore, this court favourably considers the Applicant’s application for re-sentencing. The period that the Applicant has been in prison is sufficient punishment. The State was not opposed to the Applicant’s application for a review of his custodial sentence. The Applicant’s custodial sentence is therefore commuted to the period served. He is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

**DATED AT NAIROBI THIS 12<sup>TH</sup> DAY OF FEBRUARY 2019**

**L. KIMARU**

**JUDGE**