REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.382 OF 2018

TITUS MUTULU KIMOMO..........APPLICANT

VERSUS

REPUBLIC...................................RESPONDENT

RULING

The Applicant, Titus Mutulu Kimomo was convicted of the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 30th September 1999, the Applicant, jointly with others not before court while armed with a pistol, robbed Humphrey Muchai Wageni of Kshs.3,000/- and motor vehicle registration No.KWV 664 valued at Kshs.100,000/- and during the course of the robbery, used actual violence to the said Humphrey Muchai Wageni. The Applicant was sentenced to death. His appeal to the High Court was dismissed on 29th June 2009. His appeal to the Court of Appeal was similarly dismissed on 4th June 2010. The death sentence was 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. The Applicant told the court that since his arrest on 30th September 1999, he has been in lawful custody. He admits the offence. He is a first offender. He is remorseful and regrets the crime that he had committed. At the time of his arrest, he was aged twenty-two (22) years. He is now forty-two (42) years old. He had trained in several courses during the time of his incarceration. He has been issued with several certificates while in prison. He has been teaching at the Prison's Academy for twelve (12) years. He pleads with the court to exercise leniency on him. He is emphatic that he has been rehabilitated in the period that he has been in the prison. He promises to be a useful member of the society if his application is favourably considered. Ms. Atina for the State was not opposed to the application. She urged the court to take into consideration that the Applicant had been in prison for a period of twenty (20) years.

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 As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable.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."***

In the present application, prior to hearing the Applicant on re-sentencing, this court ordered a probation officer's report to be prepared. The report was positive. It noted that the Applicant appears to have indeed been rehabilitated during the twenty (20) year period that he was both in lawful custody and prison. The courses that he has undertaken while in prison will make him a useful member of society. Indeed, he has taught at the Prison Academy for a period of twelve (12) years. The Applicant was a first offender. This court has also taken into consideration the nature of the offence that the Applicant was convicted of. It was a robbery where none of the victims were injured. The property that was stolen was recovered at the scene of crime. The Applicant was arrested at the scene of crime. His accomplices however made good their escape. The Applicant states that he is remorseful and has learnt his lesson in the period that he has been in prison. He regrets the offence that caused his incarceration. The State was not opposed to this court reviewing the Applicant's sentence.

Applying the **Francis Karioko Muruatetu** case and **Joseph Kaberia Kahinga** case, this court holds that the degree of gravity of the offence that the Applicant committed and the mitigation of the Applicant on re-sentencing means that the sentence of life imprisonment is not appropriate in the circumstances. The period that the Applicant has been in lawful custody and prison is sufficient punishment. In the premises therefore, the Applicant's application is successful to the extent that the sentence of life imprisonment is set aside and substituted by an order of this court commuting his custodial sentence 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 12TH DAY OF FEBRUARY 2019.

L. KIMARU

JUDGE