REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.384 OF 2018

WILSON MWANGI KINYUA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Wilson Mwangi Kinyua 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 1998 at Southern Credit Bank Westlands Branch in Nairobi, the Applicant, jointly with others not before court, while armed with a pistol and AK 47 Rifle robbed Manoj Mehta of cash Kshs.2,116,044.20, and in the course of the robbery, used violence to the said Manoj Mehta. He was further charged with the offence of **being in a possession of a firearm and ammunition without a firearm certificate** contrary to **Section 4(2)(a)** of the **Firearms Act**. The particulars of the offence were that on the same day and in the same place, the Applicant was found in possession of a revolver US Army model 1917 serial No.188062 calibre .45mm with six rounds of ammunition without a firearm certificate. The Applicant was sentenced to death by the trial court. His appeal to the High Court was dismissed. Similarly too, his appeal to the Court of Appeal was 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 has applied to this court for re-sentencing pursuant to the above decision. He told the court that he was arrested on 17th December 1998. Since then, he has been in lawful custody. He admits that he committed the offence. He was nineteen (19) years old at the time. He regrets the decision that he made and the consequences that has flowed therefrom. He has learnt that crime does not pay. No one was injured during the course of the robbery. He was a first offender. While in prison, he has undertaken various courses, including undertaking an accounting course. He had completed Stage 3 of the Certified Public Accountancy course. He had studied law and obtained a diploma in common law. He had also completed a Bachelors degree in Law. He swore that he would not go back to crime. He was ready to go back to the society. The African Prisons Project had promised to employ him if his plea for re-sentencing is favourably considered. He told the court that he would pursue an advocacy career if released. He pleaded with court to give him a second chance at life. Ms. Atina for the State was not opposed to the application. She submitted that it was clear from the Applicant's submission that he had been rehabilitated. He urged the court to consider the Applicant's plea for reduction of sentence.

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 ordered a probation report to be prepared. The report is favourable. The Applicant states that he was 19 years old at the time he committed the offence. According to the facts of the case, the Applicant robbed the bank stated in the particulars of the charge in company of other accomplices. They used a pistol to subdue the members of staff at the bank. They managed to rob more than Kshs.2 million from the bank. During the course of the robbery, one of the staff members pressed an alarm which alerted the police. The police rushed to the scene and were able to confront the robbers as they were making their exit from the bank. When the robbers saw the police, they shot at them. The police fired back. During the exchange of fire, the Applicant was shot and injured. He was in possession of the boxes that the robbers had used to carry the cash from the bank. The cash was recovered. It was therefore clear that the Applicant was arrested at the scene of crime.

This court has considered the circumstance in which the crime was committed. It has also considered the fact that since his incarceration the Applicant has developed himself academically. According to the probation report:

"While in prison he was able to undertake CPA Section 1 to 4 and also study a diploma in law from the University of London through correspondence. The inmate also has completed studying bachelor of law from the University of London in October this year (2018). His studies in law were financed by Kituo Cha Sheria. The inmate further states that he is a teacher in the Kamiti Academy and represents fellow inmates in many forums… The prison authorities spoke very highly of the inmate. They reported that there was no record of any misconduct or his involvement with negative gangs from the prison."

It was clear from the above report that indeed the Applicant has been rehabilitated during his incarceration. Whereas the circumstance in which the crime was committed is serious, this court takes into account the fact that the Applicant has been in prison for twenty (20) years. It was apparent that the Applicant was an impressionable youth at the time he committed the offence. The chance that he was influenced by others is not beyond the realm of possibility. His positive development since his incarceration leads this court to the conclusion that he will not be a danger to the society if the court favourably considers his plea for reduction of sentence. The court has also taken into account the length of time that the Applicant has been in prison. He has paid his just debt to the society.

In the premises therefore, this court finds favour with the Applicant's plea for reduction of sentence. The Applicant's custodial sentence is therefore commuted 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