



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

PETITION NO. 3 OF 2018

PETER GIKONYO NYOIKE.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

[1] The Petitioner moved the Court on the **21 May 2018** vide a Notice of Motion seeking Sentence Re-hearing. The Petition was filed pursuant to **Articles 19(3), 22(1), 25, 26, 27(1), 28, 29, 50(2), 160(1), 159(1), 165(3)(b) and 167(7)** of the **Constitution** and **Section 261** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya**. The Petition was predicated on the Supporting Affidavit annexed thereto, sworn by the Petitioner on **23 May 2018**, wherein he averred that he was charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**, and was sentenced to death; which sentence was later commuted to life imprisonment by way of Presidential Pardon.

[2] The Petitioner further averred that he had exhausted the appeal process as provided for in law; having appealed to the High Court vide **High Court Criminal Appeal No. 25 of 2002** and to the Court of Appeal vide **Criminal Appeal No. 258 of 2003**; both of which were dismissed. Hence, it was the contention of the Petitioner that since the death sentence which was imposed on him by the Trial Court has since been declared unconstitutional by the Supreme Court in the case of **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR**, it is his constitutional right to seek an appropriate sentence given the circumstances of his case.

[3] In his submissions before the Court, the Petitioner stated that he has reformed and produced documentation by way of copies of certificates for the Court's consideration. In addition to **the Muruatetu Case**, the Petitioner urged the Court to consider the following authorities:

[a] **HCMCRA No. 4 of 2015: Douglas Muthaura Ntoribi vs. Republic;**

[b] **Republic vs. John Nganga Gacheru & Another [2018] eKLR;**

[c] **William Okungu Kittiny vs. Republic [2018] eKLR;**

[d] **Meru HC Pet. No. 53 of 2018: John Gitonga alia Kadosi vs. Republic.**

[4] **Ms. Mumu**, Learned Counsel for the State, opposed the Petition. Her argument was that **the Muruatetu Case** did not outlaw the death penalty; and that it is in the discretion of the Court to impose the death penalty or any other penalty depending on the facts. She accordingly urged the Court to dismiss the Petition.

[5] Having carefully considered the Petition, the averments in support thereof as well as the submissions made by the Petitioner and Counsel for the State and the authorities relied on by the Petitioner, there is no dispute that the Petitioner was charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**; was found guilty and sentenced to death as by the trial Court. He then appealed the decision, the first appeal being to the High Court vide **Eldoret High Court Criminal Appeal No. 25 of 2002**; which was dismissed on **23 January 2003**; while his second appeal to the Court of Appeal, **Criminal Appeal No. 258 of 2003**, was dismissed on **23 September 2005**. The Petitioner has since benefitted from Presidential Clemency and had his sentence commuted to life imprisonment. He is therefore no longer on death row. Nevertheless, the sentence, for purposes of sentence re-hearing is the death sentence which was imposed upon conviction by the trial court for the offence of robbery with violence, with which the Petitioner was charged, and for which he is presently in custody. That sentence was the death penalty, and therefore the Petitioner is, in my respectful view, entitled to a re-hearing following the **Muruatetu Decision**.

[6] It is also worth mentioning that the impact of **the Muruatetu Case** is not confined to murder cases. In **William Okungu Kittiny vs. Republic** (supra) the Court of Appeal made this clear thus:

"...The appellant was sentenced to death for robbery with violence under Section 296 (2). The punishment provided for murder under Section 203 as read with Section 204 and for robbery with violence and attempted robbery with violence under Section 296 (2) and 297 (2) is death. By Article 27(1) of the Constitution, every person has inter alia, the right to equal protection and equal benefit of the law. Although the Muruatetu's case specifically dealt with the death sentence for murder, the decision broadly considered the constitutionality of the death sentence in general...From the foregoing, we hold that the findings and holding of the Supreme Court particularly Paragraph 69 applies *mutatis mutandis* to Section 296 (2) and 297 (2) of the Penal Code. Thus the sentence ... is a discretionary ...

[7] In the premises, I have carefully perused and considered the documents filed herein in support of the Petition. They include the proceedings and Judgment of the trial court in **Eldoret Chief Magistrate's Criminal Case No. 3513 Of 1999: Republic vs. Peter Gikonyo Nyoike and 2 Others**; Judgment of the High Court on appeal in **High Court Criminal Appeal No. 25 of 2002: Peter Gikonyo Nyoike vs. Republic**; and the Court of Appeal Judgment in **Criminal Appeal No 258 of 2003: Peter Gikonyo Nyoike and 2 Others vs. Republic**. It is manifest therefrom that the Petitioner was one of three persons who were accused before the trial court with two Counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code**; and one Count of being in possession of a firearm without a Firearm Certificate contrary to **Section 4(1)(a)** of the **Firearms Act, Chapter 114** of the **Laws of Kenya**. The particulars of the Charge in Count I were that on **26 August 1999** along Nakuru-Eldoret Road near Mulango Moja, the Petitioner and his co-accused persons, while armed with dangerous or offensive weapons, namely, a home made gun, rungun and simis, robbed one **Gedion Njagu** of Kshs. 1,500/= in cash, one passport, one wrist watch and two shirts, all valued at Kshs. 4,000/= and at or immediately before or immediately after the time of such robbery, they used actual violence on the said **Gedion Njagu**.

[8] **In Count II**, the Petitioner and his co-accuseds were charged with robbery with violence contrary to **Section 296(2)** of the **Penal Code**, in that on the **26 August 1999** along Nakuru-Eldoret Road near Mulango Moja, in Koibatek District within the Rift Valley Province, the Petitioner and his co-accused persons, while armed with dangerous or offensive weapons, namely, a home made gun, rungun and simis, robbed one Peter Murigi Muiruri of Kshs. 900/= and at or immediately before or immediately after the time of such robbery, they used actual violence on the said Peter Murigi Muiruri.

[9] While the Petitioner and his co-accused were found guilty and convicted of the two Counts of robbery with violence and sentenced to death in respect thereof, they were acquitted of Count III of being in possession of a firearm without a Firearm Licence; and as has been stated herein above, the Petitioner's appeal to the High Court and the Court of Appeal were dismissed. It is also instructive that, upon the promulgation of the **Constitution of Kenya 2010**, the Petitioner lodged a Petition seeking for retrial pursuant to **Article 50(6)** of the Constitution vide **Eldoret High Court Miscellaneous Application No. 3 of 2011** which was similarly dismissed.

[10] The foregoing notwithstanding, this Court has the powers to reconsider the sentence in the light of the **Muruatetu Case** (supra) and determine whether the death penalty was deserved. Here is what the Supreme Court had to say in that case:

[58] To our minds, any law or procedure which when executed culminates in termination of life, ought to be just, fair and reasonable. As a result, due process is made possible by a procedure which allows the Court to assess the appropriateness of the death penalty in relation to the circumstances of the offender and the offence. We are of the view that the mandatory nature of this penalty runs counter to constitutional guarantees enshrining respect for the rule of law.

[59] We now lay to rest the quagmire that has plagued the courts with regard to the mandatory nature of Section 204 of the Penal Code. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the Penal Code, unfair thereby conflicting with Articles 25 (c), 28, 48 and 50 (1) and (2)(q) of the Constitution.

[11] The Supreme Court added, at paragraph 69 of its Judgment that

"...For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment."

[12] Having reconsidered the circumstances under which the offence was committed, particularly the fact that the Petitioner and his co-accuseds were armed with a gun, I am in agreement that the sentence was well deserved. The Petition is accordingly dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 12TH DAY OF MARCH 2019

OLGA SEWE

JUDGE