**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CRIMINAL MISC. NO. 39 OF 2018**

**FRANCIS KINYUA IRERI.............................1ST APPLICANT**

**BENROGERS MUTUI KIILU........................2ND APPLICANT**

**VERSUS**

**REPUBLIC...........................................................RESPONDENT**

**R U L I N G**

**A. Introduction**

**1.** The applicants and two others not before this court were jointly charged with six (6) counts of robbery with violence contrary to Section 296 (2) of the Penal Code. The applicants and one John Muguku Ngumba each faced a separate charge of rape contrary to Section 140 of the Penal Code (now repealed). On 10/12/2008, the applicants were jointly convicted of robbery with violence as charged in counts 1, 5, 6, 7, 8 and 9 and sentenced to death. However, the trial court acquitted them of the offences of rape.

**2.** The High Court upheld the convictions on Counts 1, 6, 7 and 8 while those in counts 5 and 9 were quashed. The Court of Appeal quashed the conviction against the 1st applicant in Count 1 and that against the 2nd applicant in Count 7 as it upheld the judgement of the High Court on all other aspects.

**3.** The applicants have therefore, exhausted all the avenues of appeal available under the law.

**4.** The applicants filed separate applications being Criminal Miscellaneous Nos. 6 and 39 both of 2018 dated 19/10/2018 and 26/02/2018 respectively which were consolidated. The gist of this consolidated application is that the applicants seek re-hearing on sentence pursuant to the Supreme Court judgement in the Petition of **Francis Karioko Murwatetu**.

**5.** This application was argued by the applicants through written submissions with rejoinder of oral submissions from the respondent.

**B. Applicants' Submission**

**6.** The applicants in their identical submissions stated that they sought the appropriate sentence as a result of the Supreme Court judgement of the **Francis Karioko Murwatetu v Republic** petition that declared the mandatory nature of the death penalty as unconstitutional.

**7.** It was further submitted that none of the courts which handled the applicants' cases considered their mitigation. The 1st applicant submitted that he was young when he committed the offence and has since been in prison for 13 years and has since learnt several trades.

**C. Respondent's Submission**

**8.** The prosecution submitted that the court ought to look into the violence meted out by the applicants and further relied on the case of **Eric Njoka** where Chitembwe J. upheld the death sentence because of the injury suffered by the complainant and the surrounding circumstances of the case.

**D. The Charge**

**9.** The particulars of the robbery charge were that on the 4th July 2006 whilst armed with pistols and a sickle, robbed the complainants of their properties as listed in the various charges and at or immediately before or after such robbery, used violence on the victims. The applicant pleaded not guilty and the case proceeded for full trial. The charges of rape were in respect of PW1 alone.

**E. Analysis of the Law**

**10.** The application by the applicants is grounded on the holding of the Supreme Court judgement in the Petition of **Francis Karioko Murwatetu v Republic** that declared the mandatory death penalty as unconstitutional.

**11.** The Supreme Court in the **Muruatetu** case sets out guidelines to assist the courts in the determination of the sentence where mitigation was not considered prior to the said case. The guidelines are as follows: -

> ***"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.***
>
> ***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:***

*GUIDELINE JUDGMENTS*

> ***Where there are guideline judgments, that is, decisions from the superior courts on a sentencing principle, the subordinate courts are bound 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".***

**12.** The Supreme Court in **Muruatetu & another (**supra) petition, affirmed the decision of the Court of Appeal in **Godfrey Ngotho Mutiso v R C.A. No. 17 of 2008**, and the High Court in **Joseph Kaberia Kahinga and Others v The Attorney General [2006] eKLR** as follows;

> ***"We are in agreement and affirm the court of Appeal decision in*** *Mutiso* ***that whilst the constitution recognizes the death penalty as being lawful, it does not provide that when a conviction for murder is recorded, only the death sentence shall be imposed. We also agree with the High court's statement in*** *Joseph Kaberia Kahinga* ***that mitigation does have a place in the trial process with regard to convicted persons pursuant to section 204 of the Penal Code. It is during mitigation, after conviction and before sentencing, that the offenders' version of events may be heavy with pathos necessitating the court to***
>
> ***consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death penalty. If mitigation reveals an untold degree of brutality and callousness…'***
>
> ***'If a judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused criminal culpability. Further imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualize the circumstances of an offence or offender may result in the undesirable effect of 'over punishing' the convict…'***
>
> ***'The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of the Constitution…"***

**13.** The Supreme Court then made it clear exactly how the mitigation of the accused person should be applied by the court before the accused is sentenced. The Court stated that

> ***'it is during mitigation, after conviction and before sentencing, that the offenders' version of events may be heavy with pathos***

***necessitating the court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death penalty.'***

**14.** The position is that pursuant to the **Muruatetu** petition (supra) the courts now may exercise discretion when passing sentence. I am in agreement with **Lesiit J** that discretion to pass a sentence other than that of death in capital offences should only be exercised in the deserving cases. ***See*** **Republic v Ruth Wanjiku Kamande [2018] eKLR.**

**15.** The facts and the evidence in this case reveal that the applicants, though not convicted of the offences of rape due to lack of medical evidence, had a forced sexual encounter with PW1. The applicants engaged on a robbery spree against several victims in different households in Runyenjes township location on the $14^{th}$ July 2006. The trauma of the victims of the terror and especially PW1, was horrifying and an affront of their human rights to privacy, to human dignity, security and protection of the right to property.

**16.** In their mitigation in this application, the applicants were not remorseful of the trauma and violence they meted out on the complainants. The trial magistrate gave the applicants a chance to mitigate but none of them had anything to say which is very telling of their attitude towards the suffering they had caused to the complainants.

**17.** In view of the foregoing observation, I find that this application lacks merit and must fail. It is my considered view that the applicants deserve nothing less than the death penalty for purpose of deterrence of would be offenders.

**18.** For the reasons herein stated, I dismiss this application.

**19.** It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS20TH DAY OF MAY, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Mati for Respondent**

**$1^{st}$ and $2^{nd}$ Respondent**