



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL DIVISION

CRIMINAL MISC. APPLICATION NO. 22,

23 AND 35 OF 2018 (CONSOLIDATED)

BETWEEN

ISSAAC KIMANZI MUSEE.....1ST APPLICANT

JOSEPH MUTIO MBUKO.....2ND APPLICANT

ERIC MWANZIA MBITI.....3RD APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

A. BACKGROUND

1. The three applicants, Isaac Kimanzi Musee, Joseph Mutio Mbuko and Eric Mwanzia Mbiti were 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 22/8/2010, at NUU Market in Mathuki district within Eastern Province jointly with others not before court while armed with crude weapons namely pangas and knives robbed Eliud Kavuvu Mulwa of Kshs. 350,000/= and at the time of such Robbery used actual violence to the said Eliud Kavuvu Mulwa. The applicants were sentenced to death, which sentence was commuted to life imprisonment. Their respective appeals to the High Court and Court of Appeal were dismissed.

2. The applicants have approached this Court pursuant to the Supreme Court decision in the matter of **Francis Karioko Muruatetu & Another –vs- Republic [2017] eKLR**. The applications came up for hearing on 4th April, 2019 where the applicants agued their applications based on the above case of **Francis Karioko Muruatetu & Another –vs- Republic**.

3. Isaac Kimanzi Musee sought the Court to re-sentence him; he stated that he has served a total of 9 years in Custody. He told the Court that his appeal to the Court of Appeal against the conviction and sentence were dismissed on 29th September, 2017 and that he was convicted and sentenced on 25th February, 2013. He stated that while in Prison he has been engaging in constructive activities including undertaking courses and has attained various certificates, including one from Prisoners Journey-Fellowship International and that and that he is engaged in outreach ministry within the prison counselling other inmates to change their character and live through the bible teaching.

4. In his mitigation, he stated that he is from a humble background, and has been in prison for over 9 years having been arrested when he was 49 years, now he is 56 years and that prior to his arrest he was a casual worker married with two children now aged 20 and 24 years respectively. In addition, he states that his parents passed on and that he hopes to unite the rest of his siblings to bring unity and coexistence to themselves and the community at large. Further, he states that he is now old and wise and therefore he seeks a second chance and forgiveness from all those he wronged.

5. In support of his application, he relies on the following authorities **Francis Karioko Muruatetu & Another –vs- Republic, South Africa** case of **State vs Oscar Pistorious, Court of Appeal Case of Daniel Gichimu & Another vs Republic Criminal App No. 27 of 2009**.

6. In sum, the applicant is remorseful and urges the Court to consider his application and sentence him for the period served or any other

period the court deems appropriate.

7. Joseph Mutio Mbuko, the second applicant in his application relied on his filed amended mitigation grounds of review. He states that the sentence meted on him is harsh, excessive, degrading and unconstitutional violating his rights under Article 25(1) and 50(2) of the Constitution and that the over 8 years spent in Prison awaiting the execution of the death sentence has caused him psychological and physical torture exposing him to both chronic and mental illnesses.

8. In addition, he states that he has since atoned for his offence and devoted himself to biblical studies for behavioral change and that he has reformed and gained skills in custody. Further, he states that he is a first offender, and that he was arrested aged 20 and has been in custody since then and that at the time of his arrest, he was still young in his adolescent and therefore would not appreciate the consequences of his actions. At his age, if released can contribute to nation building.

9. In sum the applicant prays that this court makes orders that the death sentence is unjustified for the applicant and gives a sentence fit to him, secondly that the court considers the period of time the applicant has served in prison before passing the final verdict and finally that this court considers his mitigation and remorsefulness and accords him total relief for freedom.

10. The third applicant Erick Mwanzia Mbiti told the court that he is now 44 years old and has been in custody for 9 years and 5 months, and that he is unwell, being epileptic. He states that he is married with one child aged 20 and that he is remorseful and seeks a second chance. In addition, he states that he did his KCPE examination where he scored 400 marks and joined form 1 and he is keen on pursuing his education.

11. In his filed mitigation statement, the applicant states that he has attended rehabilitative courses in prison and attained various certificates, being Diploma in Theology, Advanced Diploma in Bible Correspondence, an Alternative to Violence Project, Mizizi Course, Prisoners Journey and Foundation Bible Study.

12. In regard to his personal mitigation factors, the applicant states that he comes from a humble background and at the time of his arrest he was the sole breadwinner of his family as a casual labourer and that his parents have passed on and that he his remorseful for his bad decisions and he seeking a second chance.

13. Additionally, he alleges that he is paralyzed on one hand and that he was admitted at Kenyatta Hospital for a period of 3 months which led to his part paralysis.

14. In support of his application, the applicant relies on the following authorities; **Francis Karioko Muruatetu & Another –vs- Republic, South Africa** case of **State vs Oscar Pistorious, Court of Appeal Case of Daniel Gichim & Another, Criminal App No. 27 of 2009.**

15. In sum, the applicant states that he is remorseful for the whole chain of events and urges the court to consider his mitigation, authorities relied on and grant a sentence it deems fit. 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.

16. The state through Mr. Mulati did not oppose the resentencing; arguing that the same can be taken to Mwingi Lower Court or it can be done by this court.

B. ISSUES AND ANALYSIS

17. The Supreme Court in the **Francis Karioko Muruatetu** decision gave the following guidelines when this court will be considering the applicants' application for 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.”

18. It is apparent from the Judgment that although the Supreme Court referred to murder, the same can also be applied in other cases where the law provides for a mandatory sentence, including the instant case of Robbery with Violence where a mandatory death sentence was imposed. This was confirmed by the Court of Appeal In **William Okungu Kittiny vs. Republic ([2018] eKLR)** where it was stated:

“...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 ...”

19. According to The *Sentencing Policy Guidelines, 2016* (“the Guidelines”) published by the Kenya Judiciary, the sentence imposed must meet the following objectives in totality;

- (a) Retribution: To punish the offender for his/her criminal conduct in a just manner.**
- (b) Deterrence: To deter the offender from committing a similar offence subsequently as well as discourage other people from committing similar offences.**
- (c) Rehabilitation: To enable the offender reform from his criminal disposition and become a law-abiding person.**
- (d) Restorative justice: To address the needs arising from criminal conduct such as loss and damages.**
- (e) Community protection: To protect the community by incapacitating the offender.**
- (f) Denunciation: To communicate the community’s condemnation of the criminal conduct.**

20. Applying the **Francis Karioko Muruatetu** case and the above legal principles to the instant applications, it is apparent to this court that the degree of gravity of the offence that the applicants committed and the mitigation of the applicants on re-sentencing establishes that the sentence of life imprisonment is not apt in the circumstances. Thus, the court is inclined to consider each application’s special circumstances and mitigation.

21. In the spirit of uniformity and fairness, emerging jurisprudence suggests that when dealing with sentence re-hearing in robbery with violence cases, the starting point should be 14 years. This is informed by the fact that the felony of robbery, which is a lesser offence than robbery with violence, attracts a term of imprisonment for 14 years. Further, it is imperative to also consider sentences that have been imposed by other Courts pursuant to **Muruatetu** case.

22. In **Ibrahim Ali Halake v Republic [2019] eKLR I** the Petitioner jointly with others while armed with dangerous weapon including a gun robbed a complainant of Kshs.60,000/-, and during resentencing the court took into account the petitioner age and the fact that he appears to have been rehabilitated during his period of incarceration, including going to school. The Court set aside the life imprisonment and sentencing the Petitioner to serve five (5) years imprisonment from the day of the ruling in consideration of the fact that the petitioner had already served 15 years.

23. Additionally, in **Eldoret Court of Appeal Criminal Appeal No. 22 of 2016 [2018] eKLR: Wycliffe Wangusi Mafura –vs- Republic** the appellant was involved in robbing an Mpesa shop with the use of a firearm with which he threatened the attendant but was caught before he inflicted any violence on her. The Court of Appeal imposed a 20-year sentence.

24. Further, in **Kisumu Court of Appeal Criminal Appeal No. 616 of 2010 [2018] eKLR, Paul Ouma Otieno alias Collera and Another –vs- Republic**, the Court of Appeal sentenced the appellants to 20 years imprisonment where the robbery was aggravated by the use of a firearm.

25. In purview of the above decisions, the court is inclined to consider the applicants’ case and circumstances. The particulars of the applicants’ offence were that on 22/8/2010, at NUU Market in Mathuki district within Eastern Province jointly with others not before court while armed with crude weapons namely pangas and knives robbed Eliud Kavuvu Mulwa of Kshs. 350,000/= and at the time of such Robbery used actual violence to the said Eliud Kavuvu Mulwa. This court will therefore consider the applicants’ mitigation in light of the circumstances that the crime was committed.

26. In respect to the 1st applicant Isaac Kimanzi Musee, the Officer in Charge of Kamiti Maximum Prison vide a letter dated 20th November, 2017 has recommended that the applicant in his 8 years in Prison has been well behaved and disciplined and has acquired various qualifications and certificates. And that he has a clean prison record, whose conduct is worth emulation by other Prisoners.

27. It is therefore clear that indeed the applicant has been rehabilitated during his incarceration. Whereas the circumstance in which the crime was committed is serious, this court is inclined to take into account the fact that the applicant has been in custody for period. The applicant was arrested when he was 49 years old and he is now aged 56 years and he seems to have grown up to be wiser and more reformed. In the circumstances and considering the seriousness of the offence and taking into account the applicant mitigation and the emerging Jurisprudence from other Courts position on the same, this Court will therefore give a sentence of 20 years minus the time already applicant has been in custody.

28. The 2nd applicant Joseph Mutio Mbuko is remorseful and has argued that the offence was committed in his youth and adolescence. It is 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. It is interesting that he is still denying the charges and nothing has been produced evidencing his alleged development.

29. The court taking 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 should be inclined to find favour with the applicant's plea for reduction of sentence and therefore the court is inclined to issue a considerable sentence of 20 years in view of the applicant circumstances, considering he has already been in custody for a period.

30. The 3rd applicant Eric Mwanzia circumstances seems to be similar with that of the 1st applicant, the Officer in Charge of Kamiti Maximum Prison vide a letter dated 28th November, 2018 has recommended that the applicant has reformed having acquired various certificates upon undertaking studies in Prison and that he is well behaved and disciplined. Further, the applicant is unwell, suffering from epileptic as evidenced by a letter dated 5th February, 2019 and that he also experiences some nerves breakdown affecting his left hand and the right eye.

31. It is also considerable that the applicant since incarceration has developed himself academically. He alleged in court that he sat for his KCPE exam and scored 400 marks and that he has since joined Form one. In the circumstances and considering the seriousness of the offence the applicant is equally sentenced to 20 years imprisonment minus the time already he has been in custody.

CONCLUSION

32. In the premises therefore, it is my considered view that the applicants' application is here by allowed and thus make the following orders;

(i) The sentence of death which was commuted to life imprisonment and life imprisonment thereof that was imposed on them is hereby set aside.

(ii) The applicants are hereby sentenced to 20 years imprisonment and factoring the time they have been in custody.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT GARISSA THIS 15TH DAY OF MAY, 2019.

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CHARLES KARIUKI

JUDGE