



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CRIMINAL MISC. NO. 38 OF 2018**

**MISHECK IRERI NJAGI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

**A. Introduction**

1. The applicant was charged and convicted of robbery with violence contrary to Section 296(2) of the Penal Code and sentenced to death. His appeals to High Court and Court of Appeal were both dismissed.
2. The applicant in undated application filed on the 25<sup>th</sup> October 2018, seeks orders for re-hearing on sentence pursuant to the Supreme Court decision in the case of **Francis Karioko Murwatetu** which declared the mandatory nature of death sentence unconstitutional.

**B. Applicant's Submission**

3. The applicant submits that he seeks to be accorded the appropriate sentence considering that he has been in prison custody for a long time and has since acquired various skills. He argues that the said skills will help him to earn a living and adjust to life outside prison.

**C. Respondent's Submission**

4. The prosecution submitted that though they did not oppose the application to review the sentence, the court should take into consideration the circumstances of the offence as well as its serious nature and also the fact that the applicant was armed with a metal rod which he used to hit his victim before robbing from him.

**D. Analysis of the Law**

5. It is not in doubt that the accused was sentenced to death for the offence of robbery with violence on the 5<sup>th</sup> November 2012. He submits that he has since exhausted all the avenues of appeal and approaches this court for review of sentence based on the decision of the **Francis Kariko Muruatetu & another and Republic and Others (2017) eKLR**.
6. The Supreme Court in the **Francis Karioko Murwatetu** case (supra) set 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*“As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable.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”.*

7. The Supreme Court decision in **Muruatetu & another** (supra), 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** which stated thus;

*“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...’*

8. 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.’*

9. It is true that pursuant to **Muruatetu** case, supra the courts now can exercise discretion when considering and passing sentence. I am in agreement with **Lesiit J** that discretion to pass a sentence other than death in capital offences should only be exercised in the deserving cases. See **Republic v Ruth Wanjiku Kamande [2018] eKLR**. This is not a deserving case.

10. In mitigation before the trial magistrate, the petitioner told the court that he had a wife and children and that he is the sole bread winner of the family including providing for his parents.

11. From the evidence of the complainant, I note that the victim was hit with an iron bar on the nose and immediately fell down unconscious. He was to regain it later after the attack when he realised he had been robbed of his property.

12. Taking into consideration, the serious nature of the offence and the violence meted out on the complainant, I am of the considered opinion that apart from death sentence, the petitioner deserves a deterrent sentence which should be a lesson to would-be offenders.

13. I hereby allow the petition in the following terms: -

- a) *That the death sentence now commuted to life imprisonment is hereby set aside.*

*b) That the petitioner is hereby sentenced to serve fifteen (15) years' imprisonment to commence from the date of conviction and sentence by the trial court.*

14. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 22<sup>ND</sup> DAY OF MAY, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Mati for Respondent**

**Applicant present in person**