REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO 351 OF 2017

PETER MWANGI WAITHAKA.....APPLICANT

VERSUS

REPUBLIC..... RESPONDENT

RULING

The Applicant, Peter Mwangi Waithaka was charged and convicted of the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the charge were that on 20th November 2006 at Kawangware Mlango Soko within Nairobi area, the Appellant, jointly with others not before court, while armed with dangerous weapon, namely a toy pistol robbed Mary Waithera of a mobile phone make Siemens C35 valued at Kshs.7,000/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Mary Waithera. After full trial, the Appellant was convicted and sentenced to death. His respective appeals to the High Court and to the Court of Appeal were dismissed. The death sentence imposed on the Applicant was later commuted to life imprisonment.

In its judgment, the Court of Appeal held thus:

> **"12. Having taken into account the evidence on record, we concur with the following findings of the High Court:-**
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> ***"The police shot at one of them. He managed to escape. When the police arrived at the scene, they saw a blood trail… They followed the blood trail to a kennel where they found the appellant hiding. He had a gunshot wound. When they searched him, they found him with a toy pistol and a C35 Siemens mobile phone which was later identified to be the one that was robbed from the complainant. The toy pistol and the mobile phone were produced as exhibits during trial.***
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> ***In our considered opinion, the prosecution established a clear chain of events from the time the complainant was robbed to the time the appellant was arrested hiding in the kennel. Although, the complainant and her friends did not identify their assailants, the fact that the mobile phone robbed from the complainant was recovered in the appellant's possession a few minutes after the robbery, proves beyond reasonable doubt that the appellant was in the gang that robbed the complainant. The doctrine of recent possession applies here. The mobile phone that was found in the appellant's possession was positively identified by the complainant as the one that was robbed from her."***
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> **13. Contrary to Mr. Ogeta's submissions, it is clearly on record that Mary had identified the mobile phone which had been recovered on the appellant as being hers and which had been stolen on the material day. She did so using the distinct scratch marks on the phone. In *Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. R* [2006] eKLR this Court expressed:**
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> ***"It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first that the property was found with the suspect, secondly, that the property is positively the property of the complainant; thirdly that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one to the other."* Emphasis added.""**

The Applicant has taken advantage of the opportunity offered by the recent Supreme Court decision of **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR** to apply to this court for his sentence to be reconsidered. In his application, the Applicant states that he was remorseful, was a first offender at the time of his conviction and had learnt his lesson during the period of his incarceration. The Applicant asserts that he has been rehabilitated in the period that he has been in prison. As proof of that, he annexed a letter written by his officer in-charge at the Prison dated 23rd July 2018 which states as follows:

"While in custody he has achieved the following certifications through our rehabilitation programs:

1. *Certificate in basic techniques in art painting training Sarakasi Trust (2015)*

2. *Shoe maker grade III trade test (December 2016)*

Peter Mwangi Waithaka is a disciplined youth with so much potential and performs to his best under minimum supervision. We have been able to supervise his rehabilitation we have faith in his rehabilitation. We are optimistic that he will make a positive contribution to the society if given an opportunity."

Prior to the hearing of the application, this court ordered for a sentence review report to be prepared. The said report is positive. The Applicant urged the court to take all these factors into account in determining his plea for a lenient sentence during the re-sentencing. The prosecution was not opposed to the Applicant's plea for review of his sentence.

The Supreme Court in the **Francis Karioko Muruatetu** decision gave the following guidelines when this court will be guided by when 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.""

In the present application, it was evident that the Applicant has indeed changed his life for the better during his period of incarceration. This court is persuaded that he will not be a danger to the society if he is released from custody. The Applicant has also learnt trades which will enable him to be a useful member of society upon his release. However, this court cannot fail to take into consideration the circumstances in which the robbery that the Applicant committed occurred. The victim of the robbery was traumatized when a pistol was pointed at her. One can only imagine what went through her mind at the time. It does not matter that the pistol was a toy one. The victim was not in a position to know that the pistol was not real. In assessing the mental state of the victim, this court will take into consideration how the robbery affected her. From her testimony, it was apparent that the effect the robbery had on her was distressing and devastating. Much as the Applicant was a first offender, he was a member of a gang that terrorized members of the public. That has to be taken into account in considering his application for re-sentencing.

In the premises therefore, this court will allow the Applicant's application for re-sentencing as a result of which the life imprisonment that he is serving shall be set aside and be substituted by a sentence of five (5) years imprisonment with effect from today's date. This court has taken into account the period of thirteen (13) years that the Applicant has been in lawful custody since his arrest. This court is of the view that upon serving the sentence the Applicant will have served his just debts to the society. It is so ordered.

DATED AT NAIROBI THIS 14TH DAY OF MAY 2019

L. KIMARU

JUDGE