



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

MISC. CRIMINAL APPLICATION NO. 40 OF 2018

DICKSON NDWIGA NJERU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

A. Introduction

1. The background information is that the petitioner was charged with one count of robbery with violence contrary to **Section 296 (2) of the Penal Code** and an alternative charge of handling stolen property contrary to **Section 322 (2) of the Penal Code**. The trial magistrate found the applicant guilty on the main charge of robbery with violence and sentenced him to death.
2. The appellant preferred an appeal in the High Court against the said conviction and sentence and his appeal was dismissed by a judgement dated 31st July 2018. The Court of Appeal upheld the High Court decision and dismissed the appeal.
3. The applicant filed the instant application dated 25th October 2018 in which he seeks rehearing on sentence pursuant to the Supreme Court judgement in the Petition of **Francis Kariuki Murwatetu**.
4. This application was argued by the both parties through oral submissions.

B. Petitioner's Submission

5. The petitioner submitted that he had since exhausted all his avenues of appeal and urged the court to look at his mitigation. He submitted that his mother was 96 years old and he wanted to be present during the succession proceedings so that he could get his land. He further submitted that he had since done several trades in prison such as upholstery as well as various Bible certificates which would help him to earn a living outside prison.

C. Respondent's Submission

6. The prosecution submitted that though they did not oppose the application to review the sentence, they asked the court to consider the fact that the applicant was armed with a panga whilst committing the offence that he used to hurt the complainant and that he was found with a watch stolen from the complainant.

D. Analysis of the Law

7. The applicant seeks resentencing as a result of the Supreme Court judgement in the case of **Francis Karioko Muruatetu & another v Republic & 5 others [2016] eKLR** that declared the mandatory death penalty as unconstitutional.
8. The applicant's case is that having exhausted all avenues of appeal, the **Francis Karioko Muruatetu** (supra) offered him a reprieve. It is his case that he has since undergone various rehabilitation programs and he was ready to contribute in the nation's development. The prosecution did not oppose the application but urged the court to consider the nature and the circumstances of the offence.
9. The Supreme Court in **Murwatetu & another** (supra) petition, affirmed the decision of the Court of Appeal in **Godfrey Ngotho Mutiso v R, C.A. No. 17 of 2008**, regarding the unconstitutional nature of the mandatory death sentence provided under Section 204 of the Penal Code.

10. 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.’

11. The Supreme Court in the **Murwatetu** 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: -

“(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.

.....

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. Thus the position is that pursuant to the **Murwatetu** petition (supra) the courts now may exercise discretion when passing sentence. However, in the case of **Republic v Ruth Wanjiku Kamande [2018] eKLR Lesiit J** stated that discretion to pass a sentence other than that of death in capital offences should only be exercised in the deserving cases.

13. From the particulars of the charge, the property robbed of the complainant was valued at Kshs. 14,300/=. He has been incarcerated for twelve (12) years which period must be taken into consideration as sentence served in the event that this petition succeeds.

14. Taking all these factors into consideration, I find that even after giving due weight to the mitigating circumstances, there are substantial aggravating circumstances in this case. The aggravating circumstances in this case include the fact that the accused was armed with a panga and seemed to be part of a gang. Further the applicant did cause actual harm to the applicant and was further caught with the applicant’s watch.

15. While accepting that the applicant is demonstrably reformed and rehabilitated, it is important for the Court to vividly announce the societal denunciation for the heinous and socially damaging crime the applicant committed. Such a sentence not only communicates to the applicant the sense of being a law abiding citizen and also deters other would-be offenders.

16. It is my considered view, therefore, all factors considered, the death sentence imposed on the applicant should be substituted with a sentence of fifteen (15) years imprisonment commencing the date of sentencing before the Trial Court that is from 27/03/2007.

17. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 7TH DAY OF JUNE, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for Respondent

Applicant in person