



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

PETITION NO. 5 OF 2018

ABIUD MUCHIRI ALEX.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

A. Introduction

1. This is a judgment on the petition dated 20th December 2018 seeking for re-hearing on sentence pursuant to the Supreme Court judgement in the Petition of **Francis Karioko Muruatetu Vs Republic 2017] eKLR**. The petitioner filed written submissions in support of the petition while the respondent gave oral submissions.
2. The petitioner and two others currently not before court were jointly charged and convicted by the Principal Magistrate at Siakago with the offence of robbery with violence contrary to **Section 296(2) of the Penal Code**.
3. The petitioner and the others were aggrieved and appealed to the High Court dismissed the appeal. The petitioner and another not before court then moved to the Court of Appeal which found no merit in the petitioner's appeal and dismissed it in its entirety. The Court of Appeal however faulted the conviction of the petitioner's co-accused and set him free. The petitioner has exhausted all his avenue of appeal.

B. The Petitioners Case

4. It is the petitioner's submission that the **Muruatetu** decision amounted to new evidence that was not available at the time of the trial that necessitated his resentencing and further that the information explained to him was deficient in terms of assisting those administering justice to charge him with the appropriate offence which would have attracted a commensurate sentence.

C. The Respondent's Submission

5. Ms. Mati for the respondent submitted that the prosecution was not opposed to the petition on re-hearing of the sentence. However, the respondent urged the court to consider the circumstances of the offence. It was further submitted that the death sentence was still lawful despite the decision of the Supreme Court in the case of **Murwatetu**.

D. Analysis of the Law

6. The particulars of the offence were that on the 7th day of October 2011 at Kiamutho village, Kanyuambora in Mbeere North District of Embu County jointly with others not before court while armed with offensive weapons namely pangas and slashers robbed James Mugo Njeru of one bag of 50kgs fertilizer, four tins of beans, fourteen tins of cow peas, nine tins of green grams and one panga all valued at Kshs. 8,070/= and used actual violence on the said James Mugo Njeru by cutting him on the shoulder. During the attack, the complainant who was PW2 called the petitioner by name thus positively identifying him.
7. In the spirit of uniformity and fairness, the court ought to consider the circumstances of the offence as well as other factors enumerated by the Supreme Court in the **Muruatetu petition**. It is also important to consider the sentence provided by the law for the offence of robbery with violence and apply the discretion of the court fairly and proportionately.
8. The Supreme Court in the **Muruatetu petition** gave guidelines with regard to factors to be considered during sentence re-hearing in a murder charge. The mandatory death sentence was also applicable to convicts of robbery with violence contrary to **Section 296(2) of the Penal Code**. The Supreme Court 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.

9. The court however clarified that the guidelines did not in any way replace judicial discretion and are geared towards promoting consistency and transparency in sentence hearings and are also aimed at promoting general understanding of the sentencing process.

10. The mitigating factors on record are that the petitioner was a first offender and that his parents and siblings depended on him. The petitioner was sentenced to death on the 10th June 2013 and has since been in incarceration for a period of six (6) years.

11. It is imperative to look at sentences which have been imposed by other Courts following the decision in the Muruatetu case. In **Benson Ochieng & France Kibe –vs- Republic [2018] eKLR**, the petitioners who were armed with multiple guns during the commission of the offence offered substantial mitigation and demonstrated genuine remorse and were re-sentenced to (20) year sentence imprisonment.

12. 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 twenty (20) year sentence.

13. 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 twenty (20) years imprisonment where the robbery was aggravated by the use of a firearm.

14. The petitioner and his gang were armed with slashers and pangas when they attacked the complainant. He was cut on the left shoulder as he ran away. He fell down and sustained an injury on the left leg and left hand.

15. The use of dangerous weapons and inflicting of injuries on the complainant amount to aggravating circumstances in my view.

16. The mitigation of the petitioner was that his siblings and family depended on him. He was not at all remorseful for the offence before the trial court which case took about three years to conclude.

17. In this petition, the petitioner does not show any remorse five (5) years after conviction.

18. Bearing in mind that the mandatory nature of death sentence in capital offences was declared unconstitutional, I find it appropriate to exercise my discretion to review the sentence.

19. I have taken into consideration all the necessary factors in this petition. The petitioner has now served six (6) years imprisonment since the date of conviction which was 10th June 2013.

20. I hereby set aside the death sentence and sentence him to twenty (20) years imprisonment. He will serve the balance of thirteen (13) years imprisonment.

21. The petition stands allowed.

22. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 4TH DAY OF JULY, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for Respondent

Petitioner present