



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

PETITION NO. 3 OF 2018

GEREVASIO MUGO KINYUA.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

A. Introduction

1. In his amended petition dated 18th May 2019, the petitioner seeks re-hearing on sentence pursuant to the Supreme Court judgement in the Petition of **Francis Kariuki Muruatetu Vs Republic [2017] eKLR**.
2. The petitioner was charged before the Principal Magistrate's Court at Runyenjes with the offence of robbery with violence contrary to **Section 296 (2) of the Penal Code**. He also faced the alternative count of handling stolen goods contrary to **Section 322 (2) of the Penal Code**. The trial magistrate in a judgement delivered on 15/01/2015 found the petitioner guilty on both counts and sentenced him to death.
3. The petitioner was aggrieved and unsuccessfully appealed to the High Court which dismissed his appeal in count 1 in both the conviction and sentence. The court set aside both conviction and sentence with regard to the alternative count terming it erroneous conviction. The petitioner then moved to the Court of Appeal which found no merit in his appeal and upheld the High Court judgment.

B. Petitioner's Case

4. It is the petitioner's submission that none of the courts he attended, from the trial court, high court and appeal court considered his mitigation as prescribed under section 216 and 329 of the Criminal Procedure Code. He further submitted that he had since accessed various resources oriented development initiatives. He urged the court to re-hear his petition and review sentence in accordance with the **Muruatetu** petition.

C. Respondent's Submission

5. Ms. Mati for the respondent submitted that the prosecution was not opposed to the petition but rather consider that the accused was armed with bows and arrows which he used to harm the complainant. She further submitted that after the 2nd appeal was dismissed the petitioner applied for withdrawal of the case by the complainant which application was unsuccessful.

D. Analysis of the Law

6. The application by the applicants is grounded on the holding of the Supreme Court judgement in the Petition of **Francis Kariuki Muruatetu Vs Republic case (supra)** that declared the mandatory death penalty as unconstitutional.
7. It is noted that the Supreme Court in the **Muruatetu** petition gave guidelines with regard to factors to be considered during sentence re-hearing in a murder charge. It is noted that the mandatory death sentence was applicable to convicts of robbery with violence contrary to Section 296(2). 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.*

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

9. For consistency, 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. They were re-sentenced to 20 years.

10. In **Eldoret Court of Appeal Criminal Appeal No. 22 of 2016 [2018] eKLR: Wycliffe Wangusi Mafura –vs- Republic** 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.

11. 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.

12. In this petition, the attackers were armed with pangas and slashers which are dangerous weapons. The victim PW1 was cut on the head and on the left hand using a panga. An arrow was thrashed into the victim's shoulder. The violence was meted out on the complainant after he had already given cash Kshs. 12,000/= through the window. The petitioner and his gang then broke into the house and injured PW1 saying the cash handed over to them was not enough.

13. In my considered opinion, these were aggravated circumstances that deserve a deterrent sentence that will be a lesson to would be offender. The petitioner in my view does not deserve to be sentenced to death in this day and age considering the development of jurisprudence.

14. I hereby set aside the death sentence imposed by the trial court and substitute it with twenty (20) years imprisonment. The petitioner who was sentenced on 15th January 2015 has served a period of four and half (4½) years.

15. The petitioner will therefore serve the balance of fifteen and half (15½) years.

16. The petition stands allowed.

17. 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