



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

PETITION NO. 1 OF 2019

JAMES MURIITHI MARETE.....1STPETITIONER

JAMLICK NJERU IRERI.....2ND PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

A. Introduction

1. The applicants filed separate applications being Petition Nos. 1 and 4 both of 2019 dated 9/1/2019 and 19/3/2019 respectively which were consolidated. The gist of this consolidated application is that the applicants seek re-hearing on sentence pursuant to the Supreme Court judgement in the Supreme Court Petition of **Francis Karioko Murwatetu Vs Republic [2017] eKLR** .

2. The High Court upheld the conviction and sentence of the applicants on count 3 and quashing the convictions of their co-accused. Fourteen (14) years after their appeal in the High Court was dismissed, the applicants filed an application for orders for extension of time to file an appeal in the Court of Appeal unsuccessfully.

3. The applicants and two others not before this court were jointly tried, charged and convicted by the Senior Resident Magistrate in Embu with three counts of the offence of robbery with violence contrary to **Section 296 (2) of the Penal Code**. Being dissatisfied with the trial court's decision, the applicants and their co-accused currently not before court moved on appeal to the high court.

4. This application was argued by the applicants through written submissions with rejoinder of oral submissions from the respondent.

B. Applicants' Submission

5. The applicants in their identical submissions state that they sought the appropriate sentence as a result of the Supreme Court judgement of the **Francis Karioko Murwatetu v Republic** petition that declared the mandatory nature of the death penalty as unconstitutional.

6. The 1st applicant submitted that he was aged 19 years when he committed the offence and has since been in prison for 17 years and that he had given his mitigation before the lower court. The 2nd applicant also submitted that he was a young person at the time he committed the crime and has since had a change of attitude and would be a law abiding citizen if he is released.

C. Respondent's Submission

7. The prosecution did not oppose the review of the sentence but urged the court to consider the nature of the crime committed by the applicants and the fact that the applicants used crude weapons to attack the complainant.

D. Analysis of the Law

8. The application is grounded on the holding of the Supreme Court judgement in the Petition of **Francis Karioko Murwatetu v Republic [2017] eKLR** that declared the mandatory death penalty as unconstitutional.

9. The Supreme Court in the **Murwatetu** petition 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.**

It was the court holding that the guidelines in no way replaced judicial discretion. They are advisory and not mandatory. The court further pointed out the provisions of 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”.

10. 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**, and the High Court in **Joseph Kaberia Kahinga and Others v The Attorney General [2006] eKLR** regarding the unconstitutional nature of the mandatory death sentence provided under Section 204 of the Penal Code.

11. 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.’

12. The position is that pursuant to the **Murwatetu** petition (supra) the courts may exercise discretion when passing sentence. 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. The facts and the evidence in this case reveal that on the 2nd June 2000, the applicants, whilst armed with iron bars, axes, rungs and other crude weapons, violently robbed one Hellen Wanjiru Mwaniki of cash amounting to Kshs. 5,000/= and property of minimum value, that is 5 packets of sportsman cigarettes, 3 packets of champion cigarettes and 2 radio cassettes.

14. I note that the applicants committed a series of robberies in the material night which was quite a terror in the village and especially to the victims. The petitioners were armed with iron bars, axes and rungs and when given a chance to mitigate none of them showed remorse.

15. However, in the petitions, there was no mitigation factors offered to show whether the 1st petitioner has reformed while in prison. The 2nd petitioner said he has had a change of altitude in life while in prison.

16. In the circumstances, I proceed to exercise discretion in sentencing them with all the relevant factors considered including the period of one (1) year spent in custody during the trial.

17. I hereby set aside the death sentence imposed by the trial court and substitute it with thirty (30) years imprisonment.

18. The applicants have already served seventeen (17) years since conviction on 13/08/2002 and had spent one (1) year in custody pending disposal of the trial.

19. The sentence to be served will be the balance of twelve (12) years imprisonment.

20. The petitions stand allowed.

21. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 2ND DAY OF JULY, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati

Petitioners