



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.430 OF 2015

SIMON KIMANI MAINA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Simon Kimani Maina was charged and convicted of the offence of **attempted robbery with violence** contrary to **Section 297(2) of the Penal Code**. He was sentenced to life imprisonment. The Applicant's respective appeals to the High Court and to the Court of Appeal were dismissed. The conviction and the sentence of the trial magistrate court was upheld. That would have been the end of the matter but for the window opened by the Supreme Court case of **Francis Karioko Muruatetu [2017] eKLR** which granted persons convicted on capital offences an opportunity to mitigate before they are resented.

In the present application, the Applicant told the court that he had been in prison for a period of fourteen (14) years. He had learnt his lesson from the offence that he committed. He regretted the crime that he committed. He pleads for the leniency of the court. He was a first offender. He was arrested when he was eighteen (18) years old. He had learnt that crime does not pay and during the period of his imprisonment, he had reformed. The Appellant annexed to his application a medical report which sets out his current health status. He urged the court to consider his plea for appropriate resentencing.

Ms. Nyauncho for the State opposed the application. She submitted that the Applicant attempted to commit robbery with violence while armed with an AK 47 rifle. Were it not for the fact that members of the public intervened, most probably the complainants would have been injured. In essence, learned State Counsel was saying that the offence that the Applicant was convicted was serious and deserved the sentence that was imposed upon the him. She was of the view that should the court be minded to resentence the Applicant, it should sentence him to serve a further term of six (6) years imprisonment. In response to this submission, the Applicant urged the court to find that the period that he has been in prison is sufficient punishment. He should therefore be released.

The Supreme Court in the **Francis Karioko Muruatetu** decision gave the following guidelines when this court will be 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 As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable.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, this court has taken into consideration the following factors in determining the application. It has taken into account the fact that the Applicant has been in lawful custody since 20th April 2005. He was a first offender. He was eighteen (18) years at the time he committed the offence. The robbery attempt failed. None of the victims of the robbery were injured. Nothing was robbed from the victims of the robbery. He was not the one who had the AK 47 rifle. He was an accomplice. The Applicant appears remorseful. He has learnt his lesson for the offence that he committed. He has reformed in the period that he has been in prison. This court is of the considered view that the Appellant deserves a second chance at life.

In the premises therefore, this court forms the view that the period that the Applicant has been in prison is sufficient punishment. He has paid his just debt to the society. The sentence of life imprisonment that was imposed on him is hereby set aside and substituted by a sentence of this court commuting the sentence of the Applicant to the period already served. He is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 10TH DAY OF JULY 2019

L. KIMARU

JUDGE