



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.400 OF 2006

(An Appeal arising out of the conviction and sentence of Hon. Nzioka (Mrs.) (PM)

delivered on 20th July 2006 in Makadara Criminal Case No.13009 of 2001)

YOHANA HAMISI KYANDO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Appellant, Yohana Hamisi Kyando was tried and convicted of the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. He was sentenced to death. His appeal to the High Court and to the Court of Appeal were dismissed. On sentence however, the Court of Appeal held thus:

“In the instant appeal, mitigation was received save that it was treated as inconsequential for the reason that the death penalty was the only lawful sentence capable of being handed down against the appellant as at the material time. This is no longer the position as demonstrated above. In the Muruatetu case, the Supreme Court examined comparative jurisprudence on consequential orders and in the end stated thus:

“Remitting the matter back to the High Court for the appropriate sentence seems to be the practice adopted where the mandatory death penalty has been declared unconstitutional. We therefore hold that the appropriate remedy for the petitioners in this case is to remit this matter to the High Court for sentencing.”

It is therefore our view that, the proper order to make upon dismissing the appeal against conviction is to remit the matter back to the High Court for rehearing on sentencing only consistent with the guidelines pronounced by the Supreme Court in the Muruatetu case. To that end, the case shall be mentioned before the High Court within 14 days of the delivery of the Judgment herein for appropriate directions on sentencing.”

It was pursuant to the above directions by the Court of Appeal that the Appellant appeared before this court. Mr. Swaka for the Appellant submitted that the Appellant had been in custody for a period of nineteen (19) years. He had been rehabilitated in the period that he had been in prison. His behaviour, both psychologically and morally had changed for the better. He had undertaken various courses in prison including spiritual ones which has made him a better person. The prison authorities had acknowledged that he had become a positive influence to other prisoners. The Appellant was remorseful for the offence that he committed. He regretted it. Given a chance, he would champion avoidance of crime. He pleaded with the court to take into consideration the circumstance in which the robbery was committed. No one was injured. The motor vehicle that was robbed from the complainant was recovered. Learned counsel urged the court to consider the positive report by the prison authorities and find that the Appellant was a suitable person to be released from prison having repaid his just debts to the society. He pointed out that the Appellant was a Tanzania.

Ms. Sigei for the State while appreciating that the Appellant had undergone positive change while in prison, and also while noting that the Appellant had been in lawful custody for a period of nineteen (19) years, urged the court not to lose sight of the fact that a gun was used during the robbery incident. It was also important for the court to obtain a victim impact statement before considering the Applicant's application for resentencing.

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, the Appellant pleads with the court to take into consideration that he has been in lawful custody for a period of nineteen (19) years. During the period of incarceration, he had been rehabilitated. He has learnt his lesson that crime does not pay. He has undertaken courses in prison which has improved him both spiritually and morally. He is ready to return back to society. The prison authorities have vouched for his good behaviour. Ms. Sigei for the State appears not to be opposed to the Appellant’s application. Her only concern is that the victims of the robbery’s concerned had not been taken into account. This court agrees with Ms. Sigei that this is a legitimate concern. However, noting the time that it has taken from the time the crime was committed to the time this court is considering this application, it is highly unlikely that the victims of the robbery can be traced noting that the Appellant was a stranger to the victims at the time the offence was committed.

This court is of the considered view that the Appellant has made a case for this court to favourably consider his application for resentencing. The court is of the view that the Appellant has been sufficiently punished. He has paid his just debt to the society. In the period that he has been in prison, he has been rehabilitated and has become a better person. This court has also taken into consideration the circumstance in which the crime was committed. The victims were not injured. That being the case, the Appellant’s custodial sentence is commuted to the period served. He is ordered released from prison unless otherwise lawfully held. He shall be handed over to the immigration directorate which shall repatriate him back to Tanzania, his country of origin. It is so ordered.

DATED AT NAIROBI THIS 4TH DAY OF JULY 2019

L. KIMARU

JUDGE