REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 8 OF 2019

ABDI OJI BASHIR ……….…………… PETITIONER

VERSUS

REPUBLIC………………….……… RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Ms. Sombo for the State

The petitioner in person

RE-SENTENCING

The petition before me was brought in terms of the Supreme Court decision in **Francis Muruatetu & Another v Republic {2017} eKLR.** It is the decision which declared the mandatory nature of death sentence unconstitutional, null and void. The commutation of the same to life imprisonment by an administrative fiat was also declared null and void in the same aforementioned decision. The Landmark decision clothed judicial officers with the discretion to mete out sentence in according to the individual circumstances of each case.

Prior to the decision in **Muruatetu (supra),** all the Honorable Magistrate or Judge had to do was merely to pluck out from the section, the prescribed minimum mandatory sentence and plant it in her own Judgment without regard to the individual circumstances of the case. **Muruatetu case** marked the beginning of a paradigm shift as far as sentencing of offenders is concerned.

It can also be said that **Muruatetu case (supra)** necessitated re-sentencing of all persons who were previously sentenced to a mandatory minimum sentence. In that case the court further addressed itself as follows:

> ***(111) "….. For the avoidance of doubt, the sentencing re-hearing we have allowed, applies only for the two petitioners herein. In the meantime, existing or intending petitioners with similar cases ought not approach the Supreme Court directly but await appropriate guidelines for disposal of the same. (emphasis mine) The Attorney General is directed to urgently set up a framework to deal with sentence re-hearing of cases relating to the mandatory nature of the death sentence – which is similar to that of the petitioners in this case.***
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> ***(112) (c) The Attorney General, the Director of Public Prosecutions and other relevant agencies shall prepare a detailed professional review in the context of this Judgment and order made with a view to setting up a framework to deal with sentence re-hearing cases similar to that of the petitioners herein. The Attorney General is hereby granted twelve (12) months from the date of this Judgment to give a progress report to this Court on the same."***

I'm alive to the fact that pursuant to the Supreme Court's directive, the Hon. Attorney General was required to appoint a Taskforce on the Review of the Mandatory Death Sentence under Section 204 of the Penal Code Act and the same was done vide Gazette Notice No. 2160 dated 15th March 2018. It seems that the Supreme Court decision requires that the petitioner and all those in a similar position should wait a sentence re-hearing framework from the Attorney General and the taskforce. However, the Court of Appeal in **William Okungu Kittiny v R {2018} eKLR** expressed itself as follows:

> ***"The decision of the Supreme Court only discouraged persons from filing petitions to the Supreme Court but the decision does not prohibit courts below it from ordering sentence re-hearing in a matter pending before those courts. By Article 163 (7) of the Constitution, the decision of the Supreme Court has immediate and binding effect on all other courts. The decision of the***

Supreme Court opened the door for review of death sentences even in finalized cases."

In view of the above provisions, it is abundantly clear that this court was clothed with jurisdiction to re-hear and re-sentence those that were convicted with capital offences whose sentence was mandatory death sentence.

Sentencing is a notoriously problematic exercise. It is a balancing act. From time to time jurists have espoused brilliant philosophies around it. Guidelines have been developed. The legislature sometimes weighs in with mandatory minimum sentences for certain offences. There are certain basics. The penalty must fit the crime. The interests of the offender must be balanced against those of justice. It is not right that someone who has offended society should go scot free, or escape with a trivial sentence. But at the same time he should not be penalized beyond what his misdeed befits. As a matter of principle, punishment should be less retributive and more rehabilitative.

There are more such philosophies or ideologies. But at the end of the day, after everything else has been considered and said, the judicial officer comes down to the hard facts before him or her to the individual circumstances of the people before him – the offender and the victim. He cannot be dogmatic about anything. There is no room for an approach that is purely mathematical. A slavish adherence to precedence is manifestly injudicious. In sentencing, the ages of the accused and the victim are relevant. The younger the victim the harsher the sentence, and the older the accused the lighter the sentence depending on the gravity of the offence, sometimes there is no equality on this factor.

The petitioner was after a full trial convicted of robbing **Mohamed Hassan Kontoma** of Kshs.470,700/= a nokia mobile phone worth Kshs.6,000/= on the 22nd February 2020. In mitigation, the petitioner has asserted that he is a first offender. He has no previous criminal records and he claims that he is entitled to the least severe punishment. He asserted that he spent a year and three months in custody before his conviction and sentence. He was not out on bail or bond till the time he was convicted.

Further in mitigation, he stated that he has exhibited a high pedigree of discipline and generosity for the past 10 years he has been in prison. He also claims to have achieved a vocational training certificate of Islamic studies as part of the reform programs offered in prison.

In aggravation, the offence was premediated and well planned. The petitioner and his colleagues had full appreciation of the consequences of their actions. There is also apparent use of threats of violence to obtain the monies and other items stolen from the complaint.

Robbery is a serious offence, which needs to be curbed by imposing deterrent sentences. The petitioner and his colleagues instilled fear to the complainant thereby inducing them to relinquish control over his property. What makes this matter even more serious is the fact that one of the perpetrators had a firearm though it was only used to threaten the victims, it was not used to cause any actual harm. I can add that the trauma and anxiety experienced by the victims under the petitioner's siege cannot be downplayed. The petitioner despite his age lacked respect for other people's dignity, freedom and property.

The petitioner at the time deserved to be removed from the society to hopefully be rehabilitate and deter him as a lesson and warn those of like-minded of the serious view the courts take in robbery cases. I have also taken into account in compliance Section 333 (2) of the CPC, pre-incarceration and the period the petitioner has already served, which is approximately 10 years' imprisonment.

Having considered the fact that there was little or no injury caused by the petitioner and his colleagues, and that some part of the stolen money was returned or recovered. All these count to mitigate the nature of sentence against the petitioner. That being the only point raised by the petitioner, it is proportionate to vary the sentence to the period already served. It is ordered that he shall be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 13TH DAY OF SEPTEMBER 2019

R. NYAKUNDI

JUDGE