



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.147 OF 2019

JIMMY WANJOHI WANJIKU..... APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Jimmy Wanjohi Wanjiku was convicted of the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The trial court found that the prosecution had established to the required standard of proof that the Applicant, jointly with others not before court, at Kamacharia Location in Murang'a County had on 24th June 1999, while armed with a pistol robbed John Mwangi Wambura of Kshs.4,600/- and one carton of castle beer then valued at Kshs.5,656/- and in the course of the robbery, threatened to use violence against the said John Mwangi Wambura. The Appellant was sentenced to death. His appeal to the High Court was dismissed. His second appeal to the Court of Appeal was similarly dismissed. The death sentence meted on the Appellant was commuted to life imprisonment by Presidential decree. That would have been the end of the matter but for the window opened by the Supreme Court's decision of **Francis Karioko Muruatetu v Republic [2017] eKLR** whereby mandatory death sentences were declared unconstitutional. The Supreme Court further ruled that those who were so sentenced should be given an opportunity to mitigate before they are resented.

It is the above decision that prompted the Applicant to make the present application for resentencing. He told the court that he was arrested on 24th December 1999. He had been in lawful custody since then. He admits to having committed the offence. He told the court that he was at the time, a young impressionable man of nineteen (19) years and was negatively influenced by those who were older than him. He had matured while in prison. He had also become sick while in prison and was under medication for sometime now. The prison authorities confirmed that indeed the Applicant has had various forms of ailments since his incarceration that require referral treatment at Kenyatta National Hospital. The prison authority confirmed that the Applicant has been a well behaved and disciplined prisoner. The Applicant urged the court to consider the period that he has been in lawful custody and find that he has paid his just debts to the society. He pleaded with the court to give him a second chance at life. He urged the court to exercise leniency on him and appropriately resentence him.

Ms. Kimaru for the State opposed the application. She submitted that the aggravating circumstances in which the robbery was committed prevents this court from favourably considering the Applicant's mitigating circumstances. She told the court that the Applicant robbed the complainant using a gun, which is a dangerous weapon. The Applicant and his accomplices waylaid the complainant when he was on the road, hijacked his motor vehicle and commandeered it to a secluded place before robbing the complainant. She submitted that these circumstances call for the sentence that was meted on the Applicant. She urged the court not to interfere with the sentence.

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, it was clear to the court that the Applicant has made a case for this court to favourably consider his application for resentencing. The Applicant has been in lawful custody for a period of twenty (20) years. He was arrested when he was just out of his teenage years and has spent his youth in prison. The court agrees with the prosecution that the circumstances in which the robbery took place constitute aggravating circumstances that this court ought to take into consideration when determining the Applicant’s application for resentencing. However, the Applicant’s mitigating circumstances including the fact that he has been a model prisoner while in prison, and the further fact that he has been suffering from a debilitating disease that has incapacitated him, has persuaded this court to favourably consider his application. Another factor that has influenced the court in its determination is the fact that the Applicant appears reformed and has acknowledged his mistake. He should be given a second chance at life.

In the premises therefore, this court sets aside the sentence of life imprisonment that was imposed upon the Applicant and substitutes thereof with a sentence of this court commuting the Applicant’s custodial sentence to the period already served. The Applicant is ordered set at liberty and released from prison forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 8TH DAY OF OCTOBER 2019

L. KIMARU

JUDGE