



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL PETITION NO. 2B OF 2019

ALVAN GITONGA MWOSA.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

J U D G M E N T

A. Introduction

1. This judgment is for the undated petition filed on the 14th January 2019 seeking for orders of resentencing in light of the Supreme Court in the case of **Francis Karioko Muruatetu and Another v R. [2017] eKLR** that made the death sentence unconstitutional.
2. The petitioner submits that he has been in custody for a period of 21 years and is currently in poor health. Further that he has maintained a good relationship with his family who are ready to help him restart his life.
3. It is the applicant's case that the period he was in custody should have been taken into consideration during sentencing as he was arrested on 8/04/2014 and convicted on the 19/10/2016 and that he was in custody during all this time and not released on bond.
4. The respondent are not opposed to the application but pray that the principles in the **Muruatetu (supra)** case regarding all the circumstances and facts of the case including the seriousness of the offence be considered.

B. Analysis of Law

5. The petitioner was charged with robbery with violence contrary to Section 296 (2) of the Penal Code, convicted and sentenced to death as provided by law. The petitioner has since exhausted all avenues of appeal.
6. I have carefully considered the petition herein, the response and the submissions made by both parties. The Supreme Court in **the Francis Karioko Muruatetu** decision gave the following guidelines when this court will be considering the applicants' application for 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 As a consequence of this decision, paragraph 6.4 - 6.7 of the guidelines are no longer applicable.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.”

7. It is apparent from the foregoing decision that although the Supreme Court referred to murder, the same can also be applied in other cases where the law provides for a mandatory sentence, including the instant case of Robbery with Violence where a mandatory death sentence was imposed. This was confirmed by the Court of Appeal in **William Okungu Kittiny vs. Republic ([2018] eKLR)** where it was stated:

“...The appellant was sentenced to death for robbery with violence under Section 296 (2). The punishment provided for murder under Section 203 as read with Section 204 and for robbery with violence and attempted robbery with violence under Section 296 (2) and 297 (2) is death. By Article 27(1) of the Constitution, every person has inter alia, the right to equal protection and equal benefit of the law. Although the Muruatetu's case specifically dealt with the death sentence for murder, the decision broadly considered the constitutionality of the death sentence in general...From the foregoing, we hold that the findings and holding of the Supreme Court particularly Paragraph 69 applies mutatis mutandis to Section 296 (2) and 297 (2) of the Penal Code. Thus the sentence ... is a discretionary ...”

8. According to the *Sentencing Policy guidelines, 2016* (“the Guidelines”) published by the Kenya Judiciary, the sentence imposed must meet the following objectives in totality;

(a) Retribution: To punish the offender for his/her criminal conduct in a just manner.

(b) Deterrence: To deter the offender from committing a similar offence subsequently as well as discourage other people from committing similar offences.

(c) Rehabilitation: To enable the offender reform from his criminal disposition and become a law-abiding person.

(d) Restorative justice: To address the needs arising from criminal conduct such as loss and damages.

(e) Community protection: To protect the community by incapacitating the offender.

(f) Denunciation: To communicate the community's condemnation of the criminal conduct.

9. Applying the **Francis Karioko Muruatetu** case and the above legal principles to the instant applications, it is apparent to this court that the degree of gravity of the offence that the applicants committed and the mitigation of the applicants on re-sentencing establishes that the sentence of life imprisonment is not apt in the circumstances. Thus, the court is inclined to consider each application's special circumstances and mitigation.

10. In the spirit of uniformity and fairness, emerging jurisprudence suggests that when dealing with sentence re-hearing in robbery with violence cases, the starting point should be 14 years. This is informed by the fact that the felony of robbery, which is a lesser offence than robbery with violence, attracts a term of imprisonment for 14 years. Further, it is imperative to also consider sentences that have been imposed by other Courts pursuant to **Muruatetu** case.

11. In **Ibrahim Ali Halake v Republic [2019] eKLR** the Petitioner jointly with others while armed with dangerous weapon including a gun robbed a complainant of Kshs. 60,000/=, and during resentencing the court took into account the petitioner age and the fact that he appears to have been rehabilitated during his period of incarceration, including going to school. The Court set aside the life imprisonment and sentencing the Petitioner to serve five (5) years imprisonment from the day of the ruling in consideration of the fact that the petitioner had already served 15 years.

12. Additionally, in **Eldoret Court of Appeal Criminal Appeal No. 22 of 2016 [2018] eKLR: Wycliffe Wangusi Mafura v Republic** the appellant was involved in robbing an Mpesa shop with the use of a firearm with which he threatened the attendant but was caught before he inflicted any violence on her. The Court of Appeal imposed a 20-year sentence.

13. Further, in **Kisumu Court of Appeal Criminal Appeal No. 616 of 2010 [2018] eKLR, Paul Ouma Otieno alias Collera and Another –vs- Republic**, the Court of Appeal sentenced the appellants to 20 years' imprisonment where the robbery was aggravated by the use of a firearm.

14. In purview of the above decisions, the court is inclined to consider the petitioner's case in view of its facts and circumstances. The particulars of the petitioner's offence were that on the night of 14th November 1998 at Kanja Sub-location, Kagaari North Location, Embu District of the Eastern County, jointly with others not before court robbed Antony Mugo Kanampiu of one pair of shoes, one pair of socks,

one national identity card, one Barclays bank plate card and Kshs. 2,850/= all valued at Kshs. 3,900/= and at, or immediately after the time of such robbery used actual violence to the said Antony Mugo Kanampiu.

15. The complainant was hit with an iron bar on the back of the head and lost consciousness before his property was taken away by the attackers. He was assisted by good Samaritans the following day who took him to hospital where he was admitted for several days. The attack was indeed violent and the injury very serious. The complainant was left for the dead and it is by the grace of God that he survived.

16. In mitigation, the petitioner was not remorseful and only complained about the length of the trial saying it had taken six (6) years. In his petition, the petitioner pleads poor health though he has not annexed any medical records. He also states that he has been in custody for 21 years which he feels is sufficient punishment.

17. The petitioner was sentenced on the 18/05/2005 however it is the petitioner's case that he has been in custody since being arraigned in court way back in 1998. It is now trite law that prior to sentencing, a trial court should take into consideration the time the accused has been in custody. This was the holding of the Court of Appeal in the case of **Ahamad Abolfathi Mohammed & Another v Republic [2018] eKLR.**

18. I have considered all the foregoing and I find the petition merited. It is hereby allowed in the following terms: -

a) That the death sentence imposed by the trial court on 18/05/2005 is hereby set aside and substituted with twenty-five (25) years imprisonment to run from the date of arrest 16th November 1998.

b) That the petitioner having already served twenty-one (21) year in prison that includes the period of six and a half (6½) in custody is hereby deemed to have served the full term.

c) That the petitioner is hereby set at liberty unless otherwise lawfully held.

19. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 5TH DAY OF NOVEMBER 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Nandwa for State/Respondent

**Petitioner
present**