



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

PETITION NO. 7 OF 2019

PETER MUGENDI MWANIKI..... PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

J U D G M E N T

A. Introduction

1. This is judgment for the undated petition filed on the 1st April 2019 in which the petitioner seeks orders for 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 was charged alongside another not before court with three counts of robbery with violence contrary to Section 296(2) of the Penal Code and convicted and sentenced them to death. The petitioner states that he has since exhausted all his avenues of appeal.
3. The petitioner submits in mitigation that he was arrested at the age of 25 years and 14 years have passed to date since he was placed in custody pending trial. He further states that he regrets the offence and has reformed. The petitioner further states that he has undergone a course for pastoral duties and has a certificate which course will help him in adjusting in society should he be released.
4. The respondent are not opposed to the application on resentencing but urges the court to apply the principles elucidated in the **Muruatetu** case as regards to the seriousness of the offence, the injuries inflicted on the victim and the weapon used. Further, the prosecution submit that the petitioner has not shown that he has reformed or his remorseful,

B. Analysis of Law

5. It is not in doubt that the accused was sentenced to death for the offence of robbery with violence on the 21st December 2009. He submits that he has since exhausted all the avenues of appeal and approaches this court for review of sentence based on the decision of the **Francis Karioko Muruatetu & another and Republic and Others (2017) eKLR**.
6. This petition is one for resentencing whereas the court is being called upon to re-consider the facts as they existed at the time of sentencing and impose an appropriate sentence in light of the fact that the mandatory nature of death penalty has been declared unconstitutional.
7. The *Sentencing Policy Guidelines, 2016* (“*the Guidelines*”) published by the Kenya Judiciary provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence.
8. Fourth, weigh both aggravating and mitigating circumstances. Since the *Guidelines* did not take into account the fact that the death penalty would be declared unconstitutional, the Court in the **Muruatetu Case (Supra, para. 71)**, considered that in re-sentencing in a case of murder, the following mitigating factors would be applicable;
 - (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.

9. The Supreme Court emphasized that the **Guidelines** do not replace judicial discretion but are intended to promote transparency, consistency and fairness in sentencing. In addition, the court noted the importance of guideline judgments of superior courts which promote an understanding of the process of sentencing.

10. Those factors would also apply to a case of re-sentencing in a case of robbery with violence. The Supreme Court emphasized that although the **Guidelines** do not replace judicial discretion, they are intended to promote transparency, consistency and fairness in sentencing. In addition, the court underlined the importance of guideline judgments of superior courts which promote an understanding of the process of sentencing.

11. The mandatory nature of death penalty has been declared unconstitutional, the death penalty still exists as the maximum sentence for robbery with violence under **Section 296(2) of the Penal Code**. In the case of **Michael Kathewa Laichena & another v Republic [2018] eKLR** Majanja, J. expressed himself that the death penalty should be excluded where the robbery does not result in the death of a person. From the facts of the case, there was no fatal injury which is a factor to consider in re-sentencing.

12. I have considered the circumstances of the case and the only mitigating factor on record is that the petitioner was a first offender. The facts are that the offence took place on the night of 10th April 2008 at Ena Market, Kwanjara Sub-location, Embu County, the petitioner and others not before this court robbed the complainants cell phones and cash. The attackers were armed with pangas, metal bars and axes at the time of the robbery.

13. In addition to the facts of the case, under the proviso to **Section 333(2) of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**, the court is entitled to take into account the period the accused has spent in custody in determining the sentence. The petitioner was arraigned in court in 2008 and convicted in 2009. The petitioner remained in custody for a period of one year during the trial which period requires to be taken into consideration in resentencing.

14. In **Wycliffe Wangusi Mafura v Republic ELD CA Criminal Appeal No. 22 of 2016 [2018] eKLR** where the Court of Appeal imposed a sentence of 20 years where 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. Likewise, in **Paul Ouma Otieno alias Collera and Another v Republic KSM CA Criminal Appeal No. 616 of 2010 [2018] eKLR**, the Court of Appeal sentenced the appellants to twenty (20) years imprisonment where the robbery was aggravated by the use of a firearm.

15. Considering all the mitigating and aggravating factors, the period spent in pre-trial custody and the cases. The petitioner was convicted of three counts of robbery with violence contrary to Section 296(2) of the Penal Code. PW1 was cut on her head twice by the petitioner during the robbery in his residence. In his home the same night, PW2 was also cut twice on the head by one of two attackers who entered his house and the petitioner being one of them. The same cruelty was meted out to PW3 in his house.

16. The attackers were of course armed with dangerous weapons namely pangas, metal bars and axes. The injuries on the complainants are in my view aggravated circumstances. He was convicted of three counts which is hereby noted.

17. In his mitigation before the trial magistrate, the petitioner pleaded for leniency. In his submissions, the petitioner states that he has reformed and is ready to start a new life.

18. I have considered all the foregoing factors and I hereby allow this petition on the following terms: -

(a) That the death sentence imposed on the petitioner is hereby set aside and substituted with twenty-five (25) years imprisonment to run from the date of arrest the 16th April 2008.

(b) Having served eleven (11) years, the petition shall serve the balance of fourteen (14) years subject to any remission that he may be given by the relevant authority.

19. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 7TH DAY OF NOVEMBER 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Nandwa for Respondent

Petitioner present