REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

PETITION NO. 19 OF 2017

CORAM: D.S. MAJANJA J.

BETWEEN

MICHAEL KATHEWA LAICHENA ....1ST PETITIONER

MARTIN MUGAMBI KARINDI ....2ND PETITIONER

AND

REPUBLIC ....RESPONDENT

JUDGMENT

1. The matter before the court is a petition for resentencing necessitated by the Supreme Court decision in ***Francis Karioko Muruateru & Another v Republic*** **SCK Pet. No. 15 OF 2015 [2017] eKLR** declaring the mandatory death sentence for the offence of murder unconstitutional. In the case of ***William Okungu Kittiny v Republic*** **KSM CA Criminal Appeal No. 56 of 2013 [2018] eKLR**, the Court of Appeal applied ***Muruatetu Case*** **(Supra)** *mutatis mutandis* to the provisions of **section 296(2)** of the ***Penal Code (Chapter 63 of the Laws of Kenya)*** which imposes the mandatory death penalty for the offence of robbery with violence.

2. The petitioners, **MICHAEL KATHEWA LAICHENA** and **MARTIN MUGAMBI**, were charged, convicted and sentenced to death for the offence of robbery with violence contrary to **section 296(2)** of the ***Penal Code (Chapter 63 of the Laws of Kenya)*** at a trial before the Principal Magistrate's Court in ***Nkubu Criminal Case No. 287 of 2003***. They appealed against the conviction and sentence to the High Court in ***Meru Criminal Appeal No. 16 and 17 of 2008***. The appeal was dismissed on 29th October 2010. Their second appeal to the Court of Appeal, ***NYR CA Criminal Appeal Nos. 466 and 467 of 2015*** was dismissed on 7th July 2017 hence this petition.

3. Before I consider the matter, I think it is important to address the issue of jurisdiction. In the ***Mururatetu's Case*** **(Supra)**, the Supreme Court, having declared the mandatory death sentence unconstitutional, directed that the petitioners' case be remitted back to the High Court for re-sentencing in accordance with directions of the court. In the meantime, and as regards petitioners in other similar cases, the Court stated that;

> *[111] … [They] ought not approach the Supreme Court directly but await appropriate guidelines for disposal of the same. 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.*

4. The direction regarding other petitioners in similar cases would suggest that their cases would be determined within the framework set up by the Attorney General. I take judicial notice of the fact that pursuant to the direction of the Supreme Court, the Attorney General did appoint a ***Taskforce on the Review of the Mandatory Death Sentence under Section 204 of the Penal Code Act*** vide ***Gazette Notice No. 2160*** dated 15th March 2018.

5. Although the Supreme Court direction would seem to suggest that the all petitioners would have to await the outcome of the Taskforce, the Court of Appeal in the ***Kittiny Case*** **(Supra)** thought otherwise, it held that;

> *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*. [Emphasis mine]

6. The tenor and effect of the Court of Appeal decision is that the High Court may review and re-sentence petitioners who come before by way of petition or appeal as the Supreme Court did not foreclose that avenue of re-sentencing. Further, the Supreme Court underlined the fact

that sentencing is a judicial task hence a Taskforce of the kind appointed by the Attorney General cannot review and re-sentence petitioners. Since the High Court is the has unlimited jurisdiction in civil and criminal matters and is also the court imbued with jurisdiction to enforce fundamental rights and freedoms under **Article 165(3)** of the Constitution, it is the proper forum for re-sentencing.

7. Further, the right of a person sentenced to death to seek relief is clearly grounded on the fact that the Supreme Court in ***Muruatetu's Case*** **(Supra)** found the mandatory death penalty unconstitutional and a violation of fundamental rights and freedoms. Thus by re-sentencing the petitioner, the High Court is merely enforcing and granting relief for what is in effect a violation caused by imposition of the mandatory death sentence. For the reasons I have set out I am satisfied that I have jurisdiction to consider this petition for re-sentencing.

8. Back to the petitioners' case and the facts leading to the case are summarized in the Court of Appeal decision. Martin was convicted on count one and two and Michael was convicted on count two. In the first count, the first complainant was Simon Mwika Kambuthu (PW 2) whereas in the second count the complainant was Priscilla Mwothea (PW 1). The particulars of the first count were that on 9th March, 2002, while PW 2 was in his shop at 7 pm at Kianjai market he heard a gunshot and immediately saw robbers enter PW 1's shop. He hid at the back of his shop but after five minutes, came out to check on the fate of PW 1 but to his horror, the robbers after finishing with PW 1 entered his shop. As the lights were on, he noticed that one of the robbers had a gun. He observed that Martin was one of the two robbers. He was able to recognize him before he ran out of his shop after the robbers demanded all the money from the cash drawer.

9. On the second count, the facts were that PW 1 and her husband Nguu (PW 3) operated a shop at Kianja and while the two were carrying on their business on 9th March, 2002 at 7 pm, some people forced their way into their shop. The two intruders were armed. The first one had a gun and a knife whereas the second one had a *panga* and a *rungu*. When the robbers struck, PW 3 ran away through the shop's back door. PW 1 tried to escape as well but she was overpowered by the two robbers. Martin whom PW 1 recognised immediately stabbed her twice in the stomach and she passed out and was thereafter, hospitalized for three months. When she was able to give a statement to the police she testified that she had given the names of the appellants to the police as *Mugambi* and *Kathewa* as persons whom she knew because they came from the same area and also they used to visit her shop.

10. In the plea before this court, the petitioners told the court that they had been in prison for about 16 years and they had now reformed and that they prayed for leniency. Counsel for the State told the court that the court ought to consider the circumstances of the case and note that the offence was serious and that in his view a sentence of 30 years' imprisonment was warranted.

11. I wish to emphasise that the petition before the court is for resentencing not clemency. The petitioners have already had the benefit of their respective death sentences commuted to life imprisonment by the President under the Power of Mercy conferred under **Article 133** of the Constitution. In this case, the court is being called upon to re-consider the facts as they existed at the time of sentencing and impose and appropriate sentence in light of the fact that the mandatory death penalty has been declared unconstitutional.

12. The ***Sentencing Policy Guidelines, 2016*** ("the ***Guidelines***") published by the Kenya Judiciary state (at para. 4.1) that the sentence imposed must meet the following objectives;

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

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

· Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.

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

· Community protection: To protect the community by incapacitating the offender.

· Denunciation: To communicates the community's condemnation of the criminal conduct.

13. As the ***Guidelines*** state at para. 4.2, *"These objectives are not mutually exclusive, although there are instances in which they may be in conflict with each other. As much as possible, sentences imposed should be geared towards meeting the above objectives in totality."*

14. The ***Guidelines*** 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 will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. Since the ***Guidelines*** did not take into account the fact the death penalty would be declared unconstitutional, the Court in the ***Muruatetu Case*** **(Supra, para. 71)**, held considered mitigating factors that would be applicable in re-sentencing in a case of murder as follows;

(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.

15. 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.

16. I now turn to consider the sentence to be imposed on the petitioners. The starting point of this inquiry is that although the mandatory 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 my view, the death penalty should be excluded where the robbery does not result in the death of a person. From the facts of the case, I have outlined, the petitioners did not kill anyone in the course of the robbery hence I would exclude the death penalty leaving life imprisonment as the maximum penalty.

17. Robbery with violence is a species of robbery which is defined under **section 295** of the ***Penal Code*** as follows:

Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

18. **Section 296** of the ***Penal Code*** provides for both the offences of robbery and aggravated robbery and their respective penalties under **sub-sections (1)** and **(2)** as follows:

296 (1) Any person who commits the felony of robbery is liable to <u>imprisonment for fourteen years</u>.

(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, <u>he shall be sentenced to death</u>. [Emphasis mine]

19. What is clear from these provisions is that robbery with violence is an aggravated form of robbery with additional ingredients set out in **section 296(2)** of the ***Penal Code***. The lack of a distinction was discussed and dealt with in the case of ***Joseph Kaberia Kahinga and 11 Others v Attorney General*** **NRB HC Petition No. 618 of 2010 [2016] eKLR**. The court declared **sections 295, 296(1), 296(2), 297(1) and 297(2) of the *Penal Code* unconstitutional as the provisions do not meet the constitutional threshold of setting out in sufficient precision, distinctively clarifying and differentiating the degrees of aggravation of the offence of robbery and attempted robbery with such particularity as to enable those accused to adequately answer to the charges and prepare their defences. Following the invalidation of the mandatory death penalty by the Supreme Court, the factors stated in section 296(2) of the *Penal Code* are aggravating factors which would go towards increasing the sentence of 14 years' imprisonment prescribed for simple robbery.** I would therefore take 14 years' imprisonment as the starting point for considering the sentence for robbery with violence. I should not be seen as stating or implying that 14 years' imprisonment as a mandatory minimum sentence for robbery with violence. The court is entitled to consider all the circumstances and prescribe an appropriate sentence whether below or above 14 years' imprisonment.

20. I have considered the circumstances of the case and the only mitigating factor I can find from the record is that the petitioners could be considered first offenders. The facts from the record shows that the offence took place at night where the petitioners were part of a gang that terrorized Kianjai market. They were not only armed with pangas but also firearms which they used to commit the robbery. The evidence shows that the 1st petitioner stabbed PW 1 twice causing her to be hospitalized for 3 months. The trial magistrate graphically summarized the events of that night as follows;

It is 7.00pm at Kianjai. Date 9/3/02/ Life takes a dangerous turn and mayhem descends on the land. Gunshots break the evening quiet. A young man is killed. PW 1 is stabbed and left for dead. PW 2 dashes to hide in the rear part of the shop while PW 3, a sprightly old man and husband to PW 1, (sic) out of the scene before even the robbers could say fire. Death is in the very air and fear is writ large on the faces of Kianjai residents.

21. In addition to the facts if 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 person has spent in custody in determining the sentence. The petitioners were charged in 2003 and convicted in 2008. The remained in custody for a period of 5 years throughout the trial.

22. The use of guideline judgments of Superior Courts has also been underlined to ensure consistency and fairness. 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 20 years imprisonment where the robbery was aggravated by the use of a firearm.

23. Considering all the mitigating and aggravating factors, the period spent in pre-trial custody and the cases I have cited, I re-sentence the

petitioners to **15 years' imprisonment** commencing the date of sentencing before the trial court that is from **12th February 2008**.

SIGNED AT KISII

D.S. MAJANJA

JUDGE

DATED and **DELIVERED** at **MERU** this **12th day of July 2018.**

A. MABEYA

JUDGE

Petitioners in person.

Mr Kiarie, Prosecution Counsel, instructed by the Director of Public Prosecutions for the Respondent.