REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC CRI. NO. 45 OF 2018

BENSON OCHIENG.....1ST APPLICANT

FRANCE KIBE.....2ND APPLICANT

VERSUS

REPUBLIC.....STATE

JUDGMENT UPON APPLICATION FOR RE-SENTENCING

1. In December, 2017, Supreme Court of Kenya decided ***Francis Karioko Muruatetu & Another v Republic [2017] eKLR***. In that case, the Supreme Court held that mandatory death penalty for murder is unconstitutional and struck down section 204 of the Penal Code to the extent that it prescribed mandatory death sentence upon conviction for murder.

2. The Supreme Court expressed itself as follows:

> ***[64]*** *Having la*id bare the brutal reality of the mandatory nature of the sentence under Section 204 of the Penal Code, it becomes crystal clear that that Section is out of sync with the progressive Bill of Rights enshrined in our Constitution …..That section therefore cannot stand, particularly, in light of Article 19 (3) (a) of the Constitution ….
>
> [66] It is not in dispute that Article 26 (3) of the Constitution permits the deprivation of life within the confines of the law. We are unconvinced that the wording of that Article permits the mandatory death sentence. The pronouncement of a death sentence upon conviction is therefore permissible only if there has been a fair trial, which is a non-derogable right. A fair hearing as enshrined in Article 50(1) of the Constitution must be read to mean a hearing of both sides. A murder convict whose mitigation circumstances cannot be taken into account due to the mandatory nature of the death sentence cannot be said to have been accorded a fair hearing.
>
> ***[69]*** Consequently, we find that Section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment.

3. While the ***Muruatetu Case*** was on section 204 of the Penal Code which is the penalty section for persons charged with murder, the Court of Appeal extended the reasoning to all similar mandatory death penalties in ***William Okungu Kittiny v R [2018] eKLR***.

4. Consequently, the law of the land as it stands today, therefore, is that the maximum penalty for both murder (under section 204 of the Penal Code) and robbery with violence (under section 296(2) of the Penal Code) is the death penalty but the Trial Court has discretion to impose any other penalty that it deems fit and just in the circumstances.

5. However, what about the scores of individuals, who, like the Petitioners in the ***Muruatetu Case***, their cases have already gone through the hierarchy of Courts and death sentences confirmed before the ***Muruatetu Case*** was decided?

6. The Supreme Court advised thus in the ***Muruatetu Case***:

> ***[111]*** It is prudent for the same Court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners. 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. 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.

7. In **Wycliffe Wangusi Mafura Vs Republic (2018) eKLR**, the Court of Appeal interpreted this directive of the Supreme Court thus:

> We also said in **William Okungu Kittony's** case that the decision of the Supreme Court in **Muruatetu's case** has immediate and binding effect on all other courts and that the decision did not prohibit courts below it from ordering sentence rehearing in any matter pending before those courts. Accordingly since this appeal had not been finalised, this court has jurisdiction to direct a sentence re-hearing or pass any appropriate sentence that the trial magistrate's court could have lawfully passed.

8. Undeterred by this advisory from the Supreme Court, and seemingly egged on by the Court of Appeal's interpretation of that advisory, the two Applicants approached this Court *vide* the present application requesting the Court to carry out a sentence re-hearing following the enunciation of the law in the ***Muruatetu Case***.

9. As I understand it, this Application is pivoted on Article 165(3)(a) of the Constitution. That clause gives the High Court unlimited original jurisdiction in criminal and civil matters. On the other hand, the Supreme Court adviced similarly-positioned would-be Petitioners to await the formation of the Taskforce which will recommend the way forward for the thousands of prisoners presently serving the death sentence. However, the position of the Supreme Court was quite specific: it indicated that it will not consider individual Petitions presented to it by the prisoners after enunciating the constitutionality of the mandatory death sentence.

10. I have taken the position that the Supreme Court neither intended nor achieved the purpose of limiting the jurisdiction of this Court to consider applications for re-sentencing by individuals such as the Applicants who were sentenced to death under the then mandatory provisions of the Penal Code. A progressive and purposive reading of the constitutional provisions relied on by the Supreme Court to reach its outcome in the ***Muruatetu Case*** would lead us to this conclusion. The Court, may, of course, determine for prudential reasons, to await the work of the Taskforce or other docket management considerations.

11. I will, therefore, proceed to render my ruling on the sentence re-hearing.

12. The two Applicants were charged with three counts of the offence of robbery with violence contrary to section 296(2) of the Penal Code in the Chief Magistrate's Court in Nakuru. They were acquitted of two counts but eventually convicted of one count. The record shows that the two Applicants, together with others, while armed with pistols robbed Tsandra Kent Shah of a Motor Vehicle Registration Number KAD 135H, Toyota Corolla Saloon, cash Kshs. 10,000/- and cartons of sweets all valued at Kshs. 716,000/-.

13. Evidence adduced at the trial showed that the Applicants attacked the Complainant at his home in Nakuru Section 58 as he arrived from his shop at around 6:30pm on 11th January, 1999. Three people emerged from seemingly nowhere armed with pistols and demanded money and the car. The Complainant obliged and was therefore unharmed. They fled with the vehicle and the property.

14. The Applicants were later apprehended after a shootout with the Police in the Luanda/Chavakali area. Members of the public joined in searching for the Applicants after they abandoned the vehicle upon hot pursuit by the Police. That is how the Applicants were finally arrested. The Applicants were the luckier ones; two of their colleagues were shot by the Police during the operation and died.

15. In light of this, I will, therefore, proceed to determine the appropriate sentence.

16. In support of his Application, the 1st Applicant submitted that he was sentenced in 2001 when he was only 24 years old; he was death row for nine years before his death sentence was commuted to life imprisonment. He submitted that he has been rehabilitated since he started serving sentence. He submitted that to demonstrate how reformed he was, he has been appointed a Trustee special stage by the Prisons Department. This, he said, requires extraordinary efforts and trust by the Prisons Department.

17. The 1st Applicant further submitted that he is learnt to be a metal artisan and has been certified Grade 1 by the Directorate of Industrial Training. He has also been trained in metal works dealing with shafts and fittings. Other trainings he has received include training as a paralegal by Kituo Cha Sheria and Drug and Substance Abuse counselor.

18. Finally, the 1st Appellant submitted that he was a first offender and he is very remorseful for the crime he committed. He also has a wife and a son who is in Form Four this year. The 1st Appellant urged the Court to reduce his sentence to the time served or, in the alternative, to sentence him to serve probation as he is fully reformed.

19. The 2nd Appellant informed the Court that "he has not been in prison in vain"; that he took advantage of being there to learn useful life skills including welding for which he is certified by the Directorate of Industrial Training. He is also certified in Motor Vehicle mechanics. To prove his reform credentials, the 2nd Appellant produced a Recommendation Letter from the Officer-in-Charge, Kamiti Prison. The letter states that the 2nd Appellant has displayed a lot commitment, dedication, patience and obedience in his daily duties and that he has proved to be a responsible and able leader; and that he works with minimum supervision. There is no doubt that this is high praise from the Prison Authorities.

20. I begin from the position that given that "simple" robbery under section 296(1) of the Penal Code attracts a minimum sentence of fourteen years imprisonment, it seems logical that the minimum sentence for robbery with violence should begin at fourteen years imprisonment. This is because robbery with violence under section 296(2) is, by definition, an aggravated robbery which has been singled out by the Legislature for enhanced penalty due to the impact of the crime on the victim and the society. This position is in accord with other decisions of the High Court on this point. See, for example, decisions by Majanja J. in ***Michael Kathewa Laichena and Another v Attorney General MERU High Court Crim. Pet. No. 19 of 2018 (UR)*** and ***John Kathia M'itobi v Republic [2018] eKLR***. An entry point of fourteen years for robbery with violence, in my view, is also appropriate for reasons of uniformity and parity in sentencing.

21. In the ***Muruatetu Case***, the Supreme Court approvingly cited the Judiciary ***Sentencing Policy and Guidelines***. In particular, the

Supreme Court endorsed the four-tier methodology for determining custodial sentence as well as the aggravating and mitigating circumstances catalogued in Paragraphs 23.7 and 23.8 of the ***Sentencing Guidelines***. Even then, of course, the Supreme Court was clear that those Sentencing Guidelines cannot substitute the Court's discretion in sentencing.

22. Re-phrasing the ***Sentencing Guidelines***, there are four sets of factors a Court looks at in determining the appropriate custodial sentence after determining the correct entry point (which, as stated above, I have determined to be fifteen years imprisonment). These are the following:

a. Circumstances Surrounding the Commission of the Offence: The factors here include:

i. Was the Offender armed? The more dangerous the weapon, the higher the culpability and hence the higher the sentence.

ii. Was the offender armed with a gun?

iii. Was the gun an assault weapon such as AK47?

iv. Did the offender use excessive, flagrant or gratuitous force?

v. Was the offender part of an organized gang?

vi. Were there multiple victims?

vii. Did the offender repeatedly assault or attack the same victim?

b. Circumstances Surrounding the Offender: The factors here include the following:

i. The criminal history of the offender: being a first offender is a mitigating factor;

ii. The remorse of the Applicant as expressed at the time of conviction;

iii. The remorse of the Applicant presently;

iv. Demonstrable evidence that the Applicant has reformed while in prison;

v. Demonstrable capacity for rehabilitation;

vi. Potential for re-integration with the community;

vii. The personal situation of the Offender including the Applicant's family situation; health; disability; or mental illness or impaired function of the mind.

c. Circumstances Surrounding the Victim: The factors to be considered here include:

i. The impact of the offence on the victims (if known or knowable);

ii. Whether the victim got injured, and if so the extent of the injury;

iii. Whether there were serious psychological effects on the victim;

iv. The views of the victim(s) regarding the appropriate sentence;

v. Whether the victim was a member of a vulnerable group such as children; women; Persons with disabilities; or the elderly;

vi. Whether the victim was targeted because of the special public service they offer or their position in the public service; and

vii. Whether there been commitment on the part of the offender (Applicant) to repair the harm as evidenced through reconciliation, restitution or genuine attempts to reach out to the victims of the crime.

23. Looking at these factors, the following recommend themselves as extenuating:

a. First, I accept that both Applicants have demonstrated genuine remorse;

b. Second, both are first offenders;

c. Third, both have patently demonstrated that they are reformed and that they are capable of re-integration into the society through their ability to become useful members of the society;

d. Fourth, both Applicants were fairly youthful during the commission of the offence since they were both in their early twenties;

e. Fifth, through their family connections and civic engagement participation, they have each demonstrated an affinity to a crime-free life in the future. As such, it would appear there is no demonstrated need to continue holding them in custody for the protection of the community.

24. However, there are serious aggravating circumstances present in this case:

a. First, the Applicants were armed with multiple guns during the commission of the offence;

b. Second, the commission of the offence involved a prolonged shoot-out with the Police during which members of the public were at risk;

c. Third, unfortunately, during the attempt by the Applicants to flee from justice, the lives of some of their colleagues were lost; and

d. Fourth, the Applicants were part of a seemingly organized gang whose sphere of operations ranged from Central Rift Valley to Western Kenya.

25. Taking all these factors into consideration, I find that while the mitigating circumstances are substantial – including the well-documented rehabilitation of both Applicants as certified by the Prisons authorities -- the aggravating circumstances in the case are quite weighty. In particular, even while accepting that the Applicants are demonstrably reformed and rehabilitated, it is important for the Court to accentuate the societal denunciation for the heinous and socially damaging crime the two Applicants committed: the use of multiple guns by an organized gang to commit armed robbery. A sufficiently stiff sentence will also serve the deterrence function to the extent that a custodial sentence has a signaling effect.

26. In my view, therefore, considering the entirety of the facts, it is appropriate to substitute the death sentence pronounced on the Applicants in this case. In its place, I re-sentence both Applicants to twenty (20) years imprisonment commencing the date of sentencing before the Trial Court that is from 01/02/2001.

27. Orders accordingly.

Dated and delivered in Nakuru this 4th Day of October, 2018.

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JOEL NGUGI

JUDGE