REPUBLIC OF KENYA

IN HIGH COURT OF KENYA

AT MARSABIT

MISC. CRIMINAL APPLICATION NO. 10 OF 2017

RAMADHAN UMME ALIAS SOMO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The applicant was charged with the offence of robbery with violence Contrary to Section 295 as read with Section 296 (2) of the Penal Code. The particulars of the offence were that the appellant on the 2nd day of September 2014 at Shauri yako village in Marsabit sub county within Marsabit county being armed with a stone robbed off **Hussein ALI HUSSEIN** cash Kshs. 1,000 and immediately before the robbery used actual violence against **HUSEIN ALI HUSSEIN**. The trial court convicted the appellant and sentenced him to suffer death. The sentence was passed on 9th February 2015. The applicant filed Criminal Appeal No. 23 of 2015 before the High Court in Marsabit and the same was dismissed on 9th March 2016.

The applicant filed a notice of intention to appeal the high court judgment before the Court of appeal in Nyeri but he later withdrew the notice and filed the current application. The application is grounded on two main issues. Firstly, that there is new and compelling evidence which has become available. Secondly that the sentence is excessive.

On the first issue, it is submitted that the complainant swore an affidavit to the effect that he is not interested in the matter. The affidavit of the complainant was sworn on the 27th of February 2018. The complainant states in his affidavit that he has not been threatened, bribed or induced to swear the affidavit. He has now discovered what happened to him in 2014 during the incident. The affidavit does not state much but its effect is that the complainant has no complaint against the applicant. There is also a document that was filed through the office of the DPP dated 30th April 2018 indicating that the family of the complainant and that of the applicant discussed about the issue and resolved that the applicant be forgiven. The elders agreed that since the applicant has served in prison for more than three years he must have learnt his lesson. The complainant and his parents together with their children have agreed to forgive the applicant. The applicant told the court that he was arrested in 2014 and has been in custody since then. He has served 4 years imprisonment. He has three children and his wife left him.

Mr. Mwangangi, prosecution counsel did not oppose the application. Counsel submit that the two families have reached and amicable resolution. A letter to that effect was filed in court. The state has no objection if the sentence is reviewed. Counsel further submit that Section 176 of the Criminal Procedure Code promotes reconciliation. Given the amount involved in the charge the court can exercise its discretion and review the sentence.

Before the trial court the complainant stated that the applicant is his neighbor. On the material day he had been sent by his mother to go and buy milk, sugar and cooking oil. He had been given Kshs. 1,000. On his way to the shop at about 8.00pm the appellant hit him with a stone on the head. He fell down and the appellant took the money. He found himself in hospital. He was later issued with a P3 form. The P3 form indicate that the complainant sustained bruises on the front of the head and a fracture of the right clavicle. He fully recovered. What was stolen was Kshs. 1,000 and the complainant has informed the court through his affidavit that he has forgiven the applicant. The applicant was sentenced to death. By the time the applicant was convicted the supreme court had not made its decision in the case of **FRANCIS MURUATETU & ANOTHER VS REPUBLIC Supreme Court Petition Number 15 and 16 of 2015.**

In the above case the supreme court declared as unconstitutional the mandatory nature of the death sentence in relation to section 205 of the Penal Code on murder cases. The decision can be extended to the mandatory nature of the death sentence in relation to other capital offences. The supreme court in the **Francis Muruatetu case (Supra)** stated as follows: -

> ***"Section 204 of the Penal Code deprives the court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Article 25 of the Constitution; an absolute right"***

Given the circumstances of the case it is my finding that the death sentence is not appropriate. The families of the complainant and the applicant met and approached the DPP's Office indicating that there is reconciliation. The offence occurred on the 2nd of September 2014. The applicant was arrested on the 25th of October 2014 and has been in custody since then. This is a period of about 4 years. The applicant has suffered enough punishment and has been forgiven by the complainant. There is no good reason as to why he should continue suffering in prison. I do find that the application is merited and is hereby allowed.

In the end the application is allowed. The death sentence is hereby set aside and replaced with the period already served. The applicant shall

be set at liberty unless otherwise lawfully held.

Dated, Signed and Delivered in Marsabit this 11th Day of October 2018.

SAID CHITEMBWE

JUDGE