

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. CRIMINAL APPLICATION NO. 64 OF 2018

KIARIE WANGUBA.....APPLICANT

VERSUS

REPUBLIC.....STATE

JUDGMENT UPON APPLICATION FOR RE-SENTENCING

1. Kiarie Wanguba, the Applicant, was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code in Nyahururu Principal Magistrate’s Criminal Case No. 131 of 2005. The particulars of the offence were that it was alleged that on 10/11/2004, at Lesirko Village in Nyandarua District, Central Province, jointly with others not before the Court and while armed with dangerous weapons namely pistols, robbed John Maina Nyambura cash, Kshs. 5,000/- and immediately after the time of the robbery used personal violence to the said John Maina Nyambura.

2. In the lower Court, the Applicant was acquitted. The Director of Public Prosecutions appealed against conviction and the High Court reversed the order of acquittal. The High Court proceeded to convict the Applicant of the offence of robbery. Even though this was in 2012, the Court did not sentence the Applicant to death. Instead, the Court reasoned as follows:

We are aware that the law provides for a mandatory death sentence for the above offence. However, it is a long time since anybody was ever executed in Kenya and the Courts have generally held that the death sentence is not mandatory but each case should depend on its own special circumstances. In this case, we sentence the Respondent to life imprisonment

3. The Applicant appealed to the Court of Appeal against both conviction and sentence. His appeal was dismissed on both issues. Having exhausted his appeals options, the Applicant has approached this Court again for re-sentencing. He has sought to ground his application for re-sentencing on the doctrine propounded by the Supreme Court in *Francis Karioko Muruatetu & Another v Republic [2017] Eklr*. He would like the Court to substitute the life imprisonment sentence he received with a prison term. In the *Muruatetu Case*, the Supreme Court outlawed mandatory death penalty for murder as unconstitutional and struck down section 204 of the Penal Code to the extent that it prescribed mandatory death sentence upon conviction for murder.

4. The reasoning in *Muruatetu Case* respecting section 204 of the Penal Code (the penalty section for murder), has been extended by the Court of Appeal to the mandatory death penalty in robbery with violence cases and probably all other similar mandatory death sentences. That was in *William Okungu Kittiny v R [2018] eKLR*.

5. In *Benson Ochieng & Another v Republic (Nakuru High Court Misc. Application No. 45 of 2018)*, I reached the conclusion that the High Court can invoke its original jurisdiction bequeathed to it in Article 165(3)(a) of the Constitution to re-sentence persons on death row who were sentenced pursuant to the mandatory death penalty provisions which have been declared unconstitutional. Addressing the advisory by the Supreme Court to those on death row pursuant to the mandatory death penalty provisions the Supreme Court had just declared unconstitutional that they should await a Taskforce ordered by the Supreme Court and not approach the Supreme Court with individual petitions, I had this to say:

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 advised 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.

*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.*

6. Even though I have taken the position that this Court has jurisdiction to re-sentence prisoners who were sentenced to death before the *Muruatetu Case*, the Applicant’s case does not fall into this category. As reproduced above, in his case, the High Court considered the death penalty to the maximum sentence that can be imposed for the offence of robbery with violence and expressly stated that each case would be decided on its own merit. The Court, then, determined that in the specific circumstances of the case, the Applicant deserved to be imprisoned for life. The Court of Appeal affirmed that decision.

7. Consequently, the reasoning in *Muruatetu Case* does not apply to the Applicant’s case: he was not sentenced pursuant to the mandatory death penalty provisions of the law. The sentencing Court considered his specific circumstances and the circumstances of the case in pronouncing his sentence – and then pronounced the sentence of life imprisonment. This sentence is lower than the death sentence. Considering the circumstances of the case -- the fact that two people lost their lives and two more were grievously injured during the robbery

through the Applicant's cruel and gratuitous act of violence – it is not open to even wonder whether the sentence imposed was excessive in the circumstances. It is clear that the Court was mindful of all the circumstances.

8. Consequently, I reach the conclusion that the Applicant cannot, in the circumstances of this case, benefit from the doctrine propounded in Muruatetu Case. I therefore dismiss his application for re-sentencing as unmeritorious.

9. Orders accordingly.

Dated and delivered in Nakuru this 13th day of November, 2018

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JOEL NGUGI

JUDGE