



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL MISC. APPLICATION NO. 2 OF 2018

BERNARD KARANJA MWANGI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

A. Introduction

1. This is a ruling on an undated petition filed in court on the 11th May 2018, seeking the following relief: -

a. That this Hon. Court be pleased to consider granting an appropriate sentence to be served by me the applicant/ petitioner as a substitute to death sentence imposed pursuant to the Supreme Court orders vide petition No. 15 of 2015 dated 14th day of December 2017.

b. That this Hon. Court be pleased to grant me an appropriate sentence as prayed herein.

2. The applicant was charged alongside two others with the offence of robbery with violence, convicted, and sentenced to death. He has filed two appeals that have been dismissed and is currently serving life imprisonment after a presidential directive revised the death sentence and replaces it with life imprisonment in 2009.

B. Applicant's Case

3. It is the appellant's case that pursuant to the decision of the Supreme Court in Petition No. 15 of 2015, the High Court has jurisdiction and ought to impose an appropriate sentence. The appellant further alludes to this Court's jurisdiction as provided under Article 165 (3) of the Constitution.

4. The applicant states that he seeks the courts intervention solely on the issue of sentencing as a result of the Supreme Court decision in Petition No. 15 of 2015.

C. Applicant's Submission

5. The applicant submitted that the life sentence he had received following the revision of his original sentence of death failed to recognize his right to human dignity as it limited his prospect of life while denying him a chance to atone for the offence he had committed.

6. It was the applicant's submission that this court should grant him a fair hearing in mitigation in resentencing as his current life sentence was torturous as it denied him any future prospects to develop. The applicant further submitted that he was remorseful and asked the court to consider his mitigation.

D. Respondent's Submission

7. The respondent submitted that the applicant was no longer serving a death sentence as the same was revised to life imprisonment following the executive directive by the president in 2009.

8. The respondent further submitted that whereas it was not opposed to the resentencing as prayed by the applicant and further as this court is bound by the Supreme Court decision in Petition No. 15 of 2015, this court ought to bear in mind the circumstances under which the offence

was committed and also that the applicant continues to serve a commuted sentence of life imprisonment instead of murder courtesy of the presidential directive of 2009.

E. Analysis of Law

9. Section 296(2) of the **Penal Code** provides that the offender convicted for robbery with violence in circumstances stipulated therein “*shall be sentenced to death.*”

10. That the principles enunciated in **Francis Karioko Muruatetu & another v Republic [2017] eKLR** apply to the offence of Robbery with Violence was appreciated by the Court of Appeal in **William Okungu Kittiny vs. Republic, Court of Appeal, Kisumu Criminal Appeal No. 56 of 2013 [2018] eKLR** where it held that at paras 8 and 9 that:

“[8] Robbery with violence as provided by Section 296 (2) and attempted robbery with violence as provided under Section 297 (2) respectively provide that the offender: -

“...shall be sentenced to death.”

The appellant was sentenced to death for robbery with violence under Section 296 (2). The punishment provided for murder under Section 203 as read with Section 204 and for robbery with violence and attempted robbery with violence under Section 296 (2) and 297 (2) is death. By Article 27 (1) of the Constitution, every person has inter alia, the right to equal protection and equal benefit of the law. Although the Muruatetu’s case specifically dealt with the death sentence for murder, the decision broadly considered the constitutionality of the death sentence in general.

.....

[9] From the foregoing, we hold that the findings and holding of the Supreme Court particularly in paragraph 69 applies mutatis mutandis to Section 296 (2) and 297 (2) of the Penal Code. Thus, the sentence of death under Section 296 (2) and 297 (2) of the Penal Code is a discretionary maximum punishment. To the extent that Section 296 (2) and 297 (2) of the Penal Code provides for mandatory death sentence the Sections are inconsistent with Constitution.”

11. The effect of the said decisions in my view is that while the death penalty is not outlawed, it is still applicable as a discretionary maximum penalty for the offence of robbery with violence, section 296(2) of the *Penal Code* is however inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for the offence of robbery with violence and thus it follows that the sentence of death imposed on the appellant ought to be revisited. Justice Odunga stated the same in the case of **Silas K. Ngari & another v Republic [2018] eKLR**.

12. The Court found that due process is made possible by a procedure that allows the Court to assess the appropriateness of the death penalty in relation to the circumstances of the offender, the nature and seriousness of the offence. The Supreme Court in the **Muruatetu’s case** (supra), while making it clear that it was not replacing judicial discretion, and in order to avoid a lacuna, advised the Courts to apply the following guidelines with regard to mitigating factors in a re-hearing sentence for the conviction of a murder charge. In my view, there is no reason why the same principles cannot apply to re-hearing sentence for conviction of robbery with violence.

13. As a guide in sentence re-hearing the Supreme Court in **Muruatetu Case** (supra) held that: -

“[71] As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

(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.

14. That the possibility of reform and social re-adaptation of the offender is to be considered in sentence re-hearing implies that where the applicant has been in custody for a considerable period of time the Court ought to consider calling for a pre-sentencing report and possibly

the victim impact report in order to inform itself as to whether the appellant/petitioner is fit for release back to the society. As appreciated by the Supreme Court in *Muruatetu Case* (supra):

“Comparative foreign case law has also shown that the possibility of review of life sentences and the fixing of minimum terms to serve a life sentence before parole or review, is intrinsically linked with the objectives of sentencing. In Kenya, many courts have highlighted the principles of sentencing. One such case is the High Court criminal appeal decision in Dahir Hussein v. Republic Criminal Appeal No. 1 of 2015; [2015] eKLR, where the High Court held that the objectives include: “deterrence, rehabilitation, accountability for one’s actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim.” The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows:

“Sentences are imposed to meet the following objectives:

- 1. Retribution: To punish the offender for his/her criminal conduct in a just manner.*
- 2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.*
- 3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.*
- 4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims’, communities’ and offenders’ needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender’s contribution towards meeting the victims’ needs.*
- 5. Community protection: To protect the community by incapacitating the offender.*
- 6. Denunciation: To communicate the community’s condemnation of the criminal conduct.”*

The sentencing policy states at paragraph 4.2 that when carrying out sentencing all these objectives are geared to in totality, though in some instances some of the sentences may be in conflict.”

15. In my view, fairness to the applicant where a sentence re-hearing is considered appropriate would require a consideration of the circumstances prior to the commission of the offence, at the time of the trial and subsequent to conviction. The conduct of the appellant during the three stages may therefore be a factor to be considered in determining the appropriate sentence. The need to protect the society clearly requires the Court to consider the impact of the incarceration of the offender whether beneficial to him and the society or not hence the necessity for considering a pre-sentencing report.

16. Therefore, whereas death sentence has not been declared unlawful and may still be lawfully imposed where there exist *the most exceptional and appropriate circumstances*, it is therefore no longer mandatory to impose death sentence where the court finds it not appropriate. In my view in situations where the law prescribes a grave sentence, the Court in imposing the sentence ought to give reasons for imposing a particular sentence so that the act of sentencing does not become arbitrary.

17. I am of the considered opinion that this application is merited. The applicant was convicted and sentenced by the Senior Resident Magistrate Kerugoya.

18. The appellant was convicted jointly with on **Misheck Mbogo Mureithi** and **Moses Kinoti**. Although they are not parties to this application, it is in the interests of justice and in upholding the principle of uniformity of sentence in one case that I hereby direct that the said accused persons be joined in this application for hearing on resentencing before the Chief Magistrate Kerugoya.

19. The original file to be forwarded to **Chief Magistrate Kerugoya** for hearing and re-sentencing.

20. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 10TH DAY OF DECEMBER, 2018.

F. MUCHEMI

JUDGE

In the presence of: -

The applicant

Ms. Nandwa for Respondent