REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT LODWAR

MISC. CRIMINAL APPLICATION NO. 17 OF 2019

GIDEON NGALA LOMULEN.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant herein was charged before the Magistrate court at Lodwar in Criminal case No. 311 of 2016 with two counts of robbery with violence contrary to Section 295 as read with Section 206 (2) of the Penal Code with alternative charges of handling stolen goods contrary to Section 322(1) (2) of the penal Code.

2. He was tried, convicted and sentenced to suffer death on the offence of robbery with violence.

3. Being dissatisfied with the said conviction and sentence, he filed an appeal to this court being **High Court Criminal Appeal No. 4 of 2018** and by a judgment of this court dated 15th January, 2019, the said appeal was dismissed for lack of merit and the conviction and sentence affirmed.

4. From the record, it seems that the Applicant did not file an appeal against this court's judgment but by a Notice of Motion filed on 24/9/2019 approached this court under the **Muruatetu judgment** for re-hearing of sentence imposed upon him.

5. The application was supported by his affidavit wherein he deposed that he was not accorded fair hearing in sentencing by the trial court, in contravention of Article 50(2)(9) of the Constitution and that he was relying on the cases of **DOUGLAS MUTHAURA NTORIBI Misc. Cr. Appeal No. 4 of 2015 Meru** and **FRANCIS KARIOKO MURUATETU & ANOTHER v REPUBLIC** (Supreme Court Petition No. 15 of 2015.)

SUBMISSIONS

6. Directions were given that the application be heard by way of written submissions, but it was only the prosecution who filed written submissions, wherein it was submitted that the Applicant had filed an appeal which had not been canvassed and therefore the present application was premature and may compromise the appeal. It was submitted that the Court of Appeal may still review the sentence as sought by the Applicant.

7. On behalf of the Applicant, he submitted that he was seeking re-sentencing to be given a term of ten (10) years, having served three years.

8. In compliance with the Supreme Court decision in Muruatetu, the court called for re-sentencing report dated 19/2/2021, wherein it was stated that the Applicant may be released to continue with his education and that the victim had no problem with his release since he had recovered his motorbike.

9. It was stated further that the Applicant was remorseful and regretted having committed the offender under peer pressure after his form four education and that he had learned from his years in prison. It was stated that he had one previous record where he was sentenced to two years on probation and that the prison authorities had seen a big change in the offender.

DETERMINATION.

10. The concept of re-sentencing hearing was introduced in our jurisprudence through the Supreme Court decision in the Muruatetu case where the court held as follows:-

[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.

Sentencing Policy Guidelines: A way forward.

[70] In 2016, the Judiciary of Kenya published Sentencing Policy Guidelines which gives an analysis on the mandatory death penalty as follows:

Situational Analysis

6.4 Whilst the law still recognizes the death penalty as a mandatory punishment in respect to the offences aforementioned, the last execution took place in 1986.

6.5 Following the decision in the case of Godfrey Ngotho Mutiso v. Republic, which found the mandatory death sentence to be unconstitutional, there have been divergent views with some courts imposing custodial sentences for offences attracting the death penalty and others adhering to the mandatory terms of the statutes. Subsequently, the Court of Appeal in the case of Joseph Njuguna Mwaura and Others v. Republic, emphasised that courts do not have discretion in respect to offences which attract a mandatory death sentence.

Policy Directions

6.7 In the absence of law reform or the reversing of the decision in Joseph Njuguna Mwaura and Others v. Republic, the court must impose the death sentence in respect to capital offences in accordance with the law.

6.8 To curb the indeterminate imprisonment at the President's pleasure, the court's recommendation to the President pursuant to section 25 (3) of the Penal Code should include the requirement for a review of the case after a fixed period.

[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.

[72] We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process. This notwithstanding, we are obligated to point out here that paragraph 25 of the 2016 Judiciary Sentencing Policy Guidelines states that:

25. GUIDELINE JUDGMENTS

25.1 Where there are guideline judgments, that is, decisions from the superior courts on a sentencing principle, the subordinate courts are bound by it. It is the duty of the court to keep abreast with the guideline judgments pronounced. Equally, it is the duty of the prosecutor and defence counsel to inform the court of existing guideline judgments on an issue before it."

11. For those who had been sentenced under the mandatory nature of section 204of the penal code the supreme court was of the that the cases be remitted back to the trial court to determine the appropriate sentence and stated thus:

[109] **Here in Kenya, in the case of *Mutiso, the* Court of Appeal stated [para 38]:**

"In all the circumstances of this case, the order that commends itself to us is to remit the case to the superior court with the direction that the court records the prosecution's as well as the appellant's submissions before deciding on the sentence that befits the appellant."

[110] **We agree with the reasoning of the Courts in the authorities cited and the submissions of the 1st petitioner, the DPP and the *amici curiae*. Comparative jurisprudence is persuasive and we see no need to deviate from the already established practice. The facts in this case are similar to what has been decided in other jurisdictions. Remitting the matter back to the High Court for the appropriate sentence seems to be the practice adopted where the mandatory death penalty has been declared unconstitutional. We therefore hold that the appropriate remedy for the petitioners in this case is to remit this matter to the High Court for sentencing.**

[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.**

G. Orders

[112] Accordingly, with regards to the claims of the petitioners in this case, the Court makes the following Orders:

a) The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated

under Article 26(3) of the Constitution.

b) This matter is hereby remitted to the High Court for re- hearing on sentence only, on a priority basis, and in conformity with this judgment.

c) The Attorney General, the Director of Public Prosecutions and other relevant agencies shall prepare a detailed professional review in the context of this Judgment and Order made with a view to setting up a framework to deal with sentence re-hearing cases similar to that of the petitioners herein. The Attorney General is hereby granted twelve (12) months from the date of this Judgment to give a progress report to this Court on the same."

12. From the record placed before me there is no evidence that the appellant ever filed an Appeal to the Court of Appeal thereby granting the court the jurisdiction to hear the application herein for purposes of sentence re-hearing.

13. The court of Appeal in the case of **WILLIAM OKUNGU KITTINY v REPUBLIC [2018] eKLR** had this to say on the issue: -

"[11] Although the appellants' appeal was dismissed by the Court of Appeal on 20th June, 2008, which was then the last appellate court, the constitutional petition filed in the High Court revived the case and by the time the Supreme Court rendered its decision, this appeal was still pending.

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.

[12] From the foregoing, the learned judge having partly found in favor of the appellant erred in law in not remitting the case for sentence re-hearing and the appeal is allowed to that extent. Now that the Supreme Court has opened the door for sentence re-hearing, the matter is remitted to the Chief Magistrate's Court, Kisumu, for sentence re-hearing and sentencing only. The Registrar of this Court to return the record of the Chief Magistrates Court at Kisumu- Criminal Case No. 181 of 2004 as soon as reasonably practicable for sentence re-hearing and sentencing by the Chief Magistrate."

14. Having confirmed that the applicant did not file an appeal, it therefore follows that the respondent's submissions to that effect has no merit and will therefore proceed to resentence the applicant by way of review of the sentence passed herein by the court, on the ground of new matters which were not before the court at the time of sentencing. The new matter being that the court did not exercise discretion while sentencing him.

15. In dismissing the application Appeal in Criminal Appeal No. 4 of 2018 the court did not take into account the fact that the same had been sentenced to the mandatory sentence then lawfully provided for the offence of robbery with violence and therefore did not accord the Applicant the benefit of the decision of the Supreme Court in **Muruatetu's case** as applied to robbery with violence by the Court of Appeal in the case of **WILLIAM OKUNGU KITTINY v REPUBLIC (SUPRA)**

16. The Applicant is therefore entitled to sentence re-hearing and having taken into account his age, the fact that the motor cycle, the subject of his conviction was recovered and the nature of the weapon used and the fact that no physical violence was meted upon the victims, come to the conclusion that the death sentence given to the Applicant was excessive in the circumstances.

17. I therefore allow the application by the applicant, set aside the death sentence, and substitute the same with a term of seven (7) years with effect from 7/6/2016 when he first appeared in court under the provisions of Section 333(2) of the Criminal Procedure Code, of which the last two (2) thereof, shall be served on probation for purposes of further rehabilitation to be useful member of society.

ORDER

18. I therefore make the following orders:-

a. The death sentence is hereby reviewed and substituted with alternative sentence.

b. The accused is sentenced to a seven (7) years term which shall be served as follows:-

i. The first five (5) years thereon with effect from 7/6/2021 imprisonment.

ii. The last two (2) years thereon on probation.

19. And it is ordered.

DATED, SIGNED AND DELIVERED AT LODWAR ON 7TH DAY OF JULY, 2021

.....

J. WAKIAGA

JUDGE