Case Number:	Criminal Petition 21 of 2019 (Consolidated with HCCR Petition 146 of 2018)
Date Delivered:	18 Dec 2019
Case Class:	Criminal
Court:	High Court at Meru
Case Action:	Ruling
Judge:	Francis Gikonyo
Citation:	John Kubai & another v Republic [2019] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Meru
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL PETITION NO. 21 OF 2019

(Consolidated with HCCR. Petition 146 of 2018)

JOHN KUBAI.....1st APPLICANT

ABDI ALI GAKUO.....2nd APPLICANT

Versus

REPUBLIC.....RESPONDENT

RULING ON RE-SENTENCING

Re-sentencing

1. The applicants herein were charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of the offence are that the two, jointly with others not before court on 14th February 2003 at Isiolo Township robbed Hassan Huka of his jacket valued at Kshs 900 and cash of Kshs 1,200/= and immediately before the time of such robbery wounded the said Hassan Huka. There was an alternative charge relating to the 1st applicant that he on 15TH February 2004 at Isiolo Township, otherwise that in the course of stealing dishonestly, received, retained a jacket with Kshs 900/= knowing or having reason to believe it to be stolen property.

2. The trial Magistrate found the principal charge proved and sentenced the Applicants to death. The applicants lodged an appeal in H.C.CR.A. No. 135 & 137 of 2001. The appeal was however dismissed. They lodged a second appeal at the Court of Appeal (S.E.O.Bosire, E.M.Githinji, P.N.Waki, JJA) but was similarly dismissed.

3. Following the decision by the Supreme Court in **Francis Karioko Muruatetu & Another –vs- Republic [2017] eKLR** the applicants applied for re-sentencing. The 1st applicant submitted that; (1) he has been rehabilitated during the 16 years he has been in custody; (2) he is remorseful; and (3) at the time of the commissioning of the offence he was young. He provided Certificates of rehabilitation and courses in biblical studies.

4. The 2nd Applicant also asked the court to consider the time they have been in custody and sought the courts mercy. He submitted that he is asthmatic and has since learned his lesson.

5. **Ali. A. Athman the officer in charge Meru Main Prison** presented a favourable report with regard to the 1st Applicant. The report was however not favourable to the 2nd Applicant. The Officer in charge in his report dated 15th November 2019 stated that the 2nd Applicant has been in conflict with the Prison Rules and has been charged with eight aggravated prison offences. They range from incitement, mutiny, use of abusive language and being in possession of unauthorised articles.

ANALYSIS AND SENTENCING

6. My view has always been that the core, reason and decision in the Judgment by the Supreme Court in Muruatetu case, although it

referred to murder, should also apply in other cases where the law provides for a mandatory sentence, including Robbery with Violence. I will provide the constitutional philosophy which underpins this opinion.

7. I am not alone in the thinking that similar arguments could and should be made in respect of other statutes which fix a mandatory or minimum sentence whose effect is to remove or limit the discretion of the court in sentencing. On this I will dig the ancient wells.

8. In the case of **Godfrey Ngotho Mutiso v R [2010] eKLR (Criminal Appeal 17 of 2008)** which was affirmed by the Supreme Court, the Court of Appeal attempted to confine its decision to section 204 of the Penal Code but they heard echoes of wisdom and so they stated the following-:

"We have confined this judgment to sentences in respect of murder cases, because that was what was before us and what the Attorney General conceded to. <u>But we doubt if different arguments could be raised in respect of other capital offences such as treason under section 40 (3), robbery with violence under section 296 (2) and attempted robbery with violence under section 297 (2) of the Penal Code. Without making conclusive determination on those other sections, the arguments we have set out in respect of section 203 as read with section 204 of the Penal Code might well apply to them."</u> [Underlining mine]

9. Accordingly, I am not wrong in my belief- as this was confirmed by the Supreme Court- that the decision in Mutiso case was and still is sound and properly grounded law in respect of judicial discretion in sentencing.

10. See also **William Okungu Kittiny vs. Republic ([2018] eKLR where** the court considered the Muruatetu case *vis a vis* the decision in Geodfrey Mutiso and formed the following opinion;

"In the Mutiso case which was affirmed by the Supreme Court, the Court of Appeal said obiter that the arguments set out in that case in respect of Section 203 as read with Section 204 of the Penal Code might apply to other capital offences. Moreover, the Supreme Court in paragraph 111 referred to similar mandatory death sentences."

11. I am aware that a robust debate has ensued on the scope of application of Muruatetu especially on other mandatory sentences or minimum sentences which take away or limit the discretion of the court in sentencing respectively. But, standing on the solid foundation of the Constitution, local and contemporary jurisprudence, it is safe to state that arguments in Muruatetu applies to other provisions of the law which sets mandatory or minimum sentences the effect of which is to remove or restrict the discretion of the court in sentencing. Such provisions are unconstitutional. Judicial precedent established by the Supreme Court supports this finding.

12. The basis for this my position is that judicial discretion in sentencing is a fundamental and inseparable part of criminal justice- which is a matter of the Constitution. A mandatory or minimum sentence takes away or limits the discretion of the court to pass appropriate sentence, thus, an affront to justice itself. I should also think that, offenders who are subject of such law which sets a mandatory or minimum sentence suffer two ills: (1) denial of right to appropriate sentence; and (2) prohibited discrimination.

Applying the test

13. The applicants are therefore entitled to apply for re-sentencing. Accordingly, I will consider the circumstances of this case as well as the relevant factors in sentencing that were stated by the Supreme Court in the Muruatetu case in the following paragraphs: -

"[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:

GUIDELINE JUDGMENTS

Where there are guideline judgments, that is, decisions from the superior courts on a sentencing principle, the subordinate courts are bounded 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."

14. In **Isaac Kimanzi Musee & 2 others v Republic [2019] eKLR** the Court suggested that in the spirit of uniformity and fairness, emerging jurisprudence support the view that in sentence re-hearing in robbery with violence cases, the starting point should be 14 years. This is informed by the fact that the felony of robbery, which is a lesser offence than robbery with violence, attracts a term of imprisonment of 14 years.

15. In this case the applicants herein have been in custody for the last sixteen years and at the time of their sentence, they were first-time offenders. I find it prudent to therefore set aside the death sentence meted upon them.

16. While in prison, the 1st Applicant has been rehabilitated and the report from the correctional service show that the 1st Applicant has reformed and rehabilitated in many ways including that he regrets his actions and is remorseful; he is of good temperament and has acquired skills as motor vehicle mechanic. He has learnt his lesson and is capable of restoration into society. I also note that he was not said to have hit the victim. I therefore find that the period he has been in custody that is, about 15 years constitutes appropriate sentence in the circumstances of this case. As a result, he shall be set free from custody unless otherwise lawfully held. It is so ordered.

17. As for the 2nd Applicant the report from the Prison Department is negative and shows that he has not been rehabilitated as he has been engaged in prison offences ranging from incitement to mutiny to use of abusive language and to being in possession of unauthorised articles. The report opines that he is not fit to return to the society. I also note that he is the one who hit the victim of the offence herein inflicting him injury and pain. Nonetheless, the execution of the offence does not warrant death penalty. I am aware the sentence was commuted to life imprisonment by the President under prerogative of mercy. And, taking all factors into account, I find a jail term of 25 years to be most appropriate in the circumstances. I therefore set aside the death penalty and sentence the 2nd Applicant to serve a jail term of 25 years with effect from 15th February, 2004. It is so ordered.

Dated Signed and delivered at Meru in open court this 18th December, 2019

F. GIKONYO

JUDGE

In presence

1st Petitioner/Applicant – present

2nd Petitioner/applicant – present

Maina for respondent

F. GIKONYO

JUDGE