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| Court:   | High Court at Kitale                                |
| Case Action:   | Ruling  |
| Judge:   | Luka Kiprotich Kimaru                               |
| Citation:  | Musa Wanjala Ndiwa & another v Republic [2021] eKLR |
| Advocates:   | -   |
| Case Summary:  | -   |
| Court Division:  | Criminal  |
| History Magistrates:   | -   |
| County:  | Trans Nzoia   |
| Docket Number:   | -   |
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| Case Outcome:  | -   |
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| Representation By Advocates:   | -   |
| Advocates For:   | -   |
| Advocates Against:   | -   |
| Sum Awarded:   | -   |
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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**CRIMINAL PET. NO. 49 & 51 OF 2018**

**MUSA WANJALA NDIWA.....1<sup>ST</sup> APPLICANT**

**ANTHONY BARASA SIMIYU.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The Applicants, **Antony Barasa Simiyu** and **Musa Wanjala Ndiwa** were convicted of three charges of committing robbery with violence contrary to *Section 296(2) of the Penal Code*. The particulars of the offences were that on **27<sup>th</sup> June, 2011** at Kachibora trading centre, the applicants, jointly with others, while armed with an AK47 rifle with 25 rounds of ammunition robbed several persons, whose names appear in the charge sheet, of their valuables, and in the course of the robbery threatened to use actual violence against them. The applicants further faced possession of firearm and ammunition related offences under the *Firearms Act*. Although they were also convicted of these subsequent charges, of interest in this application is the sentence that was imposed in respect of the first three counts. The applicants were sentenced to serve life imprisonment. On appeal to the High Court, their sentence of life imprisonment was set aside and substituted with the death sentence. However, the death sentences were later commuted to life imprisonment again by Presidential Decree.

The applicants lodged appeals against the decision of the High Court to the Court of Appeal. However, before the appeal could be heard, the applicants opted to seek to be resentenced before this court pursuant to the then prevailing Supreme Court decision of *Francis Karioko Muruatetu -vs- Republic [2017] eKLR*. In that regard, the applicants withdrew their respective appeals before the Court of Appeal. They then filed their respective applications for resentencing before this court.

Both applicants stated that they have been in lawful custody since their arrest on **27<sup>th</sup> June, 2011**. They both stated that at the time of their arrest, they were breadwinners for their respective families. While in prison, they had learned several and varied trades which will enable them to be model members of the society should their applications meet favour with the court. They had reformed and would not reoffend if they are granted back their freedom. They had learnt the hard lesson that crime does not pay. They were now older and wiser - they are better persons than the persons who were incarcerated more than ten (10) years ago. They pleaded with the court to give them a second chance at life. They were extremely remorseful. They attributed their past behaviour to alcohol abuse.

Mr. Omooria for the State pointed out that the charges facing the applicants were serious. They deserve the sentence that was meted on them. However, he was not averse to the court exercising its jurisdiction as it deems fit in the circumstances.

In the *Francis Karioko Muruatetu* decision above, the Supreme Court declared mandatory death sentence in murder cases to be unconstitutional. The legal principle in this holding was later extended by the Court of Appeal to mandatory sentences imposed by courts in robbery with violence offences under the *Penal Code* and offences under the *Sexual Offence Act*. However, in a recent directions issued by the Supreme Court, the said court clarified that the guidelines in the decisions of the above case only applied to those convicted and sentenced under *Section 203 and 204 of Penal Code*. In effect the Supreme Court reversed the decisions of the Court of Appeal that had extended the reasoning in the above cases to those convicted of mandatory sentences in other types of cases.

This application was filed before the Supreme Court gave the above directions. Indeed, the application for resentencing was argued before this court on the same **6<sup>th</sup> July, 2021**, that the Supreme Court rendered itself regarding the extent of the application of the

**Muruatetu decision.** That being the case, this court holds that the applicants cannot be deprived of the benefit of the previous interpretation of the **Muruatetu decision** extending the application to those sentenced to death for committing robbery with violence offences under **Section 296(2) of the Penal Code**. This court therefore holds that it shall resentence the applicants accordingly. For the avoidance of doubt, such resentencing shall only apply to those applications for resentencing heard on or before **6<sup>th</sup> July, 2021** when the Supreme Court gave its binding directions.

On the merits of the applications, it was clear to this court that the applicants were properly convicted of the serious charge of robbery with violence contrary to **Section 296(2) of the Penal Code**. The applicants used an AK47 rifle to subdue their victims before robbing them. A saving grace in this otherwise grave situation is that the victims of the robbery were not injured. This court can only imagine what terror was visited upon the victims when a lethal weapon was pointed at them. This court agrees that the applicants were indeed convicted of a serious offence as submitted by the learned prosecutor.

The applicants have however pleaded with the court to consider their current circumstances. In the period of over ten (10) years that they have been in lawful custody, they have been reformed; they have learnt that crime does not pay; they have undertaken training in various trades that have made them better persons; those trades will make them useful members of the society if they are released from prison; they were remorseful and pleaded with the court to give them a second chance at life. This court agrees with the applicants that the sentence of life imprisonment is indeterminate and does not take into account the real possibility that the applicants may have reformed while in prison - the sentence overlooks the fact that human beings have capacity to change for the better and therefore should be given a second chance at life. For the applicants, this court formed the view that their sentence should be substituted from an indeterminate to a determinate sentence so that they can benefit from the possibility of release from prison upon completion of their sentences.


In the premises therefore, this court set aside the sentence of life imprisonment that was imposed upon the applicants and substitutes it with a sentence of **twenty-five (25) years imprisonment**. The sentence shall commence on **27<sup>th</sup> June, 2011** when the applicants were placed in lawful custody.

It is so ordered.

**DATED AT KITALE THIS 27TH DAY OF JULY, 2021.**

**L. KIMARU**

**JUDGE**

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