REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO 45 OF 2006

DAVID MWANGI WAIGWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from Conviction and Sentence in Nanyuki SRM

Criminal Case No 1066 of 2005 – E.G. Mbaya, Ag. SRM)

RULING AND RE-SENTENCING (DONE AT THE HIGH COURT AT NANYUKI)

1. The Appellant herein, **DAVID MWANGI WAIGWA**, was convicted of one count of ***robbery with violence*** contrary to **section 296(2)** of the ***Penal Code*** and sentenced to death. He informed this court that his death sentence was some time back commuted to life imprisonment by executive clemency. The Appellant was also convicted of one count of ***rape*** contrary to **section 140** (since repealed) of the Penal Code. For this offence he was sentenced to life imprisonment.

2. The Appellant's first appeal (in this appeal file) against the convictions and sentences was dismissed in a judgment dated and delivered on 02/10/2008 (Kasango & Makhandia, JJ). The court however set aside the sentence on the rape charge by dint of the principle that sentencing on the rape charge ought to have been held in abeyance, the Appellant having already been sentenced to death on the robbery with violence charge.

3. The Appellant's second appeal to the ***Court of Appeal*** was dismissed in a judgment read and delivered on 13/11/2013 in ***Court of Appeal, Nyeri Criminal Appeal No 233 of 2008***.

4. The Appellant subsequently applied to this court by ***Petition No 17 of 2018*** for re-sentencing. The application was made upon the strength of the decision of the ***Supreme Court of Kenya*** in ***Petitions Nos 15 & 16 of 2015 (Consolidated), Francis Karioko Muruatetu & Another – vs- Republic & Others (2017) eKLR.*** In its judgment dated and delivered on 14/12/2017, that apex court declared as unconstitutional the mandatory nature of the death sentence as provided for under **section 204** of the Penal Code for the offence of ***murder*** contrary to **section 203** of the same Code. The court remitted the matter back to the trial court (***High Court***) for re-hearing on sentence. The court also stated, for avoidance of doubt, that its declaration did not disturb the validity of the death sentence as contemplated under **Article 26(3)** of the ***Constitution of Kenya, 2010.***

5. By parity of reasoning, the above-stated declaration of the Supreme Court in regard to the mandatory nature of the death sentence under section 204 of the *Penal Code* no doubt applies in equal measure to the mandatory nature of the death sentence under section 296(2) of the Penal Code.

6. The High Court in its criminal appellate jurisdiction (as the first appellate court) has the same sentencing powers as the trial court. See **section 354** of the ***Criminal Procedure Code, Cap 75***. This court therefore considered it more expedient to hear the Appellant's petition for re-sentencing rather than remit the matter back to the trial court. This would save on time and possibly prevent mischief of multiple applications.

7. I have considered the submissions of the Appellant as well as those of the learned prosecution counsel. I have also seen the probation/pre-sentencing report dated 03/12/2019, which is favourable to the Appellant. Finally I have considered the circumstances in which the offences were committed. These circumstances included sexual violence (rape). The Appellant was alone, but armed with a somali sword. He did not use the sword on his victim except to threaten her.

8. The rape was committed in the course of the robbery. This was certainly an aggravating circumstance. I also note that the Appellant was not remorseful when sentenced by the trial court; nor was he remorseful at the re-sentencing hearing. Finally, I have considered that the

Appellant was in custody throughout his trial, a period of about ten (10) months.

9. The death sentence meted out to the Appellant in count I was certainly not suitable in the circumstances of this case; nor was the life imprisonment imposed for count II. He was a first offender, and everybody deserves a second chance. The sentence for count II had been set aside by this court on account of the Appellant having already been sentenced to death in count I.

10. I will in the circumstances set aside the sentence of death in count I and substitute therefor imprisonment for twenty-five (25) years. For count II I will sentence the Appellant also to twenty-five (25) years imprisonment. Both sentences shall run concurrently from the date of the original sentencing, that is, 07/03/2006. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 16TH DAY OF MARCH 2021

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 18TH DAY OF MARCH 2021