



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 242 OF 2018 CONSOLIDATED WITH 140 OF 2019

1. MICHAEL TSUMA

2. MWAWAZA BENYOKA MWATHENJE.....PETITIONERS

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT ON RESENTENCING

1. The Petitioners herein **MICHAEL TSUMA** and **BENYOKA MWATHENJE MWANANZA** were charged with the Offence of Robbery with Violence contrary to 296 (2) of the Penal Code.

2. The particulars of the offence were that **on the night of 15th December 2005, at Simakeni Village, Rabai Location in Kilifi District of the Coast Province, the accused persons together with others while armed with dangerous or offensive weapons, to wit a panga and an axe, jointly robbed Peter Sila Muindi of cash Kshs. 29,000/-, one mobile phone make siemens C50 valued at Kshs. 4,000, one charger, one radio, assorted clothes and utensils and that at or immediately before or immediately after the time of such robbery, used actual violence to the said Peter Sila Muindi.**

3. They were sentenced to death.

4. Their appeals to the High Court and to the Court of Appeal were dismissed. Their sentence was later commuted to life imprisonment.

5. The Petitioners are now in this court pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** in which the apex Court found the mandatory nature of the death sentence to be unconstitutional.

6. When the matter came for resentencing, Mr. Fedha learned counsel appeared for the State. Counsel submitted that the Petitioners were in a group of four, they were armed with dangerous weapons. Counsel submitted that the petitioners descended into the victim's house and attacked them in the presence of young children who were traumatized, shocked and utterly frightened. Counsel prayed for a definite sentence of 20 years imprisonment.

7. The 1st Petitioner (MWANAZA BENYOKA MWATHENJE) on his part submitted that he is remorseful and transformed. He has been in custody for the last 14 years through which he has undergone counseling and several rehabilitation programs and has also undertaken courses to enhance his skills. He claims to have maintained a good behavior and lived in peace with fellow inmates. He expressed that he had transformed and that he was very remorseful. He also indicated that he has developed health complications of peptic ulcers and hypertension. He prayed to be sentenced to the term that he has already served.

8. The 2nd Petitioner (MICHAEL TSUMA MWAZAMA) on his part submitted that he has nurtured his moral character; he has become a devoted christian. He has been in custody for the last 14 years and has maintained a good behavior and lived in peace with fellow inmates. He expressed remorsefulness. He also indicated that he has developed high blood pressure and is diabetic. He prayed to be sentenced to the term that he has already served.

9. I have considered the Petition and the submissions. The only issue for determination is the length of the imprisonment. The Court of Appeal in **William Okungu Kittiny v Republic [2018] eKLR** held that: -

“...the sentence of death under Section 296 (2) and Section 297 (2) of the Penal Code is 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.”

10. The Court of Appeal in **Thomas Mwambu Wenyi v Republic [2017] eKLR** cited the decision of the Supreme Court of India in **Alister Anthony Pereira v State of Maharashtra at paragraph 70-71** where the court held the following on sentencing: -

“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.”

11. In **Douglas Muthaura Ntoribi v Republic, Meru High Court, Misc. Criminal Appeal No. 4 of 2015** the robbers while armed with a panga stole Ksh. 500/= from the victim and occasioned him minor injuries. Chitembwe J. substituted the death sentence with a prison term of 5 years.

12. In this case the Petitioners have transformed and are remorseful. The Prosecution counsel pointed out the aggravating factors to be the use of dangerous and offensive weapons in the form of pangas and an axe. Though they did not injure the victim.

13. The Petitioners have already served 14 years in prison. In my consideration of the aggravating factors and the mitigating factors, the Petitioners have spent sufficient time in prison. I therefore sentence the Petitioners to the time served. The petitioners are hereby set at liberty, and forthwith released from prison unless they are otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 18TH DAY OF MARCH, 2021.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Petitioners in person

Mr. Fedha for the DPP

Ms. Peris Court Assistant