



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R, MWONGO, J)

CRIMINAL APPEAL NO. 30 OF 2017

GEORGE MBAYA GITHINJI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment dated 30th May 2017 by Hon P Gesora Chief Magistrate in CMCR Case No. 934 of 2015, Naivasha,)

JUDGMENT ON SENTENCE

1. In the lower court, the 3rd Accused herein was found guilty of robbery with violence, convicted and sentenced to death. The lower court failed to conduct a sentence hearing mitigation merely as follows:

“Mitigation : Nil.”

2. On appeal this court upheld the conviction (See HCCRA No. 30 of 2017), and determined that sentencing was improper and must be re-done. This court stated at paragraph 28 as follows:

“28. I note that the trial court failed to avail the appellant his full trial rights; did not hold a sentencing hearing and applied the mandatory provisions of section 296 (2) Penal Code without giving any consideration to mitigating circumstances.

31. To the extent that it was only the sentencing that was not conducted by the trial court in accordance with the guidelines under Muruatetu, the appeal herein succeeds.”

3. The court then stated at paragraph 33 (c):

“c. This Court shall conduct sentencing hearing, considering all relevant matters and sentence the Appellant afresh.

4. The appellant was directed to file mitigation submissions, which he did on 14th October, 2020. Similarly, the Probation Officer was directed to file a pre-sentence report on the appellant. The Probation Report was filed on 18th December, 2019.

5. The judgment of this court on the appeal set out the mitigation factors relevant for consideration based on the guideline in the case of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR**. These bear repeating as follows:

“(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.”

6. Applying these criteria the Appellant:

- a) Age - 42 years.
- b) First offender - Yes
- c) Appellant pleaded not guilty.
- d) Character and record of offender. See below.
- e) Commission of offence in response to Gender Based Violence - No.
- f) Remorsefulness - He insists he did not commit offence.
- g) Possibility of reform - see below.
- h) Probation Officers Pre-sentencing Report - Availed and duly considered.
- i) Any other factors the Court considers relevant:
 - 1) Victim's views could not be captured as they could not be traced.
 - 2) Appellant was an average student but could not proceed to high school due to financial constraints.
 - 3) Appellant was arrested and in custody from 10th June, 2015 (2 years) to conviction, which period should be taken into account pursuant to **Section 333 (2)** of the **Criminal Procedure Code**.
 - 4) Appellant was convicted on 30th May, 2017.

7. With regard to possibility of reform and social re-adaptation of the appellant, the Probation Officer's Report merely indicates that the Prison authorities describe the Appellant as "*cool and a well behaved man. He has never had a negative report against him while in prison*". The Report further found that he has a good social record and recommended that the appellant "*may be given a chance to play his social economic responsibilities in society*". There was no concrete indication of the rehabilitation he has undergone nor was there a recommendation for a rehabilitative probationary programme. This deals equally with the character and record of the appellant.

8. The mandatory sentence for robbery with violence under **Section 296 (2)** of the **Penal Code** is death. The jurisprudence emanating from the **Muruatetu** case declares as unconstitutional the mandatory death sentence, and decrees that mitigation obliges application of judicial discretion. In light thereof this court has discretion in sentencing for robbery with violence.

9. As shown in the authorities cited in the earlier judgment in this case, which I need not to repeat here, the range of sentences in robbery with violence is roughly between about 15 years to about 30 years imprisonment.

10. Taking all the foregoing matters into careful consideration, and noting the violent nature of the acts committed at the time of the offence, I am of the view that a custodial sentence is the appropriate sentence to mete here.

11. Accordingly, I sentence the Appellant to twenty (20) years imprisonment, which term shall commence on the date of the appellant's first incarceration.

Administrative directions

12. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

13. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

14. Orders accordingly.

Dated and Delivered in Naivasha by teleconference this 29th Day of April, 2021.

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Ms Maingi for the State
2. George Mbaya Githinji - present in person in Naivasha Maximum Prison
3. Court Assistant – Quinter Ogutu