



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

HIGH COURT CRIMINAL MISC. APPLICATION NO. 58 AND 59 OF 2018

(CONSOLIDATED)

WAMBUA DOMINIC.....1ST APPELLANT

KITONGA MAITHYA MANGA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an application for re-sentencing from **Judgement** in Kitui **HC.CR. Appeal No. 6 'A' and 6'B' of 2016** (Consolidated) delivered on **6th day of September, 2016** by **Hon. Lady Justice L.N. Mutende-Judge**)

R U L I N G

1. **Wambua Dominic** and **Kitonga Maithya Manga**, the 1st and 2nd Applicants respectively, are both before this court on an application for re-sentencing. Their applications though undated, were both filed on **26th September, 2018** and have been consolidated in this application for purposes of hearing and determination.

2. The Applicants were jointly charged with the offence of robbery with violence Contrary to **Section 296 (2) vide Kitui Chief Magistrate's Court Criminal Case number 65 of 2012.**

The particulars of the offence as per the charge sheet are that both the Applicants jointly while armed with offensive weapons namely pangas, rungas, knives, torches and metal bars robbed Carol Charles of assorted goods worth Kshs. 50,000 and or immediately the time of such robbery used actual violence to the said Carol Charles the Complainant in the trial.

3. The record of proceedings from the trial court shows that after trial both the Applicants were found guilty of the charge of robbery with violence and convicted. Each was sentenced to death as provided by law.

4. The Applicants felt aggrieved and filed appeals vide **Criminal Appeal Number 6A and 6'B' of 2016** respectively which were consolidated and heard together. Their appeals were disallowed for lacking in merit and dismissed. They both filed notice to appeal but have indicated that they no longer wish to pursue an appeal in the Court of Appeal. They have applied to this court, asking this to re-sentence them following the Supreme Court's decision in the case of **Francis Karioko Muruatetu (2017) eKLR**. They have also each given different reasons for their application and this court will consider them as presented.

5. For the 1st Applicant, Wambua Dominic, he claims that he was a first offender and has reformed. He states that, for the last seven years in prison he has been of good conduct and has not been found on the wrong side of the law or disobeying prison regulations.

6. He further expresses his remorsefulness saying he regrets his past deeds which he blames on drugs and his youthful age. He says he is now 28 years old and has learnt his lessons.

7. He also claims that, the complainant has since forgiven him and that she is a neighbour and has visited him in prison several times, bringing clothes and taking care of his family.

8. Kitonga Maithya, the 2nd Applicant on his part is asking for leniency from this court stating that, he was drunk when he committed the offence. He states that he is now 32 years old and has been in custody for the last 10 years since he was arrested. He urges this court to be

lenient with him, since the Complainant has since forgiven him and that she usually visits both of them in prison.

9. The Respondent, through the office of Director of Public Prosecution has indicated that it is not opposed to the Application in respect to the 1st Applicant but has urged this court to consider the fact that there is no social inquiry to demonstrate that he has reformed and whether the victim has forgiven him.

10. In respect to the 2nd Applicant, the Respondent states that in view of the favorable probation report, it is not opposed to the application to resentence him.

11. This court has considered both applications. It is true that when the Applicants were convicted in 2014, the legal position was that, where the law prescribed a mandatory sentence, the trial court's hands were tied as it could only mete out the prescribed sentence. That position has since changed with the Supreme Court decision in the case of *Francis K. Muruatetu (2017) eKLR*. It is on that basis, that the Applicants have approached this court for re-sentence. I have considered their pleas and I note that though the Probation Officer only managed to file one social inquiry report in respect to the 2nd Applicant, it is apparent that the victim appears to have healed and forgiven the Applicants. However, that is not the only consideration in re-sentencing. I am not persuaded that the Applicants have fully reformed because they have not demonstrated that they have undergone any rehabilitation programme while in prison and this court takes Judicial Notice of the fact that are many such programs in correctional facilities which have tremendously transformed and reformed convicts while in jail. Though both the Applicants appear remorseful, they appear young and still in need of rehabilitation to make them transform and learn useful trades/skills which will endear them well when they are eventually out in order to be useful citizens, not only to their respective families but the community as well.

12. This court having taken everything into consideration finds merit in the application presented before me. The death sentences meted out against the Applicants on 30th April, 2014 is hereby set aside. In their place, both the Applicants are sentenced to 15 (fifteen) years each in prison and this shall run from 30th January, 2012 when their plea was taken in court and placed in custody.

DATED, SIGNED AND DELIVERED AT KITUI THIS 29TH DAY OF APRIL, 2021.

HON. JUSTICE R. K. LIMO

JUDGE