



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

PETITION NO. 173 OF 2019

VICTOR OGESA SAMUNYU.....PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT ON RESENTENCING

1. The Petitioner was convicted on four counts of the offence of Robbery with violence contrary to Section 295 as read with 296(2) of the Penal Code and sentenced to death in Mombasa Cr. Case No. 2062 of 2008. He appealed in Mombasa HCCRA No. 96 of 2010 and his Appeal was dismissed and sentence upheld.

2. The Petitioner has now petitioned this Court for review of sentence in view of the Supreme Court declaration in **Francis Kariokor Muruatetu & Another v Republic SCK Pet. No. 15 of 2015 [2017] eKLR** in which the apex court found the mandatory nature of the death sentence to be unconstitutional.

Brief Circumstance of the offence

3. The particulars are that on the night of 23/6/2008, at Kiembeni hillside estate within Bamburi village in Mombasa, the Petitioner jointly with others not before Court, while armed with dangerous weapons namely pistols, robbed **Obuya Otieno Ritzau** and 3 other victims of their mobile phones, bracelets, watches, household items and ATM cards, and immediately before or immediately after the robbery threatened to use actual violence to the said victims.

4. The Petitioner submitted he has been in jail for the last 13 years, and in those years spent in jail, he is reformed and he is remorseful and regrets his actions. The Petitioner further submitted that he has paid his debt to the society, and promises not to indulge himself in any Criminal activities in future.

5. **Ms. Anyumba** for the prosecution submitted that taking into account the circumstances of the case, and the fact that the Petitioner and his accomplices engaged in a spate of robberies, a deterrent sentence of 20 years including time served in prison would be appropriate.

6. I have considered the petition, the submissions by the Petitioner and the D.P.P. Sentencing is a discretion of the trial court. In **Ambani v Republic [1990] KLR**, Bosire J. (as he then was) stated that a sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and that the Court should look at the facts and the circumstances of the case in its entirety before settling for any given sentence.

7. Section 333 (2) of the Criminal Procedure Code requires a sentencing court to take into account the period spent in custody awaiting trial.

8. I have now considered the mitigating and aggravating circumstances in the case. In my view, the nature of this robberies do not call for invocation of the death penalty. Further, it is noteworthy that no actual violence was meted on the Petitioner's victims during the said robberies.

9. I have also considered the sentences imposed in some other cases where convicts of robbery with violence were re-sentenced after the Supreme Court decision in the *Muruatetu case*. In **Wycliffe Wangugi Mafura v Republic Eldoret Criminal Appeal No. 22 of 2016 [2018]** the Court of Appeal imposed a sentence of 20 years' imprisonment where the appellant was involved in robbing an Mpesa shop agent with the use of firearm but no actual injuries were inflicted on the victim. However, the Petitioner was on the same night involved in a spate of robberies. He is a person most likely to continue with his crime and he needs to be given a stiff sentence which makes him appreciate his crimes.

10. In conclusion, and in consideration of the fact that the victim was injured and lucky to get away with his life, this Court substitutes the death sentence herein, and hereby sentences the Petitioner to serve a jail term of twenty two (22) years from the date of arrest.

That is the Judgment of the court.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF APRIL, 2021.

E. K. O. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Petitioner in person

Ms. Wanjohi for DPP

Ms. Peris Court Assistant