REPUBLIC OF KENYA

IN THE HIGH COURT OF KITUI

HIGH COURT CRIMINAL APPEAL NO. 19 OF 2019

NICHODEMUS NZUKI MUTINDA.............APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(Being original conviction and re-sentence in Criminal Case no. 1429 of 2018 at

Kitui –CM's Court, by Hon. S. Mbungi-CM)

J U D G E M E N T

1. **Nichodemus Nzuki Mutinda**, the Appellant herein was charged with the offence of **Robbery with violence** Contrary to **Section 296(2) of the Penal Code** vide *Kitui Chief Magistrate's Court Criminal Case No. 1429 of 2018*. The particulars as per the charge sheet were that on 26th April, 2005, at around midnight at Ithiku sub-location, Mutitu jointly with others not before court while armed with offensive weapons namely pangas, bows and arrows, robbed **KAKUU MUVEVA** her Kshs. 200,000 in cash and at or immediately before the time of such robbery used actual violence to the said **KAKUU MUVEVA**.

2. He also faced a second count of assaulting the same victim on the same day.

3. The record from the trial court indicates that, the Appellant upon trial was found guilty and sentenced to serve death sentence in *Count I* and 2 years' imprisonment in *Count II*.

4. He was dissatisfied with the conviction and sentence and preferred an appeal vide *Machakos High Court Appeal No. 91 of 2006*. His appeal was unsuccessful as the court upheld the death sentence, in view of the then mandatory nature of the sentence prescribed under ***Section 296 (2)*** *of the* ***Penal Code*****.** The 2 years sentence in respect of the 2nd count of assault was suspended in view of the capital punishment in respect of count 1.

5. This court was unable to establish from the record, whether the Appellant made attempts to appeal to the Court of Appeal but what is apparent is that following the now famous decision of the Supreme Court in the case of ***Francis Karioko Muruatetu (2017) Eklr,*** the Appellant successfully applied for re-sentence vide *Kitui High Court Criminal Miscellaneous Application* number *112 of 2018*. The High Court sitting in Machakos directed that the matter be placed before the trial court for resentence and the trial court on 24 th November, 2019 duly resentenced him to 30 years' imprisonment and the trial court expressly directed that sentence would be counted from 31 st July, 2006 when he was convicted.

6. The Appellant was aggrieved with the sentence and preferred this appeal raising the following grounds namely: -

(i) That his mitigation was not considered.

(ii) That the trial court re-sentenced him without considering the probation report.

(iii) That the sentence meted out, was harsh and cruel.

(iv) That the circumstances of his case was not considered particularly, that he was a first offender and young at the time.

(v) That he has reformed and should be given a chance to have a fresh start.

7. The Respondent opposed this appeal and stated that the grievances expressed by the Appellant had no basis since everything alleged was considered by the trial court. The Respondent also felt that the Appellant was not remorseful and that the social inquiry was not binding to

the trial court.

8. This court has considered this appeal and the response made. The Appellant has been in court corridors for fairly a long time. He says, he has been in prison for more than 12 years. As a matter of fact, by July this year, he will have served 15 years in jail. It is expected that after such a period of time a convict would have reformed and transformed after many rehabilitation programs undertaken by Kenya Prisons Service. This court takes Judicial Notice of many success stories from Kenya Prisons' Service that have seen many prisoners, make great strides in their rehabilitation and transformation. The Appellant herein, presented no evidence of any transformation before the trial court, before he was re-sentenced. He showed no sign of remorsefulness for the offence he committed.

The trial court exercised its discretion and resentenced him to 30 years' imprisonment. He says that the sentence was harsh and cruel but he does not show any remorsefulness for the cruelty visited upon his victim. This court notes from the probation report tabled before the trial court that the victim and her family are still bitter, which shows that the Appellant has not taken any steps to reconcile with them or even reflect on the fact that he offended an innocent person. I am not persuaded that the sentence meted out against the Appellant was harsh in anyway given the circumstances.

9. This court finds no basis to interfere with the discretion of the trial court because the same was exercised judiciously. The trial court considered the mitigation of the Appellant as per the record of proceedings. I agree with the Respondent that, even though the probation report recommended a lesser sentence and non-custodial one at that, that recommendation was not binding to the trial court.

I have looked at the social inquiry report which as I have observed above, shows that the victim impact assessment was quite averse to the Appellant and perhaps that is what informed the trial court in meting out a prison term of 30 years.

Again as observed above, the trial court duly exercised its discretion and meted out a sentence which I find appropriate and fair in the circumstances. This court finds that this appeal lacks merit.

The Appellant should be informed that the sentence prescribed by the law for the sort of offence he committed, is death sentence and so the 30 years' imprisonment he was given is lenient given the nature of the offence and the circumstances obtaining.

This appeal is disallowed. The sentence meted out on re-sentence is upheld.

DATED, SIGNED AND DELIVERED AT KITUI THIS 27TH DAY OF APRIL 2021.

HON. JUSTICE R. K. LIMO

JUDGE