



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J)

MISCELLANEOUS CRIMINAL APPLICATION NO. 40 OF 2019

SNW.....1ST APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

MISCELLANEOUS CRIMINAL APPLICATION NO. 48 OF 2019

SMK.....2ND APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

Background

1. The 1st and 2nd Applicants were charged in the lower court in Criminal Case No. 3293 of 2011 with the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**.
2. The brief particulars of the case were that the two accused on the night of 5th and 6th November, 2011 at [particulars withheld] Village, Engineer Location in Nyandarua County, jointly while armed with knives robbed Francis Mwangi Kio and Victoria Lucy Kio of mobile telephones and household all goods valued at Kshs 82,930/=, as indicated in the charge sheets. In the process of the said robbery that they used actual violence upon Francis Mwangi Kio and Victoria Lucy Kio.
3. There was an alternative charge of handling stolen property in respect of the said robbery. Both applicants were found guilty on 22nd February, 2013 and sentenced to death on 28th February, 2013.
4. The 2nd accused SM, being at the time of the commission of the offence 17 years old, was ordered to be detained at the President's pleasure.
5. Both applicants filed appeals against their convictions and sentences. The 1st Applicant in HCCRA No. 29 of 2013; and the 2nd Applicant in HCCRA 28 of 2019 Nakuru. Both appeals were transferred to Naivasha and were consolidated and renumbered HCCRA No. 88 of 2015. The appeals failed vide judgment rendered on 13th April, 2017 by Meoli J.
6. They then filed appeals in the Court of Appeal. While those appeals were pending, the applicants filed the present applications for re-sentencing. This court declined to hear the applications as that would amount to a parallel process with that proceeding in the Court of Appeal.
7. Accordingly, both applicants filed notices of withdrawal of their separate appeals in the Court of Appeal so as to pursue the present applications. The acknowledgment of the withdrawal by the Court of Appeal Deputy Registrar is dated 22nd January 2021, and filed on 28th January, 2021.

8. The applicants were directed to file their submissions which they did. Equally Probation Officer's Reports and Reports from Prisons Services on each of the applicants were filed as directed.

1st Applicant's Case

9. The 1st Applicant's case is that the death sentence was meted upon him by the subordinate court without considering the mitigation in contravention of Section 216 and 329 of the Criminal Procedure Code. Further that the sentence does not accord with the principles established by the Supreme Court Case of **Francis Karioko Muruatetu & Anor. v. Republic [2017] eKLR**. Finally, that there was failure to consider the **Judiciary Sentencing Police Guidelines, 2016**. The 1st Applicant further prays that the court considers circumstances of the offence, and that no witness was injured during the robbery. He seeks a lenient sentence.

2nd Applicant's Case

10. Through his prolix and rather convoluted application, supporting affidavit and submissions, the 2nd Applicant, in substance, challenges the imposition of the sentence of undefined nature and duration at the President's pleasure. He urges that this offends **Article 53 (f) (2)** and **37 (e)** of the **Constitution**.

11. They now rely entirely on the jurisprudential crack pried open by the **Muruatetu** case, and subsequent authorities. In essence, in this regard, **Muruatetu** held as follows:

“First that the death penalty per se is not unconstitutional.

That where the death penalty is provided for as a mandatory sentence, it is unconstitutional to mete such sentence without granting an accused a full hearing on mitigation.

Second that in taken consideration of all mitigating circumstances, the trial court has to exercise discretion as to the appropriate sentence to mete, and;

Thirdly, that among the consideration to be taken into account on meting sentence are the sentencing policy guidelines including the guidelines set out by the Supreme Court in that case.

Fourthly, for avoidance of doubt, the death sentence was nto declared unconstitutional.”

12. Subsequent numerous authorities have extended the principles in the **Muruatetu case** to other capital offences viz robbery with violence and sexual offences. See **Dismas Wafula Kilwake v Republic [2018] eKLR** (Sexual Offences); **William Okungu Kittingy v Republic [2018] eKLR** (Kisumu) (Robbery with violence).

13. As for the 2nd Applicant, there is the further question as to whether the imposition of an indeterminate sentence at the President's pleasure is constitutional.

14. On this point, this court has previously stated that, Detention at the President's pleasure is an excessive sentence. In **HM v Republic [2017] eKLR** the court stated:

“The lengthy incarceration of such convicts erodes their human dignity provided under Article 28 of the Constitution. The appellant did not know that he ought not to have committed the act. He was mentally sick and the law acknowledges that mental status....

The sentence is now indefinite and all what the appellant has to do is to entertain the faint hope that the President's pleasure will be exercised before the expiry of 10 years. One serving such a sentence cannot be held to be serving a proper sentence. The sentence is indefinite it can be more or less than 10 years prescribed period. That situation erodes the appellant's dignity....

I do find that his detention at the President's pleasure for an unknown period is an excessive sentence”

In that case, the convict's sentence was reduced to the period already served.

15. In the end, both of the applicants are desirous of having their sentences reviewed. I have perused the trial court's record and note the mitigation proceedings on 22nd February, 2013 as follows:

“Prosecutor : Treat as a first offender (s).

1st Accused : I have nothing to say in mitigation.

2nd Accused : I am 17 years old. I am a student in Form 2.”

16. The trial court then went into discovery concerning the age of the 2nd Accused (2nd Applicant herein) and it was determined that his age was 19, or 17 at the time of commission of the offence. Thus, he was detained at President's pleasure, whilst the 1st Accused was sentenced to death on both counts of robbery with violence, the second sentence being held in abeyance.

1st Applicant's Reports

17. There is no Probation Officer's report on the 1st applicant on file. However there is a Kenya Prisons Service Report dated 6th November, 2020. The report shows that the 1st Applicant was aged 25 years at the time of conviction on 28th February, 2013; that he had served 7 years in prison; that he took full advantage of rehabilitation programmes in prison.

18. With regard to other social aspects, the report indicate that he socialized well with his teachers and other inmates, that he does metal works; that he is well behaved and has kept a clean disciplinary record.

19. The report concludes that the applicant is remorseful for the offence; that he is focused and ready to benefit for what is offered at prison; that he was visited frequently by his family prior to covid; that his family is ready to receive him and support him with tools and a role model if given a chance to rejoin society.

2nd Applicant's Report

20. A report by the Probation Officer Naivasha Sub-County dated 25th November, 2020 was filed on 25th November, 2020 in respect of the 2nd Applicant. No report was filed by the Kenya Prisons Service concerning him.

21. The DPP however did not object to re-sentencing.

22. The report shows that the 2nd Applicant was 17 years old at the time of first arrest and 19 years at the time of conviction. He was in Form 2 at [particulars withheld] Secondary School, Engineer. The report indicates the Applicant's family background: a relatively stale family with elderly parents and eight siblings, the last three of whom are in still in school.

23. The applicant was single with no dependants; uninvolved in drug and substance abuse and resided with his parents. His attitude towards the offence was remorse and he attributed his action negative to peer influence where he was lured into delinquency.

24. His family has maintained frequent contact with the applicant; and the community, through the chief, noted that the applicant had no other record of criminality although there were reports of normal minor misdemeanors. The chief felt that he can be rehabilitated and the community was not opposed to his release.

25. As for his rehabilitation, the information from the prison through the Probation Officer was that he was well behaved and had been training as an evangelist. The victims have moved on, had forgiven the accused, and had no resentment over him.

26. The Report concludes and recommends that:

“In view of the above social finding, the inmate ought to have been rehabilitated in age-appropriate institutions such as Borstal. He has been in custody for over 9 years; we therefore recommend to the court to consider releasing him for further supervision by Probation Department for 2 years.

This will enable proper integration into the community. He is a young man (26 years) who can be mentored to be a fruitful member of the society through his talent in music and evangelism.”

Summary and Conclusion

27. The applications before court are well founded and they merit the due consideration hereby given. The DPP stated that she did not object to either the 1st or 2nd Applicant's applications.

28. In light of the above considerations, I take the view that a review of the sentence of both applicants is appropriate. In particular, I note that the victims recovered the stolen goods; that although there was actual violence meted on them, including one of the complainant's being tied up, there were no physical injuries inflicted.

29. The applicants were young men who may not have fully understood the consequences of their delinquency. It is clear from their submissions that they now full appreciate the injury loss and suffering they caused to others and to themselves by their actions.

30. The sentencing procedure in this case, as in all cases, should, in my view, be fashioned along the following lines:

1. Mandatory consideration of mitigation (Muruatetu).

2. Observance of the four tier methodology for:

- a) Determination of a custodial sentence under the applicable statute.
 - b) Aggravating circumstances.
 - c) Mitigating circumstances.
 - d) Weighing and balancing aggravating and mitigation circumstances.
3. Consideration and application of Sentencing guidelines.
4. Obligatory consideration of the period spent in custody prior to sentencing pursuant to **Section 333 (2)** of the **Criminal Procedure Code**.
31. Taking all the above matters into account, I think the appropriate orders should be as follows:

- a) The 1st and 2nd Applicant are each hereby sentenced to twenty (20) years imprisonment commencing on the date of their first incarceration.
- b) Should the applicants maintain good conduct and discipline for the next three (3) years, they shall be entitled to serve a Probationary sentence up to the time of their entitlement for remission.
- c) The Probation Officer shall design their probation programme and maintain a record of their attendance thereto.
- d) Should they or any one of them fail to maintain good conduct as set out in (b) above, the probation sentence shall forthwith stand revoked.

Administrative directions

32. 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.
33. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.
34. Orders accordingly.

DATED AND DELIVERED IN NAIVASHA BY TELECONFERENCE THIS 28TH DAY OF APRIL, 2021.

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Ms Maingi for the State
2. 1st Applicant - Samuel Ndungu Wairimu - in person - in Naivasha Maximum Prison
3. 2nd Applicant - Samuel Murungi Karanja - in person - in Naivasha Maximum Prison
4. Court Assistant – Quinter Ogutu