



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CORAM: R. MWONGO (J)

PETITION NO. 1 OF 2018

SIMON NJOROGE KABUI.....1ST PETITIONER

COLLINS ANTONY HOAREAU.....2ND PETITIONER

STANLEY KARANJA MWANGI.....3RD PETITIONER

SAMMY MWANGI KINYUA.....4TH PETITIONER

ABDI CHEGE ALLI.....5TH PETITIONER

-VS-

REPUBLIC.....RESPONDENT

JUDGMENT

1. At the commencement of this matter, the Petitioners were all prisoners serving life sentences for robbery with violence. The record shows that, subsequently, Simon Njoroge Kabui (Petitioner No.1), Stanley Karanja Mwangi (Petitioner No.3), Sammy Mwangi Kinyua (Petitioner No.4) and Abdi Ali Chege (Petitioner No.5) were released from prison. Their interest in the petition ceased.

2. Collins Anthony Hoareau, the remaining petitioner, seeks re-sentencing, his appeals in the High Court and Court of Appeal having been dismissed. He was first convicted in Naivasha CMCR No. 1052 of 2001. His life sentence was commuted by the President to life imprisonment in 2009. He was 20 years old when convicted and has spent over nineteen years in prison.

3. The petition is premised on the principles of resentencing established by the case of **Francis Karioko Muruatetu & Anor. v. Republic [2017] eKLR**. The State is not opposed to the petition and application for re-sentencing.

4. As directed by the Court, the applicant filed mitigation submissions. Similarly, the Probation Officer filed a Probation Report establishing the Petitioners suitability for re-sentencing, as did the Kenya Prisons Service.

5. In his submissions, the petitioner has expressed his remorse and rehabilitation inter alia, in the following words:

“My Lordship, the events of the day remain very clear in my mind, I admit I really caused pain to the complainants and their family. I personally ask for forgiveness from the complainants for my actions which caused the pain and embarrassment. I have also forgiven myself and asked God to forgive me too. I have actually given my life to God through accepting his salvation and now I preach the same through churches and my writings.

My Lordship, I believe in the power of forgiveness to allow healing. I have done all what is humanly possible to make good out of this bad situation. I am truly remorseful and my heart bleeds with all the tears and the material loss of the complainant and his family. I hope he found fever in my apology and forgave me.

I have regretted all that I did all those years ago. I have been in prison and I can say I have learned a better lesson. I wish I could take back time this event when it happened I was a young man in my teens and under the influence of alcohol and hard drugs.

There is nothing much I can do about the past but my Lord, I can use the future to re-correct the wrong I have done and teach others the value of living an upright life of Godliness and integrity.

My Lordship, I kindly request you to look into my case and somebody who had lacked direction and now after 19 years I was able to see my wrong corrected it and how in need of second chance in life so as I can use the remaining years of my life teaching others the lessons I have painfully learned.

I caused a lot of agonies to the family of the complainants and my family too. I need a chance to re-correct this.

As earlier mentioned, I the applicant realized that the longest journey in one's life is the journey to rediscovering themselves. In the period I have been in custody first decided to make peace with myself and with God. It was hard at first because the guilty over what happened kept haunting me but through constant counselling from the church and other life mentors there accepted myself.

I felt that there was need to use my time in prison constructively to better myself and also reach out to fellow colleagues in prison to mentor and motivate them to better their lives while in custody and use skills that are available I the vocational courses to the community when they are released."

6. The petitioner seeks to be treated as a first offender.

7. In his report, the Officer-in-Charge of Naivasha Maximum Security Prison states:

"The inmate is remorseful and regrets for what he did, he has learnt this through a hard way by the long stay in prison. He is ready to re-integrate back to the family and has great hopes of getting support from his mother and immediate family. With the skills he has achieved he can be able to depend himself and be useful to the society. I propose that he be given consideration."

8. Further, the Prisons Report shows that the petitioner has kept a good record of discipline, has not committed any offence and has taken advantage of rehabilitation programmes offered by the Prisons Service. These include training in computers.

9. The Probation Officer's Report is a social enquiry report. It covers the Petitioner's family background, personal profile and several other matters. Under the head community attitude the report states that he is not known in his home area as he was imprisoned a long time ago. The petitioner's attitude is one of remorse. The report states that he has been receiving visits from his family and that they are ready to receive him back.

10. The Probation Report concludes:

"Before his arrest and imprisonment, he had just completed his secondary education and he was working for the complainant as an assistant technician in satellite installation.

He was single with no children.

During the interview, the inmate pleaded for leniency saying that incarceration has transformed him to an informed and responsible person.

The inmate pleaded with the court to release him on account of the 19 years he has been in custody. He has a passion to raise his own family.

The family is positive about him and will support his resettlement."

11. The Probation Officer has made a positive recommendation that the court should:

".....consider the 19 years of his stay in custody, and review his sentence to a Probation Order sentence of two years."

The report indicates that the Probation Department will ensure his full reintegration into society.

12. I have taken the reports and mitigation submissions into account. I have also considered the Judiciary Sentencing Policy which indicates the sentencing objectives at Paragraph 4.1 as follows:

"1. Retribution: To punish the offender for his/her criminal conduct in a just manner.

2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.

4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.

5. Community protection: To protect the community by incapacitating the offender.

6. Denunciation: To communicate the community's condemnation of the criminal conduct."

13. In 2001, it was taken for granted that, under **Section 295 and 296** of the **Penal Code**, the automatic sentence for conviction for robbery with violence was the death sentence. **Section 296 (2)** of the **Penal Code** provides as follows:

"If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death." (Emphasis added)

The death sentence was meted without further thought because of the obligatory and mandatory wording of the section. In light of the new paradigm instituted since the advent of the **Muruatetu Case**, however, Kenyan jurisprudence now requires that where a death sentence is to be meted, the court must take into account mitigating circumstances and then exercise its discretion to mete sentence in light of the mitigation.

14. Although the **Muruatetu Case** concerned the capital offence of murder, its principles have been adopted for the capital offence of robbery with violence. This was first stated in **William Okungu Kittiny v Republic [2018] eKLR** where it was stated:

"The appellant was sentenced to death for robbery with violence under Section 296 (2). The punishment provided for murder under Section 203 as read with Section 204 and for robbery with violence and attempted robbery with violence under Section 296 (2) and 297 (2) is death. By Article 27 (1) of the Constitution, every person has inter alia, the right to equal protection and equal benefit of the law. Although the Muruatetu's case specifically dealt with the death sentence for murder, the decision broadly considered the constitutionality of the death sentence in general.

In the Mutiso case which was affirmed by the Supreme Court, the Court of Appeal said obiter that the arguments set out in that case in respect of Section 203 as read with Section 204 of the Penal Code might apply to other capital offences. Moreover, the Supreme Court in paragraph 111 referred to similar mandatory death sentences.

[9] From the foregoing, we hold that the findings and holding of the Supreme Court particularly in paragraph 69 applies mutatis mutandis to Section 296 (2) and 297 (2) of the Penal Code. Thus, the sentence of death under Section 296 (2) and 297 (2) of the Penal Code is a discretionary maximum punishment." (Emphasis added)

15. The present case is a perfect example of a case where, based on the new jurisprudence, the court must grant the petitioner/inmate his constitutional right to be heard on mitigation and to be given a sentence that is appropriate in light of the mitigating circumstances.

16. In this case I have, in particular, taken into account that the petitioner has expressed his remorse; was only teenager when he committed the offence; and has now spent more than half his life in prison. There is clear evidence that he has rehabilitated and therefore that the objectives of sentencing have been achieved.

17. Accordingly, taking the mitigation and all other matters into account, I accept the recommendation of the Probation Officer and order and direct as follows:

1. The petitioner's sentence is hereby truncated to the extent that the petitioner shall, forthwith, serve a two (2) year Probation Sentence in a programme designed by the Probation Officer, inter alia, for his Rehabilitation and Reintegration.

2. The Probation Officer shall maintain a record of the said programme and of the petitioner's attendance thereto. Should the court require to see the said programme and record of the petitioner's attendance, the same shall be availed forthwith.

Administrative directions

18. 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.

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

20. Orders accordingly.

DATED AND DELIVERED IN NAIVASHA BY TELECONFERENCE THIS 22ND DAY OF APRIL, 2021.

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Ms Maingi for the Respondent
2. Collins Antony Hoareau - the Petitioner in Naivasha Maximum Prison
3. Court Assistant - Japheth Maramba