



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

PETITION NO. 214 OF 2018 CONSOLIDATED WITH 187,208 OF 2019

1. SHEM ABIENDA OMONDI

2. JACOB MUKUNGA

3. STEPHEN MUIRURI.....PETITIONERS

VS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT ON RESENTENCING

1. The Petitioners herein **SHEM ABIENDA OMONDI, JACOB MUKUNGA, STEPHEN MUIRURI** were charged with the Offence of Robbery with Violence contrary to 296 (2) of the Penal Code.

2. The particulars of the offence were that **“on the 4th day of October 1998 at railway round about in Mombasa District within Coast Province, jointly with others not before the court, while armed with dangerous weapons namely knives, robbed JOHN MWANIKI MWANGANGI of cash Kshs.5,000/-, national identity card, money link card, one bag with two speakers and assorted clothes all valued at Kshs.20,000/=, and at or immediately before or immediately after the time of such robbery used actual violence on the said JOHN MWANIKI MWANGANGI.”**

3. The Petitioners were convicted and sentenced to death. They Appealed to the High Court which by its decision rendered on the 8th day of October,2001 dismissed their appeals.

4. The Petitioners are now in this court pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** in which the apex Court found the mandatory nature of the death sentence to be unconstitutional.

5. When the matter came for resentencing, Ms. Wanjohi learned counsel appeared for the State. Counsel submitted that the Petitioners were armed with dangerous weapons namely knives. They strangled the complainant without killing him then stabbed him on the forehead. Counsel submitted that the petitioners had served 21 years in prison. Counsel prayed for a definite and deterrent sentence of 35 years' imprisonment including years served.

6. The Petitioners on their part submitted that they have been in custody for the last 22 years through which they have reformed. They claim to have maintained a good behavior and lived in peace with fellow inmates.

7. I have considered the Petition and rival submissions. The only issue for determination is the length of sentence to be imposed. The Court of Appeal in **William Okungu Kittiny v Republic [2018] eKLR** held that: -

“...the sentence of death under Section 296 (2) and Section 297 (2) of the Penal Code is discretionary maximum punishment. To the extent that Section 296 (2) and 297 (2) of the Penal Code provides for mandatory death sentence the Sections are inconsistent with Constitution.”

8. The Court of Appeal in **Thomas Mwambu Wenyi v Republic [2017] eKLR** cited the decision of the Supreme Court of India in **Alister Anthony Pereira v State of Maharashtra** at paragraph 70-71 where the court held the following on sentencing: -

“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for

the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.”

9. The Judiciary Sentencing Policy Guidelines lists the objectives of sentencing at page 15 paragraph 4.1 as follows:

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

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

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

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.

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

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

10. In this case the Petitioners were first offenders; they have transformed and are remorseful. The Prosecution counsel pointed out the aggravating factors to be the use of dangerous and offensive weapons in the form of a knife. The petitioners injured the victim on the forehead.

11. The Petitioners have already served 22 years in prison. In my consideration of the aggravating factors and the mitigating factors, the Petitioners have spent sufficient time in prison. I therefore sentence the Petitioners to the time served. The petitioners are hereby set at liberty, and forthwith released from prison unless they are otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 19TH DAY OF APRIL, 2021.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Petitioner in person

Ms. Wanjohi for the DPP

Ms. Peris Court Assistant