



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J)

MISCELLANEOUS CRIMINAL APPLICATION NO. 29 OF 2019

SAMMY MURUNGU WAIHARO.....APPLICANT

-VERSUS-

REPUBLIC.....PROSECUTOR

JUDGMENT ON SENTENCING

1. The Applicant was charged and convicted with the offence of robbery with violence contrary to **Section 296 (2)** as read with **Section 296 (3)** of the **Penal Code**. He was sentenced to death on 30th July, 2015. He has therefore served almost six years of his sentence in prison.

2. The particulars and brief facts are that the Applicant with four (4) others, on 11th October, 2012 at Karai, Naivasha, armed with an AK 47 rifle robbed Daniel Otieno Onyango (Count 1 and 2), Nicholas Murimi Kagundu (Count 3 and 4); Samuel Mbuthia Wangombe (Count 5, 6, & 7); Catherine Anwa Tera (Count 8). Three of the accused were acquitted.

3. The robbery occurred when a matatu ferrying the victims as passengers was carjacked by the applicant and his co-accused. It was about 10.00pm at night and the vehicle had stopped for a passenger to disembark when it got stuck in the mud. The attackers struck and stole from the victims various items including mobile phones and other items and cash ranging from Kshs 700/= to Kshs 9,999/= some of which were individually worth upto Kshs 1,400,000/=. In the process, the attacker threatened to use violence.

4. Immediately after their conviction, mitigation took place as follows:

“Koima (prosecutor) : No record.

1st Accused (Applicant) : I pray for leniency. I have a family.

Court : Mitigation noted. The only penalty known to law for the offence is death sentence. The accused is sentenced to death.”

5. The Applicant’s appeal in the High Court in HCCRA No. 125 of 2015 was unsuccessful following a judgment by Meoli J on 22nd September, 2017. He appealed to the Court of Appeal in Criminal Appeal No.109 of 2017, which he then withdrew to pursue the re-sentencing application herein. He appointed Mr. D. Gichuki as his counsel.

6. It is clear that the mitigation in this case was not done as required following the jurisprudence enunciated in the case of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR**. The string of authorities spawned by **Muruatetu** hold that an accused person has a constitutional right to a hearing on mitigation in a capital offence. Further, the Supreme Court stated that notwithstanding that there is a prescribed mandatory minimum sentence for the offence on the statute book, the judicial officer nevertheless has discretion in meting a sentence based on mitigation factors.

7. The present case falls squarely within the realm of the **Muruatetu**-spawned authorities given that the trial magistrate here stated he was statute bound by the prescribed sentence and also noting that there was no substantive mitigation conducted.

8. I have considered the mitigation submissions of the Applicant filed by counsel. He says he is remorseful and has undergone reform, rehabilitation and social re-adaptation. To this end, he has done several courses and learned life skills such as tailoring. He says he was 37 years old at the time of committing the offence; was a first offender; and has since his incarceration in 2012 had no incidences of breach of prison rules. His father is currently 85 years old and his mother passed on whilst he was in prison.

9. Counsel cited the South African case of **Oscar Leonard Carl Pistorious CC 113 of 2013 High Court of South Africa Gauteng**

Division Pretoria where Lady Justice Thokozile Masipa stated as follows regarding the purpose of sentencing:

“While the deterrent effect of punishment has remained as important as ever, it is, I think, correct to say that the retributive aspect has tended to yield ground to the aspects of prevention and correction. That is no doubt a good thing, but the element of retribution, historically important, is by no means absent from the modern approach.

It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands. Naturally, righteous anger should not becloud judgment.”

10. In the same **Pistorious** case, the Court stated as follows concerning the appropriateness of sentences:

“For a very good reason an appropriate sentence should neither be too light, nor too severe. The former might cause the public to lose confidence in the justice system and people might be tempted to take the law into their own hands. On the other hand, the latter might break the accused and the result might be just the opposite of what the punishment set out to do, which ultimately is to rehabilitate the accused and to give him an opportunity, where possible, to become a useful member of society once more.”

11. Counsel also cited several local cases where the courts had substituted the death sentence with another sentence or remitted the case for re-sentencing. These include:

- **HC Miscellaneous Criminal Application No. 45 of 2018 Benson Ochieng & France Kibe v Republic** where the court substituted the Applicant’s death sentence for one of twenty years from the date of original sentence.
- **William Okungu Kittiny v Republic Court of Appeal Criminal Appeal No. 56 of 2013** where the Court of Appeal allowed an appeal and ordered the case to be remitted for re-sentencing.

12. The Prisons Service filed a Report on 27th June 2020, confirming that the applicant’s death sentence was commuted to life imprisonment on 20th October, 2016. It also indicates that the applicant was on 13th July, 2018 charged with the offence of being in possession of an unauthorized article contrary to **Section 66** of the **Prisons Act**. The matter was handled at prison. The Applicant is also stated to be asthmatic and hypertensive both of which are managed.

13. The Probation Officer filed a report on 9th January, 2020. It states that the Chief knew the Applicant as a young man; that he had never been in trouble before; that there would be no danger if he is released. The Applicant’s family described the Applicant as hardworking and not known to be troublesome. They would welcome his released.

14. The victim’s/complainants’ declined to comment on the matter and left it to the court to decide. The report concludes:

“[The Applicant] was hardworking businessman and a boda boda operative who had managed to bring together boda boda riders to raise over 2.4 million for development.

I recommend him for a positive sentence review to a definite period other than life, hopefully that he will complete his sentence and save his family that is totally disintegrated. He was the sole bread winner to his wife, children and his old parents. While in prison he studied theology. The prison authority speaks well about him.”

15. I have taken all the above matters into account. I also take into account the objectives of sentencing at Paragraph 4 of the **Judiciary Sentencing Policy Guidelines** which are 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.”

16. I am required to take into account the maximum number of the objectives when meting sentence herein. I must balance that with the gravity of the offence and aggravating and mitigating factors. Further, I also take into account that the fact that during the robbery, the accused persons threatened the complainant’s with force and brandished an AK 47 rifle.

17. Taking all these matters into consideration, I hereby sentence the Applicant to eighteen (18) years imprisonment with effect from his first incarceration on 8th November, 2012.

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 20TH DAY OF MAY, 2021.

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Ms Maingi for the State
2. Mr. D. K. Gichuki for the Applicant
3. Sammy Murungu Waiharo - present at Kamiti Maximum Prison
4. Court Assistant – Quinter Ogutu