



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 159 OF 2020

SARONI MENGU MUNENE.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT ON RESENTENCING

1. The Petitioner in this case were charged with four counts. The first count was robbery contrary to Section 296(2) of the Penal Code and personating a public officer contrary to Section 105(b) of the Penal Code; being in possession of an imitation of a firearm contrary to Section 34(1) (2) of the Firearm Act Cap 114 Laws of Kenya and finally being in possession of narcotic drugs contrary to Section 3(1) as read with Section 3(2) of the Narcotic Drugs and Psychotropic Substance Control Act No. 4 of 1994. The particulars of those charges are set out in the charge sheet No. 20/20/12/07 annexed to the proceedings herein.

2. The Petitioner was tried by the Senior Resident Magistrates Court at Taveta and was found guilty in all four counts. He was sentenced to death on the first count, three years on the second, third and fourth counts. Since the sentence for the first count was death, the other three counts were suspended. It is against that conviction and sentence that Petitioner has filed this petition seeking for resentencing pursuant to Muruatetu case.

3. The Petitioner prays for sentence rehearing only. The Petitioner was charged on 24/12/2007 before Senior Resident Magistrate, Taveta with a number of offences among them robbery with violence contrary to Section 296(2) of the Penal Code, Cap 63 Laws of Kenya. He was convicted and sentenced to suffer death for the said offence. His appeal to the High Court was dismissed and the conviction and sentence sustained in the court's judgment given on 28/3/2014. Both courts were of the opinion that the death sentence was the only available sentence to the offence of murder. His mitigation for sentence leniency was therefore superfluous. He now seeks a sentence rehearing following the celebrated Supreme Court decision in **Francis Karioko Muruatetu v Republic [2017] eKLR** and prays for a reduction of the sentence.

4. The Petitioner submitted that he did not benefit from the crime. The phone subject of the robbery was recovered and the money subject of the robbery was only Kshs. 500/=. Further, the Petitioner submitted that he did not inflict severe or serious injuries on the complainant (PW1). PW1 testified that the suffered slight injuries which did not require him to seek medical treatment. In **John Kirui v Prosecution [2018]** the court considered the nature of violence inflicted on the complainant as a mere slapping on the upper lip and the small value of the stolen items and awarded the Appellant an imprisonment term of 7 years on the offence of robbery with violence. The court considered the Appellant's pre-conviction custodial period and subtracted it from the imprisonment term.

5. I have carefully considered the Petition. In as much as the toy pistol was intended to cause the victim to have an apprehension of fear in his mind, it is arguable that being a toy pistol the Petitioner had no intention of using a gun or any weapon to harm the complainant. There was no evidence before the trial court that the Petitioner attempted to use the gun to inflict injury on the complainant during the robbery or on the witnesses who arrested the Petitioner.

6. Mr. Wamotsa, learned counsel for the Petitioner submitted that the Petitioner's elder brother Sifa Mengo and his sister Laura Florence live in Taveta. The brother works in a bakery in Taveta. The sister is an actor in bongo movies in Tanzania. They are ready and willing to receive and support him when released from prison.

7. Before his arrest the Petitioner was farming tomatoes and bananas and he kept livestock in Taveta irrigation scheme for a living. It was submitted that he is ready and willing to go back to the said businesses if released by this Court.

8. The Petitioner has lived in prison from the date he was arrested on 19/12/2007 to date, a period of 13 years. While in prison he has

reflected on his criminal life and he is remorseful. He has received religious teachings in Christianity and successfully completed two bible courses and awarded certificates while in prison. He regrets engaging in crime and he has promised himself to never go back to the criminal life he led in society.

9. The Petitioner is now 44 years. At the time of his arrest he was about 31 years. He has vowed to be a role model and offer public education to young people in his village on the dangers of engaging in crime using himself as a living example and using his experiences from his former criminal life and what the law subjected him to.

10. The prison authorities have subjected the Petitioner to rehabilitation which has been successful leading them to certify that he is now a reformed person as evidenced by the prison certificate.

11. Ms. Wanjohi, learned counsel for the prosecution submitted that the Petitioner was found guilty in 3 counts – robbery with violence and sentenced to death; impersonating a public officer and being in possession of firearm for which he was sentenced to serve 3 years, all were to run concurrently. Counsel submitted that these are heinous offences and should be punished adequately.

12. Counsel further submitted that the Petitioner is a repeat offender. On 21/4/2008 he was convicted of offence of handling stolen goods and he was sentenced to 14 years in Criminal Case No. 760 of 2007. On 26/5/2008 he was convicted for offence of escaping from lawful custody and was sentenced to prison for 1 year in Criminal Case No. 736 of 2008.

13. He is currently serving those sentences and he will be free in 2023 to start the death sentence.

14. Counsel prayed that the Petitioner should be jailed for 50 years, and that sentences which were held in abeyance should run consecutively.

15. Mr. Wamotsa in reply submitted that the Petitioner was a young unwise man hence those offences, but that he has since changed. As regards the sentences which were held in abeyance counsel submitted that they were held in abeyance, but have already been served.

16. I have carefully considered the submissions on resentencing. This Court has the jurisdiction to resentence pursuant to **Muruatetu case** having considered mitigating factors and aggravating factors. I have decided to lift the death sentence imposed on the Petitioner. In place thereof I now jail the Petitioner to serve a jail term of 25 years. The other sentences in the other counts shall run concurrently with the said 25 years from the date of arrest.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JUNE, 2021

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Mr. Wamotsa for Petitioner

Ms. Wanjohi for State

Ms. Peris Court Assistant