



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 50 OF 2006

DAVID KURIA MUTURA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RE-SENTENCING RULING

1. The Appellant, David Kuria Mutura, together with three others were charged with three counts of the offence of robbery with Violence contrary to Section 296(2) of the Penal Code at the Chief Magistrate's Court in Nakuru. On 07/02/2006, the Trial Court convicted all four of one of the counts and sentenced them to death.
2. The four appealed to the High Court. In a judgment dated 13/02/2009, the High Court dismissed the appeal and affirmed both conviction and sentence. The four proceeded to file their appeal to the Court of Appeal. When the Appellant's appeal came up before the Court of Appeal on 19/11/2018, the Appellant withdrew the Appeal and requested that the matter be remitted to the High Court for further consideration of sentence as the Appellant's mitigation was not considered.
3. In remanding the case back to this Court, the Court of Appeal remarked that in view of the "new" jurisprudence in Kenya following the Supreme Court judgment in the case of Francis Muruatetu v R, this Court should consider the Appellant's mitigation and award an appropriate sentence.
4. The Court conducted a sentence hearing and requested for a Social Inquiry Report to aid in arriving at the correct sentence.
5. The circumstances in which the offence was committed were as follows. The Appellant was in the company of other people and they apparently engaged in a spree of robberies at Kasarani Estate in Elburgon, Nakuru on the night of 17/12/2004. The gang attacked at least three other victims. The victim with respect to whom the conviction for the Appellant was entered and affirmed at the High Court was Jeremiah Mwengera. The victim testified before the Court that on that day he was on his way home from a night shift at a saw mill when he met four people. The Appellant was one of them. The group of four ordered him to sit on the ground. He obeyed. They started beating and robbing him. He did not resist. They robbed him of cash and a torch (flashlight). Thereafter, one of them cut him on the left shoulder with a panga. Another one hit him on the left side of the face and arm with a timber. The victim recognized the Appellant; and this is what eventually led to his arrest. The victim was treated at Nyayo Wards and discharged. The treating medical personnel categorized the injury as "harm."
6. During the Sentence re-hearing, counsel for the Appellant, Ms. Nancy Njoroge submitted on his behalf. She submitted that the Appellant is now a changed man; that he is "born again" as a Christian and is quite remorseful for his role in the robbery. The Appellant has also undergone training as a carpenter now, she submitted. She produced the certificates showing that the Appellant has trained and achieved Grade III in carpentry and joinery. The Appellant also produced a very positive recommendation letter from Prison Authorities which describes him as having taken full advantage of the rehabilitation programs offered in Prison; as being of good conduct; and has having skills to enable him to earn a living after release.
7. The Re-Sentencing Report filed by the Probation and Aftercare Services Department is quite positive for the Appellant. It describes generally positive antecedents of the Appellant and a general community that has a positive view of him. It makes a finding that the Appellant regrets his actions which he blamed on alcoholism. The report states that the Appellant has been fully rehabilitated and that he has a strong social support system back home. It highly recommends him to be released on probation.
8. As aforesaid, the Appellant seeks to be resentenced pursuant to the Supreme Court decision in *Francis Karioko Muruatetu & Another v Republic [2017] eKLR*. He seeks for substitution of the death penalty he received with a prison term. In the *Muruatetu Case*, the Supreme Court outlawed mandatory death penalty for murder as unconstitutional and struck down section 204 of the Penal Code to the extent that it prescribed mandatory death sentence upon conviction for murder.

9. The reasoning in *Muruatetu Case* respecting section 204 of the Penal Code (the penalty section for murder), has been extended by the Court of Appeal to the mandatory death penalty in robbery with violence cases and probably all other similar mandatory death sentences. That was in *William Okungu Kittiny v R [2018] eKLR*. In remanding this case to this Court for resentencing, the Court of Appeal indirectly endorsed the applicability of the *ratio* in *Muruatetu Case* to convictions of robbery with violence by parity of reasoning.

10. In *Benson Ochieng & Another v Republic (Nakuru High Court Misc. Application No. 45 of 2018)*, I reached the conclusion that the High Court can invoke its original jurisdiction bequeathed to it in Article 165(3)(a) of the Constitution to re-sentence persons on death row who were sentenced pursuant to the mandatory death penalty provisions which have been declared unconstitutional.

11. To determine whether the plea to substitute the death sentence imposed with a term sentence, the Court must look at the circumstances surrounding the commission of the offence, the circumstances related to the victims of the offence as well as the circumstances related to the Applicant himself.

12. From a review of the Court records and the submissions at the re-sentencing hearing, the following mitigating factors apply:

a. *First*, the Appellant was a first offender;

b. *Second*, the Appellant is deeply remorseful for his actions

– and the Court formed the view that he was sincere in his remorse;

c. *Third*, the Appellant was quite youthful when he committed the offence.

d. *Fourth*, the Appellant has fully reformed and has maintained good character in Prison. Both the letter from Prison Authorities and the Re-Sentencing Report bear this out.

e. *Fifth*, the Appellant has now acquired several skills while in Prison including carpentry and joinery which he will use to provide for himself if released from Prison.

f. *Sixth*, the Appellant has a strong social support system which indicates a strong possibility and capacity to reform.

13. There are, however, several aggravating factors. They include the fact that the Appellant was part of a gang of at least four; and that they used violence and offensive weapons to attack the victims. The gang also engaged in a spate of robberies. Finally, the gang injured the victims necessitating treatment.

14. I have now considered all the aggravating and mitigating circumstances in the case. I have also noted that the State agrees that the offence here is not of the category that should attract the death sentence. Death sentence should be reserved for the most egregious and highest degrees of armed robberies. I have noted that the Appellant has been in custody since he was first arraigned on 29/12/2004 – more than sixteen years and six months ago. I have also noted that the Prison authorities say that he has reformed. Finally, I have considered that the Applicant was relatively youthful when he committed the offence.

15. Consequently, taking all factors into consideration, I hereby substitute the death sentence imposed on the Applicant with a term sentence equal to the time served. Additionally, I will sentence the Appellant to a Probation period of three (3) years. The Appellant shall be released from Prison forthwith to begin his Probation.

16. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 23RD DAY OF SEPTEMBER, 2021

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.