KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Munyoki v Republic (Miscellaneous Criminal Application E001 of 2020) [2021] KEHC 268 (KLR) (22 November 2021) (Ruling)

Neutral citation: [2021] KEHC 268 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

MISCELLANEOUS CRIMINAL APPLICATION E001 OF 2020

MW MUIGAI, J

NOVEMBER 22, 2021

BETWEEN

JOSEPH KYALO MUNYOKI .... APPLICANT

AND

REPUBLIC .... RESPONDENT

RULING

1. The Applicant was charged before the Mavoko AG. Principal Magistrate P.O. Ooko in Mavoko Criminal case No. 1035 of 2013 for the offence of Robbery with violence contrary to Section 295 as read with Section 296(2) of the *Penal code*. The Trial Magistrate convicted and sentenced the Appellant to death sentence.
2. There was an alternative charge of handling stolen goods (Motorcycle) contrary to Section 322(1) (2) of the Penal Code which was also preferred against the Applicant.
3. Despite considering the Applicant's mitigation, the Trial Magistrate sentenced him to death on the basis that the Section 296(2) of the Penal Code stipulated sentence to be death and is couched in mandatory terms.
4. Aggrieved by the conviction and sentence, he appealed before the High Court in Criminal Appeal No.23 of 2015 based on amended grounds of appeal. Guided by the Supreme Court decision in *Francis Karioko Muruatetu & Another vs.Republic* SCK Petition No.15 of 2015 (2017) eKLR, L.J. D.O Chepkwony upheld the conviction and set aside the death sentence. The Learned Judge held that it was appropriate for the High Court to impose the new sentence after considering the Applicant's mitigation.

Resentencing

5. The court notes that the resentencing was conducted before Hon. E. Michieka (PM) at Mavoko Law Courts whereby the Applicant orally mitigated his sentence while the Prosecution Counsel asked the court to impose a deterrent sentence on the Applicant.

6. In his ruling on sentence, the Honourable Magistrate held as follows-

> " I have carefully considered the Probation Officer's report. I have also considered the accused persons submissions together with the learned prosecutions. Indeed looking at the evidence presented before the trial court and the circumstances of the offence, it points out to a violent crime. Indeed the accused has expressed his remorse and I also note that the victims could not be traced for interview. I note that the accused has served 5 years in lawful custody and in the circumstances I will be constrained to reduce his sentence from life imprisonment to twenty (20) years which he is to serve from the date of conviction 9/112/14."

Appeal

7. Aggrieved by the resentence, the Applicant lodged a Petition of Appeal and Memorandum of Appeal on 10th September, 2020 essentially seeking a non-custodial or community based sentence.

Applicant's Submissions

8. On 2nd November, 2021, the Applicant orally asked the court to reduce the 20 years imprisonment and take into account the period he has been in remand.

Prosecution Submissions

9. Prosecution Counsel, Martin Mwongera submitted that the Applicant case has already been heard and determined substantively by this Court hence the Applicant ought to proceed to the Court of Appeal. The Prosecution relied on the case of Bernard Kimani Gacheru vs Republic [2002] eKLR

   That sentence is a matter that rests in the discretion of the Court.

Determination

10. I have considered the Applicant's oral submissions and Prosecution's written submissions.

Whether To Reduce 20 Years Imprisonment

11. The Court record shows the judgment was by Hon. Ag PM P.O. Ooko on 9th December 2014 and that the resentencing was done by Hon E. Michieka PM on 7th January 2020 another Magistrate and not the Trial Magistrate. The Hon. Magistrate considered the Applicant's mitigation and time spent in remand.

12. Section 322(2) of the CPC provides that:-

> (2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

13. Kiarie Waweru Kiarie J. in the case of *Joseph Maburu alias Ayub vs. Republic [2019] eKLR* stated that:-

> " Sentencing is a judicial exercise. Once a judge or a judicial officer has pronounced a sentence, he/she becomes functus officio. If the sentence is illegal or inappropriate the only court which can address it is the appellate one.

14. The Probation Officer stated in his report that the Applicant was in the company of persons with criminal conduct but was a first offender and not a threat to the community hence he should be considered for lenient sentence.

15. According to the report, prior to the Applicant arrest, he was a boda boda rider. It is indicated that he has a wife and children who are living at their maternal grandparents. He has no history of alcoholism and drug abuse. He was a friend to the victim. The Probation officer stated that the Applicant was trained in welding Grade I and studied theology. He was involved in cooking and supervising other cooks.

16. This court is cautious not to take the Probation officer's report as the gospel truth for it has not been subjected to cross-examination but considering that efforts to get the views of the victim bore no fruit, the information in the report cannot be ignored.

17. In the 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 inter alia that the objective one of the objective of sentencing was Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

18. In 2016 Judiciary of Kenya Sentencing Policy Guidelines also outlines at paragraph 23 aggravating and mitigating circumstances that guide the Court to grant a suitable sentence. The Applicant is a 1st Offender, during the robbery although the Applicant was with another person not in Court, there was violence visited on the Complainant, they were not armed with a weapon but hurled the Complainant off the motorcycle and hopped on the motorcycle they robbed the Complainant and sped off, the motorcycle subject of the robbery was recovered.

19. In Muruatetu Case, the Supreme Court relied on the case of *Vinter and others vs. the United Kingdom (Applications nos. 66069/09, 130/10 and 3896/10)* in which the Court held that:

> " 111. It is axiomatic that a prisoner cannot be detained unless there are legitimate penological grounds for that detention. As was recognized by the Court of Appeal in Bieber and the Chamber in its judgment in the present case, these grounds will include punishment, deterrence, public protection and rehabilitation. Many of these grounds will be present at the time when a life sentence is imposed. However, the balance between these justifications for detention is not necessarily static and may shift in the course of the sentence. What may be the primary justification for detention at the start of the sentence may not be so after a lengthy period into the service of the sentence. It is only by carrying out a review of the justification for continued detention at an appropriate point in the sentence that these factors or shifts can be properly evaluated..."

20. Ngugi, J. in *Benson Ochieng & Another vs. Republic [2018] eKLR* expressed himself in paragraph 20 as hereunder:

> " I begin from the position that given that "simple" robbery under section 296(1) of the Penal Code attracts a minimum sentence of fourteen years imprisonment, it seems logical that the minimum sentence for robbery with violence should begin at fourteen years imprisonment. This is because robbery with violence under section 296(2) is, by definition, an aggravated robbery which has been singled out by the Legislature for enhanced penalty due to the impact of the crime on the victim and the society…An entry point of fourteen years for robbery with violence, in my view, is also appropriate for reasons of uniformity and parity in sentencing."

21. In *Duncan Kyalo Muange & another vs. Republic [2019] eKLR* where life was lost, Odunga J resentenced the accused to 20 years imprisonment. In *Aden Abdi Simba vs. The DPP Petition No. 24 of 2015*, the Court's decision in meting out the 15 years' imprisonment seems to have been informed by the fact that nobody was injured in the incident and the items were recovered. *In Daniel Gichimu Githinji & Another vs. Republic Criminal Appeal No. 27 of 2009*, the Court of Appeal in meting out the sentence of 15 years considered the fact that the appellant was a first offender, the violence meted was minimal and the item robbed was recovered.

22. Taking into account the Muruatetu case and the Judiciary Guidelines on sentencing, in particular the objectives of sentencing, the court's view is that fifteen (15) years imprisonment would serve justice. According to the evidence on record the victim was just thrown off from the motor cycle. The Applicant and his accomplice did not have weapons but the court found threats must have been issued against the victim.

Disposition

23. Accordingly, the court hereby reduce the Applicant's sentence of twenty (20) years to fifteen (15) years imprisonment.

24. Pursuant to Section 333(2) of the CPC, the sentence of fifteen-five (15) years in prison will start from 19th day of September, 2013- the day the Applicant was first charged in court and remained in custody to date.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 22nd DAY OF NOVEMBER, 2021.

M.W. MUIGAI

JUDGE