



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC CRIMINAL APPLICATION NO. 94 OF 2018

DANIEL WAWERU NJOROGE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. On 07/05/2002 at around 8:00pm, Teresia Wangui Ng'ang'a was sleeping in her house at Moto Farm in Molo when she heard her employee, Joseph Kariuki, screaming in the sitting room. She decided to check on him. On getting there, she saw three people pushing and beating Joseph. They were armed with swords and *simis*.

2. One of the three assailants saw Teresia and attacked her. He slapped her. She fell on the floor. They demanded money from her. She told them where the money was and they took Kshs. 9,000/-. They demanded more. When they learnt there was none more, they stole other items from the house in fury. They then fled.

3. Unfortunately for the assailants, Teresia had identified them. She was therefore able to identify them when some of her stolen items were recovered. In the end, the three assailants were charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The charge sheet stated that the assailants jointly robbed Teresia of 65 table clothes, one Sony radio, 4 travelling bags, one shirt, 5 ladies dresses, one wall clock two trays, 4 wrist watches, one pressure land, two compact cassette, one torch all valued at Ksh 40, 800/= and that at or immediately before or immediately after such robbery used actual violence to the said Teresia.

4. The Applicant herein, Daniel Waweru Njoroge, was one of the assailants who burst into Teresia's house that fateful May evening in 2002. For his role, he was charged as the 3rd Accused Person. The appeals by the Applicant and his two Co-Accused Persons to the High Court and Court of Appeal failed: both the convictions and sentences were confirmed at both Court levels.

5. In the end, having been on death row for the last seventeen years, a ray of hope shone for the Applicant in the form of the Supreme Court's decision in *Francis Karioko Muruatetu & Another v Republic [2017] eKLR*. The Applicant relies on the "cause of action" judicially created by the Supreme Court to bring the present application. 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.

6. 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*.

7. 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.

8. To determine whether the Application is meritorious and to what extent, 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.

9. I have already outlined above the circumstances in which the offence was committed. In his submission in support of his Application, the Applicant says that he is very remorseful for his actions. He begged for leniency and stated that he deeply regrets his actions. He submitted that he contracted HIV while in Prison. This happened when he was sodomized by his fellow inmates. In addition to his HIV status, the Applicant is also epileptic. A medical record filed in Court confirms these two medical conditions. The Applicant informed the Court that these two conditions make his life in Prison really difficult and pleaded to be allowed to return to civilian life on humanitarian grounds.

10. The Applicant told the Court that he has had the opportunity to think through his actions and life choices he made nineteen years ago; and that he is a changed man. He said that his family is ready to support him in his new life. To demonstrate this, his sister-in-law, Jane Mugure spoke on his behalf during the hearing. She promised that the family was ready to support the Applicant when he returns to life outside Prison.

11. Ms. Serling, the Prosecutor, submitted that there were aggravating circumstances which the Court should consider:

- a. First, that the Appellant and his group broke into the house;
- b. Second, that it was an organized gang;
- c. Third, that the gang was armed with offensive weapons; and
- d. Fourth, that they assaulted the two victims.

12. Ms. Serling submitted that in view of all these aggravating circumstances, the death sentence should be substituted with a life imprisonment.

13. I have now considered all the aggravating and mitigating circumstances in the case. I have noted the aggravating circumstances pointed out by Ms. Serling. I have also noted that the State agrees that the offence here is not of the category that should attract the death sentence. I have noted that the Applicant has been in custody since they were arrested in June, 2002 – nineteen years ago. I have also noted that the Probation Report filed at the request of the Court is quite favourable to the Applicant. It recommends that the Applicant be placed on non-custodial sentence in view of his health conditions and the fact that he has now reformed. Finally, I have noted that the Applicant has family members who are willing to take him in and help him ease into life out of prison. At his age, I am of the opinion that no further sentencing objectives will be served by his continued incarceration.

14. Consequently, I hereby substitute the death sentence imposed on the Applicant with a term sentence of imprisonment equal to the term already served plus a Probationary period of two years. The Applicant shall, therefore, be released from Prison forthwith unless otherwise lawfully held. He shall, then, be on Probation for a period of two years.

15. Orders accordingly.

Dated and delivered at Nakuru this 30th day of January, 2020

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JOEL NGUGI

JUDGE