REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. APPLICATION NO. 93 OF 2018

ROBERT EKAI MARTIN...APPLICANT

VERSUS

REPUBLIC...RESPONDENT

JUDGMENT

1. The Applicant, Robert Ekai Martin, was charged with the offence of robbery with Violence contrary to Section 296(2) of the Penal Code. The charge sheet stated that on the 16th day of July, 2005 at Kimakia Estate, Njoro within Nakuru District of the Rift Valley Province jointly with others not before the Court while armed with offensive weapons namely bars and arrows, pangas and rungus robbed Michael Macharia Karanja Kshs. 4,500/-, 15 kgs of sugar, 12 packets of Unga Ngano, 10 kgs of rice, 10 pairs of EverReady batteries all valued at Kshs. 7,088/- and, at, or immediately after or immediately before the robbery, used actual violence to the said Michael Macharia Karanja.

2. The Applicant pleaded not guilty and the case proceeded to full hearing. At the end of the trial, the Trial Court found the Applicant guilty of the offence charged and sentenced him to death as the law then mandatorily required.

3. Upon appeals to the High Court and the Court of Appeal affirmed both the conviction and sentence.

4. The Applicant now 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.

5. 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***.

6. 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.

7. 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.

8. Evidence adduced at the trial showed that the Applicant and his colleagues – a gang of eight – burst into the house/shop of the Complainant at 3:00am on 16/07/2005. While there, the gang terrorized the Complainant and his friend and stole money and assorted items from them. In the process, the gang attacked the Complainant and his friend – injuring them with pangas and rungus. The Complainant sustained injuries on his finger, and had deep cuts on the head. His friend sustained injuries on both the left and right hands and on had his scrotum cut by a panga.

9. In support of his Application for re-sentencing, Mr. Olonyi, counsel for the Applicant submitted that:

a. The Applicant was a first offender;

b. That he was deeply remorseful for this actions;

c. That he has fully reformed and has maintained good character in Prison. He produced a letter of recommendation from the Chaplain-in-charge of Naivasha Maximum Security Prison and several certificates in Bible Studies to demonstrate that he has now taken up Christianity quite seriously and is fully rehabilitated.

d. That the Applicant has now learnt several skills while in Prison including carpentry and playing music which he will use to provide for himself if released from Prison.

10. On her part, the Prosecutor, Ms. Serling told the Court to consider that there were serious aggravating circumstances here. They include the fact that the Applicant was part of a large gang of eight; and that they used violence and offensive weapons to attack the victims. Finally, the Prosecutor asked the Court to consider that the Applicant and his gang injured the victims necessitating treatment.

11. 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 he was arrested on 16/07/2005 – more than fourteen years 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.

12. Consequently, taking all factors into consideration, I hereby substitute the death sentence imposed on the Applicant with a term sentence of imprisonment for twenty-one (21) years. The time will be computed from 16/07/2005 when the Applicant was arrested since he was in custody since then.

13. Orders accordingly.

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

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JOEL M. NGUGI

JUDGE