



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL PETITION NO. 19 OF 2018**

**BONFACE INDICHE MUNASIO..... PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING ON RE-SENTENCING**

1. The petitioner was convicted of the offence of robbery with violence contrary to Section 296 (2) of the Penal code and sentenced to death. His appeals to the High Court and the Court of Appeal were unsuccessful. He has now filed a petition for re-sentencing. This is as a result of the Supreme Court decision in **Francis Karioko Muruatetu & Another –Vs- Republic (2017) eKLR** where the said superior court considered the constitutionality of the mandatory death sentence for the offence of murder under Section 204 of the Penal Code and held that the said sentence was unconstitutional as it deprives the court of its inherent jurisdiction not to impose a death sentence in an appropriate case. In **William Okungu Kittiny –Vs- Republic (2018) eKLR** the Court of Appeal applied *mutatis mutandis* the Supreme Court decision in *Muruatetu case* to the mandatory death sentence for the offence of robbery with violence under Section 296 (2) of the Penal Code and held the mandatory death under that section to be unconstitutional for the same reasons stated by the Supreme Court in the *Muruatetu case*. In so holding then courts have discretion not to impose the death sentence in appropriate cases for robbery with violence. It is on this basis that the petitioner has applied for review of his sentence.
2. The petitioner filed submissions. He did not say anything in mitigation.
3. The court called for a pre-sentencing report. The same was prepared by **Mr. Collins Gaunya**, Senior Probation Officer, Kakamega. The report states that the petitioner has a good name back home. That his neighbours, the community and members of his immediate family describe him as a co-operative and hardworking individual who related well with others. That he has been in prison for 11 years. That the community feels that the sentence served is enough. That he has a young family. The report recommends that the offender be released to serve a probation sentence.
4. The facts of the case against the petitioner were that the victim in his case was his neighbour. That on the 4/4/2007 the petitioner and two others attacked the complainant. The petitioner was armed with a knife while his colleagues had runguns. The petitioner stabbed the victim several times and robbed him of Ksh. 5,000/= after which they fled. The victim was taken to hospital. He reported to the police. The petitioner was arrested and charged.
5. Sentencing is a discretion of the trial court. In **Ambani –Vs- Republic (1990) KLR**, Bosire J. (as he then was) stated that a sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and that the court should look at the facts and the circumstances of the case in its entirety before settling for any given sentence.
6. Section 333 (2) of the Criminal Procedure Code requires a sentencing court to take into account the period spent in custody awaiting trial.
7. I have considered the sentences imposed in some other cases where convicts of robbery with violence were re-sentenced after the Supreme Court decision in the *Muruatetu case*. In **Michael Kathewa Laichena –Vs- Republic (2018) eKLR** where the petitioner was in a gang that was armed with a gun and knives, Mabeya J. re-sentenced the petitioner to a prison term of 15 years after considering that he had been in custody for 5 years pending trial.
8. In **Benjamin Kemboi Kipkone –Vs- Republic (2018) eKLR** where 3 robbers armed with an AK 47 rifle robbed the complainant of Ksh. 250,000/= and a mobile phone Chemitei J. substituted the death sentence with 20 years imprisonment.
9. In **Paul Ouma Otieno –Vs- Republic (2018) eKLR** where the accused was armed with an AK 47 rifle and a kitchen knife robbed the complainant of Ksh. 450,000/= and 3 mobile phones, Majanja J. substituted the death sentence with 20 years imprisonment.
10. In **Wycliffe Wangugi Mafura –Vs- Republic Eldoret Criminal Appeal No. 22 of 2016 (2018)** the Court of Appeal imposed a sentence of 20 years imprisonment where the appellant was involved in robbing an Mpesa shop agent with the use of firearm.

11. The petitioner was charged on 19/11/07 and sentenced on 11/7/08. He was therefore in custody for nearly 8 months awaiting trial. He has been in incarceration for a period of slightly over 12 years.

12. I have considered all the circumstances of the case. The petitioner stabbed his victim severally with a knife before robbing him. Though the pre-sentencing report is favourable I do not think that the period spent in prison is sufficient for the offence committed. The offence was aggravated by the assault on the victim. The amount stolen was however only Ksh. 5,000/=. I do not think that the sentence of death is appropriate for the offence committed. A prison sentence will do. The death sentence imposed by the lower court is therefore set aside. I re-sentence the petitioner to fifteen (15) years imprisonment commencing from the date of sentence by the lower court.

**Delivered, dated and signed in open court at Kakamega this 27<sup>th</sup> day of February, 2020.**

**J. N. NJAGI**

**JUDGE**

In the presence of:

Mr. Mutua for State/Respondent

Petitioner - present

Court Assistant - Polycap

14 days right of appeal.