



**REPUBLIC OF KENYA**

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

**CRIMINAL PETITION NO. 26 OF 2018**

**ABUBAKAR MUHAMMED WAFULA .....PETITIONER**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**RULING ON RE-SENTENCING**

1. The petitioner was convicted by the lower court of the offence of robbery with violence and sentenced to suffer death. His appeal to the High Court was unsuccessful. He has now filed a petition for re-sentencing following the Supreme Court decision in **Francis Karioko Muruatetu & Another –Vs- Republic, Petition No. 5 of 2015 (2017) eKLR** where the said superior court held that the mandatory death sentence for the offence of murder as provided in Section 204 of the Penal Code is unconstitutional as it deprives courts of their 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 *Muruatetu case* to the offence of robbery with violence under Section 296 (2) of the Penal Code. The said court accordingly held the provisions of Section 296 (2) of the Penal Code that provide for a mandatory death sentence for the offence of robbery with violence to be unconstitutional for the same reasons given by the Supreme Court in the *Muruatetu case*. The court held that the mandatory death sentence for robbery with violence under Section 296 (2) of the Penal Code is a discretionary maximum sentence. It is on this basis that the petitioner has sought for re-sentencing.
2. The case against the petitioner was that while armed with pangas, knives, rungas and iron bars he and others robbed two victims of the offence of one chloride oxide battery, one mobile phone and cash Ksh. 500/= all to the total value of Ksh. 13,000/=. During the robbery one of the victims was hit with a stick on the neck while the other one was slapped.
3. The petitioner was sentenced on 15/8/2013. He was in custody for one year awaiting trial. That means that he has been in incarceration for a period of nearly 7 ½ years.
4. The advocate for the petitioner **Mr. Malalah** mitigated on behalf of the petitioner that the petitioner was 19 years old when he was jailed. That he had only completed class 8 when he was jailed. That he acted out of youthful exuberance and ignorance. That his father is dead but that his mother is alive. That before incarceration he was working as a barber. That he admits his mistakes. That he is remorseful and reformed. That he has been an exemplary prisoner with no disciplinary issues.
5. The court called for a pre-sentencing report that was prepared by **Mr. Kennedy Achungo**, Kakamega County Director of Probation. The report notes that the petitioner is aged 27 years. That the victim was their neighbour. That after the incident the petitioner's family relocated to Busia and has had no contact with the victim's family. That the victim of the offence felt that the inmate has received adequate punishment. That the inmate's immediate family is willing to receive him and mold him into a responsible member of the society.
6. The state did not make a reply to the petition. They relied on the report of the probation officer.
7. I have considered the petition, the submissions by the advocate for the petitioner and the pre-sentencing report. 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.
8. Section 333 (2) of the Criminal Procedure Code requires a sentencing court to take into account the period spent in custody awaiting trial.
9. 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.
10. 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.

11. 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.

12. 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 a firearm.

13. In this case I have considered that the property stolen from the victims was of the value of Ksh. 13,000/= only. There was minimal force used during the robbery. The petitioner was in his teens when he committed the offence. I am of the considered view that a sentence of death is not an appropriate sentence in the case.

14. The offence of robbery with violence is however a very serious offence. People cannot be allowed to reap where they have not sown through use of force. Considering the circumstances of the case and the youthfulness of the petitioner when he committed the offence, I am of the view that a sentence of ten years imprisonment is appropriate for the offence committed.

15. In the foregoing, the death sentence imposed by the lower court is set aside and substituted with one of ten years imprisonment commencing from the date of sentence by the lower court.

Delivered, dated and signed in open court at Kakamega this 20<sup>th</sup> day of February, 2020.

**J. NJAGI**

**JUDGE**

In the presence of:

Mr. Malala for Petitioner

Mr. Mutua for State/Respondent

Petitioner - present

Court Assistant - Polycap

14 days right of appeal.