



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL PETITION NO. 64 OF 2019

DISHON LITWAKA LIBAMBULAPETITIONER

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 petitioner was convicted of robbing the victim of the offence of cash of Ksh. 1,000/= and a coat all valued at Ksh. 1,500/=. In the course of robbery the petitioner and his colleagues assaulted the complainant with pangas and occasioned him cut wound on the left shoulder; fracture at the tip of left shoulder blade; three cut wounds on the upper left arm; cut wound on the dorsum of the left forearm; left middle, ring and little fingers were flaccid; cut wound on anterior right upper arm; cut wound on right hand with fracture of the proximal of the right middle finger; cut wound on the left knee with fracture of the left patella towards middle part which caused a foot drop and paralysis of the left foot. The victim was admitted in hospital for a period of 6 weeks.
3. The petitioner was sentenced on 15/3/2001. He was in custody for 1 ½ years awaiting trial. That means that he has been in incarceration for a period of nearly 20 ½ years.
4. The advocate for the petitioner **Mr. Malalah** mitigated on behalf of the petitioner that the petitioner has been an exemplary prisoner while in prison custody. That he has attained Trade Test Certificate in Carpentry/Joiner Grade III, II and I from NITA. That he has received recommendation from the officer in charge, Kamiti Maximum Prison Mr. George O. Diang'a to the effect that he is hardworking and that he was deployed in training other prisoners at the prison carpentry section (*the Certificates and the recommendation letter were attached*). Counsel submitted that the prisoner is now reformed and that he deserves a second chance. He urged the court to reduce the sentence imposed on the petitioner.
5. The court called for a pre-sentencing report that was prepared by a probation officer, **Mr. Kennedy Achungo**. The report notes that the petitioner is aged 53 years, married with 5 children. That he has been used as a carpentry instructor at Kamiti Maximum Security Prison for a period of 8 years. That the petitioner and the complainant are cousins. That their respective families had a land dispute between them. However that relations between the two families have gradually improved over time given the prolonged imprisonment of the petitioner. That the petitioner's family is supportive of him.
6. The state did not make a reply to the petition.
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 firearm.

13. The petitioner herein was in a gang that viciously attacked their victim and left him for the dead. I have however considered the value of the stolen property was only Ksh. 1,500/= and that the petitioner has been in incarceration for a period of 20 ½ years. He has been an exemplary prisoner while in prison where he has been used as a trainer. Though the probation officer's report did not mention anything about the personal sentiments of the victim of the offence, I am of the considered view that the sentence served is sufficient punishment for the offence committed.

14. In the foregoing, the sentence of death imposed by the lower court is set aside and substituted with a sentence of the period already served. The petitioner is to be set at liberty forthwith unless otherwise lawfully held.

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

J. NJAGI

JUDGE

In the presence of:

Mr. Malalah for Petitioner

Mr. Mutua for State/Respondent

Petitioner – present

Court Assistant - Polycap

14 days right of appeal.