



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT GARSEN
CRIMINAL APPEAL NO. 41 OF 2015

OMAR ALI DAKU.....1st APPELLANT
ALI ISMAEL HUSSEIN.....2nd APPELLANT
SALIM BAMARO ISMAEL.....3rd APPELLANT
MOHAMMED OMAR YUSA.....4th APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in the Principal Magistrate Court at Garsen

Criminal Case 327 of 2012 Hon. J. M. Kituku (Ag P.M) dated 24th April, 2014)

RULING ON SENTENCE

1. Omar Ali Daku, Ali Ismael Hussein, Salim Bamaro Ismael and Mohamed Omar Yusa alias Saa Robo were the 1st, 5th, 6th and 7th Accused respectively in Criminal Case No 327 of 2012 at the Principal Magistrate's Court at Garsen. They were charged with 5 others being Abdalla Ali Balonzi (2nd Accused), Ade Amani Ali (3rd Accused), Ali Omar Amuma (4th Accused), Feiswal Omar Swaleh (8th Accused) and Ali Shore Barisa (9th Accused). They faced 9 counts of robbery with violence contrary to Section 295 as read with Section 296 (2) of the Penal Code. The particulars of the charge were that on the 10th September, 2012 at Kilelengwani village within Tana River County with others not before court, being armed with dangerous weapons namely rifles, spears, pangas and axes robbed nine officers of their guns and ammunition killing eight of the officers.

2. The Accused pleaded not guilty. In the course of the trial, the prosecution withdrew charges against the 3rd, 4th and 9th accused and charged them for murder in the High Court at Malindi. At the conclusion of the trial for robbery with violence, the trial magistrate found the four Appellants guilty of the offence as charged and sentenced them to death while acquitting the 2nd and 8th Accused persons.

3. The four Appellants appealed to this court against both conviction and sentence. In a judgement delivered on 18th June, 2019, the court upheld the conviction by the trial court. With regard to sentence however, the court directed a sentence rehearing in accordance with the Supreme Court decision in the case of *Francis Karioko Muruatetu & Another Vs Republic, SC Petition No. 15/2015* which held that: -

“Consequently, we find that section 203 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory deaths sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum penalty”

It further held at paragraph 111 that: -

“It is prudent for the same court that heard this matter to consider and evaluate mitigation submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners.

4. While the decision in the Supreme Court was in relation to murder, it was held by the Court of Appeal that the judgment by the Apex court similarly applied to cases of robbery with violence. It stated in *William Okungu Kittony Vs Republic, the court of Appeal NO. 56 of 2013*

that: -

“ From the foregoing, we hold that the findings and holding of the Supreme Court, particularly in Paragraph 69 applies Mutatis Mutantis to Section 296(2) and 297 (2) of the Penal Code. Thus the Sentence of death Under Section 296(2) and 297(2) of the Penal Code is a discretionary maximum punishment.”

5. I am guided by the above authorities to find that this court has discretion to order a sentence re-hearing or to pass an appropriate sentence. Such discretion was further elucidated in *Wycliffe Wangusi Mafura Vs Republic (2018) eKLR* where the Court of Appeal held that: -

“We also said in William Okungu Kittony's case (Supra) that the decision of the Supreme Court in Muruatetus case has immediate and binding effect on all other courts and that the decision did not prohibit courts below it from ordering sentence rehearing in any matter pending before those courts. Accordingly, since this appeal had not been finalised, this court has jurisdiction to direct a sentence re-hearing or pass any appropriate sentence that the trial magistrate's court could have lawfully passed.”

6. This court set a sentence rehearing date for 17th July, 2019 and ordered a pre - sentence probation officer's report on each Appellant. On the return date however, the probation officer sought more time to trace the victims so as to provide victim impact statements. All the reports were finally filed on 21st November, 2019. At the hearing thereof, Mr. Gekanana learned counsel for the appellants relied on the pre - sentence reports and the victim impact statements. In his brief submissions he drew the court's attention to the circumstances of the offence. He pleaded with the court to consider that some of the suspects who had been arrested along with the Appellants and charged with murder at the High court in Malindi had been acquitted and that there was peace building at the community level which had resulted in the two communities now living together in peace.

7. The 1st Appellant addressed the court in person and stated that he was sick. He prayed for mercy. In their address, the 2nd, 3rd and 4th Appellants asked the court to consider the circumstances of the offence stating that the clashes ended and that there was peace on the ground. They pleaded that they also lost their people and prayed for forgiveness.

8. Mr. Mwangi, learned prosecution counsel for the Respondents submitted that there was loss of life and therefore a non-custodial sentence was not suitable. He however left the matter to the discretion of the court.

9. There was no victim impact statement filed in respect of the nine police officers. The court accepted the probation officer's report that it was not possible to trace the families of the victims as the fallen police officers came from different parts of the country. With regard to the victims of the clashes at the community level, there was wide acknowledgement that both the warring Pokomo and Orma communities suffered loss of life and property and wished to continue with the peace building and reconciliation initiatives already being implemented.

10. I have considered the pre - sentence probation report in respect of each Appellant. In summary, the reports detail the personal circumstances of each Appellant. The common thread is that the four Appellants were ordinary villagers of humble backgrounds whom at the time of the ethnic clashes joined their kinsmen in the ethnic clashes. Their immediate families are said to have disintegrated as a result of their incarceration and their children faced an uncertain future. Their extended families and immediate community were however willing to have them back in the community and to assist them resettle and reconstruct their lives.

11. It is notable from the pre - sentence probation report that apart from the local community elders and administration, the police (Officer Commanding Police Station (OCPD), OCS Witu and Kipini, and DCI officers) were also interviewed to confirm the security status on the ground. They returned the verdict of peaceful co-existence between the communities and that there had been no backlash even with the acquittal of the other accused persons who had been charged along with the present Appellants and those acquitted of murder by the High Court in Malindi.

12. As stated in the present judgement, and also in the probation reports, the offences occurred in the context of tribal clashes between the Pokomo and the Orma ethnic groups in the Tana Delta in August and September 2012 in which many people including 9 police officers lost their lives. I must restate as I consider this sentence that the right to life is paramount and that the circumstances of ethnic animosity cannot be taken to justify loss of life or robbery of arms and ammunition from police officers who were merely executing their duties. The trial court therefore did not err in imposing the then mandatory death sentence on the Appellants.

13. The purposes of sentencing as captured in the Judiciary Sentencing guidelines are:

1. Retribution: to punish the offender for his/her criminal conduct in a just manner.

2. Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

3. Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law abiding person.

4. Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.

5. Community protection: to protect the community by incapacitating the offender.

6. Denunciation: to communicate the community's condemnation of the criminal conduct.

These purposes are not exclusive in themselves and their application is dependent on the unique circumstances of each case.

14. All four Appellants were sentenced to suffer death as provided by law. I have in this re sentencing considered the circumstances of the offence *vis' a vis'* the purposes of sentencing. It is clear to me that the Appellants have served part of their punishment having been imprisoned on 16th May 2014 and having served pre-trial detention from August 2012. It is also clear to me that the communities in question are desirous of reconciliation and peace building and efforts are ongoing to that effect. Further, I have found the Appellants remorseful. They have indicated to the court through the probation report, their willingness to participate in the peace building efforts in the community. I accede to their plea for mercy. It is my considered view that the Appellants and the wider community which was devastated by the ethnic clashes will find closure with the release of the Appellants.

15. In the end, having considered all factors, I substitute the death penalty imposed by the trial court with a prison term equivalent to the period already served. The Appellants are released from prison custody forthwith to serve 3 years' probation. They shall participate in the community peace building and reconciliation efforts.

Sentence delivered, dated and signed at Garsen on this 30th day of April, 2020.

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R. LAGAT KORIR

JUDGE

Due to the COVID-19 pandemic, this sentence has been delivered in the presence of Maro (Court Assistant), Mr. Gekanana (Counsel for the Appellants), Ms. Sombo holding brief for Mr. Mwangi for the Respondent; and the 1st, 2nd, 3rd and 4th Appellants virtually present via video link to Malindi GK Prison.