



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. APPLICATION NO. 288 OF 2018

CHARLES OPEL OTIENO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT UPON APPLICATION FOR RE-SENTENCING

1. The Applicant, Charles Opel, together with another person were charged and convicted with two counts of the offence of robbery with Violence contrary to Section 296(2) of the Penal Code. The charge sheet alleged that on the 14th day of May, 2005 at Kenya Pentecostal of Holiness Rhonda in what was then Nakuru District, while armed with dangerous weapons namely knives and *pangas*, the Applicant, together with others, robbed Lilian Adhiambo Okul of cash Kshs. 17,000/-, a jacket; and a mobile phone make Nokia all valued at Kshs. 26,000/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Lilian Adhiambo Okul.
2. A second count alleged that the Applicant with others, in similar fashion, and on the same date, at the same time and place, robbed Margaret Isusta Kirui of Kshs. 2,500/-, a mobile phone make Nokia all valued at Kshs. 10,500/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Margaret Isusta Kirui.
3. The Applicant and his Co-Accused denied the charges and a fully-fledged hearing ensued. At the conclusion of the trial, the Applicant and his Co-Accused were convicted and sentenced to suffer death on
4. Upon appeals to the High Court and the Court of Appeal affirmed both the conviction and sentence.
5. The Applicant now seeks to be resented 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.
6. 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*.
7. 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.
8. 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.
9. Evidence adduced at the trial showed that the Applicant and his colleagues – a gang of nine or ten men – accosted the victims at Pentecostal Church of Holiness at Rhonda Estate in Nakuru at about 3:00pm. The victims had gone to the church for a women’s conference when the robbers struck. Evidence showed that the assailants attacked the victims, threatened violence and when the attack was resisted, they resorted to violence. Indeed, the victim in Count 1 very narrowly escaped being cut with a panga as she struggled with the assailants. Evidence also showed that there was an infant in the car when the attack to place.
10. In support of his Application for re-sentencing, the Applicant submitted that:

a. He 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 which states that his *“conduct and character since incarceration have been commendable as evidenced by the fact that he has never committed any offence against the Prison discipline.”*

d. That he is now old – only six months shy of turning 60 and that he intends to spend his old age as a law-abiding citizen with his family.

11. On her part, the Prosecutor, Ms. Rotich told the Court to consider that there were serious aggravating circumstances presented in the case. They include, she argued, the fact that the Applicant was part of a large gang of eight; and that they used actual violence and offensive weapons against the victims. She also asked the Court to consider that apart from the victims named in the charge sheet, there was an infant who must have been truly traumatized by the events of the day. Ms. Rotich also asked the Court to consider that the attack was at a place of worship.

12. I have now considered all the aggravating and mitigating circumstances in the case. I have noted the very serious aggravating circumstances pointed out by the Prosecutor:

a. That the attack was by a marauding gang of more than eight with all the tell-tale signs of an organized criminal group;

b. That the Applicant and his group used actual violence against the victims;

c. That the Applicant and his group were armed with offensive weapons;

d. That the attack took place at a place of worship;

e. That a child was one of the victims.

13. I have also considered the mitigating circumstances – including the fact that the Applicant was a first offender; that he is demonstrably remorseful; and that there is adequate demonstration that he has reformed while in prison.

14. Weighing all these factors, I hereby substitute the death sentence imposed on the Applicant with a term sentence of imprisonment for twenty-four (24) years. The time will be computed from 10/06/2005 when the Applicant was first arraigned in Court since he was in custody since then.

15. Orders accordingly.

Dated and delivered at Nakuru this 25th day of June, 2020

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by Video-conference facility pursuant to the various Directives by the Honourable Chief Justice asking Courts to consider use of technology to deliver judgments and rulings where expedient due to the Corona Virus Pandemic. This resulted in Administrative Directives dated 01/04/2020 by the Presiding Judge, Nakuru Law Courts authorizing the delivery of judgment by video-conferencing. This avoided the need for the participants to be in the same Court room for the delivery of the judgment. The Appellant attended by video-conference from Prison while the Prosecutor, Mr. Alex Chigiti, and the Court Assistant were in attendance by video-conference set up at the Court’s Boardroom. Representatives of the media were able to access the proceedings by watching at the Court’s Boardroom. Accordingly, the proceedings met the constitutional requirement of public hearing.