REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 17 OF 2019

(From original conviction and sentence in Criminal Case No. 263 of 2016 of the Chief Magistrate's court at Kerugoya)

BENEDICT THEURI KANYONI.....APPELLANT

V E R S U S

REPUBLIC.....PROSECUTOR

JUDGMENT

1. The appellant Benedict Theuri Kanyoni was convicted for the offence of robbery with violence contrary to **Section 29(6) of the Penal Code** and was sentenced to death. He proceeded to file this appeal which raised the following Four grounds:-

a. The learned trial Magistrate erred in law and facts by relying on identification parade which was not fairly conducted.

b. That the trial Magistrate failed in law and facts by convicting me on the basis of identification which lacked merit.

c. That the trial Magistrate erred in law and facts by sentencing me to life imprisonment which is harsh and excessive without considering that I am a first offender.

d. That the trial Magistrate failed to consider that the prosecution failed to prove their case beyond any reasonable doubt.

2. The appeal was admitted and when the matter came up for mention of directions, the appellant requested for more time and stated that he would consider whether to proceed with the appeal. He cited the Supreme Court decision in the case of Francis Kioko Muruatetu as his reason for that request. Eventually the appellant informed the court that he wished to proceed with an application on the re-sentencing. The appeal was therefore marked as abandoned and withdrawn.

3. The appellant filed submissions on the application for re-sentencing. He submits that he was sentenced to death despite the sentence having been outlawed. He prays that the court substitutes the death penalty in line with the Supreme Court decision in **Francis Kioko Muruatetu & Another –v- R & Others 2017 eKLR.**

4. The appellant urges the court to find that there were no aggravating circumstances in the case, he has shown remorse and he is fully rehabilitated. That the violence used was minimal and not excessive or sadistic. That there was no use of firearm or weapon during the robbery.

5. He submits that he has already served Four (4) years and Fourty Seven (47) years old. He has urged the court to consider the following mitigation:

a) That am a first offender and promise not to indulge in criminal activities again in future.

b) That am remorseful to the incident that has ruined my life and the life of my family who suffered.

c) That am urging the court to consider the period served in prison in sentencing me (under Sec 333(2)).

d) That the years I have been in prison has been useful for me to get me back to my right track.

e) That I have undergone a lot of training especially on theology to help me overcome the spiritual foolishness I was suffering (see my attached theological studies certificates).

6. The prosecution filed submissions through F.S. Ashimosi, Assistant Director of Public Prosecution. He submits that the conviction was based on proper analysis of the evidence and the application of the law. He prays that the appeal on conviction be dismissed.

7. With regard to the appeal on the sentence, counsel submits that the principles upon which an appellate court will act in exercising discretion to review or alter the sentence imposed by the trial court were settled in the case of **Ogolla Owuor –v- R 1954 E.A.C.A 270** where the court held:-

> ***"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors"***. To this, we could add a third criterion namely, "That the sentence is manifestly excessive in view of the circumstances of the case **"CR –v- Sily Simshowsky (1912) CCA 28 TLR 263" See also Shadrack Kipkoech Kogo –v- Republic Eldoret Criminal Appeal No. 253/2003** held:

> ***"Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irregular factor or fact or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered."***

8. Regarding the resentencing the counsel submits that the court is guided by the case of **Francis Kioko Muruatetu & Others –v- Republic Petition 15 & 16 of 2015** where the supreme court set out guidelines with regard to mitigating factors that are applicable in a re-hearing. Sentence for conviction on a charge of murder.

These are –

a) Age of the offender

b) Being first offender

c) Whether the offender pleaded guilty.

d) Character and record of the offender.

e) Commission of an offence in reference to gender based violence.

f) Remorsefulness of the offender.

g) The possibility of reform and social preadaptation of the offender.

h) Any other factor the court may consider relevant.

9. The counsel submits that the petitioner be sentenced to Twelve years Imprisonment.

10. I have considered the petition and the submissions.

11. The Supreme Court did not outlaw the death sentence as submitted by the petitioner. The death penalty is not unconstitutional. **Article 26(3) of the Constitution** provides that –

> ***"A person shall not be deprived of life intentionally except to the extent authorized by this Constitution or other written:"***

12. What the Supreme Court held in the case of Francis Kioko Muruatetu is that the mandatory nature of the death penalty is unconstitutional as it deprives the trial Judge the discretion in sentencing. Death penalty remains a lawful sentence which can be imposed by courts depending on the circumstances of the case.

13. In this case, the trial Magistrate imposed the mandatory death sentence. The trial Magistrate stated while passing the sentence on the petitioner –

> ***"But unfortunately the provision of Section 296(2) remains unchanged though the Supreme Court has ruled against the death sentence. The provision in relation to the offence remains unchanged hence this courts hands are tied and has no other option available other than to sentence the accused to death -----"***

14. The sentence speaks volume. The court passed the mandatory death sentence not because the sentence was deserved after considering the circumstances of the case and the mitigation but because the sentence death was mandatory. This was contrary to the holding by the Supreme Court in Muruatetus case. This court has jurisdiction to interfere with the sentence by way of re-sentencing hearing as directed by the Supreme Court.

15. The sentencing Policy Guidelines has stated that there are four considerations which the court should make when imposing sentence.

16. These are:-

- The sentence provided for under the relevant statute.
- Mitigating circumstances which would determine whether the sentence would be lessened in favour of the accused.
- Aggravating circumstances.
- Weigh the mitigating as well as the aggravating circumstances.

17. The Supreme Court in Muruatetu case gave guidance to courts on the factors which the courts should consider as mitigating factors in re-sentence. These has been well articulated in the submissions by Mr. Ashimosi, the Prosecution Counsel, above and I need not list them again. In considering these factors, it was the view of the Supreme Court that the key element in sentencing which is Judicial discretion is not affected by the factors which it has given as the guidelines in sentencing. They were only intended to ensure that there is transparency, consistency and fairness in sentencing.

18. I have considered the petition. The 1st consideration is the sentence provided under **Section 296(2) of the Penal Code** is death. I have perused the record of the lower court. I find that minimal violence was used although the appellant committed the offence in company of others. There are no aggravating circumstances. The petitioner was sentenced on 23/3/2019. He was arraigned in court on 25/4/2016 and was in custody through out the period of his trial. **Section 333(2) of the Criminal Procedure Code** provides where a person was held in custody during trial the sentence shall take into account the period spent in custody.

19. Having considered the circumstances of this case, the mitigation and the submission by the Prosecution's counsel I re-sentence the petitioner to Twelve (12) years imprisonment to be computed from 25/4/2016.

Dated at Kerugoya this 23rd Day of July 2020.

L. W. GITARI

JUDGE

23/7/20