



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL PETITION NO. 51 OF 2018

CLEOPHAS JUMA WEPUKHULU.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT ON RE-SENTENCING

1. The petitioner was on the 16th October, 2008 convicted of the offence of robbery with violence at Mumias Law Courts and sentenced to suffer death. His appeal to the High Court at Kakamega was unsuccessful. He has now approached this court seeking for re-sentencing following the Supreme Court decision in the case of **Francis Karioko Muruatetu & Another -Vs- Republic (2017) eKLR** where the said court declared the mandatory sentence for murder under Section 204 of the Penal Code to be unconstitutional for the reason that it deprives courts the discretion to impose a lesser sentence in an appropriate case. As a corollary, the Court of Appeal in **William Okungu Kittiny – Vs- Republic (2018) eKLR** applied the Muruatetu case *mutatis mutandis* to the mandatory sentence for the offence of robbery with violence under section 296 (2) of the Penal Code and held that the said section was unconstitutional for the same reasons given by the Supreme Court in the *Muruatetu case*. The court held that the sentence for robbery with violence provided under section 296 (2) of the Penal Code is a discretionary maximum sentence. In the premises courts have discretion in a charge of robbery with violence to impose a sentence other than the death sentence in an appropriate case. It is on that basis that the petitioner is seeking for re-sentencing. The petition is therefore well founded in law.

2. The petitioner mitigated that he has been in prison custody since the year 2006 and that the time served ought to be treated as sufficient punishment. That he is fully reformed. That he would wish to go back to his family and community who are ready to support him.

3. The evidence adduced against the petitioner at the lower court was that he was a member of a gang that on the 7th November, 2006 broke into a shop at Mumias Township whereby they beat up the watchman, fractured his hand and leg and stole mobile phones valued at Ksh. 95,600/=.

4. Sentencing is a discretion of the trial court that should be exercised judiciously. In **Ambani Vs Republic**, the High Court 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.

5. The Judiciary Sentencing Policy Guidelines lists the objectives of sentencing at page 15 paragraph 4.1 as follows:

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 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. Criminal conduct ordinarily occasions victims, communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.

5. **Community protection:** To protect the community by incapacitating the offender.

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

6. In **Francis Karioko Muruatetu & Another –Vs- Republic (Supra)** the Supreme Court stated the following guidelines as mitigating factors in a re-hearing sentence for the conviction of a murder charge:-

(a) age of the offender;

(b) being a first offender;

(c) whether the offender pleaded guilty;

(d) character and record of the offender;

(e) commission of the offence in response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender and

(h) any other factor that the court considers relevant.

These factors are also applicable in a re-sentencing hearing for the offence of robbery with violence.

7. Section 333 (2) of the Penal Code requires a court when sentencing an accused person to take into account the time spent in custody awaiting trial.

8. I have considered all the above. I have also considered some other sentences imposed by courts in robbery with violence cases after the Supreme Court judgment in the *Muruatetu case*. In **Nicholas Mukila Ndeti –V- Republic (2019) eKLR** where the appellant and others robbed several people while armed with machetes and other crude weapons and in the course of the robbery cut their victims, the court observed that the offences committed were serious. The court reduced the sentence of 30 years imprisonment imposed by the trial court to 25 years imprisonment.

9. In **Benson Ochieng & France Kibe –V- Republic (2018) eKLR** the court re-sentenced the petitioner to 20 years imprisonment upon considering that the offence was aggravated by the use of multiple guns by an organized gang to commit armed robbery.

10. The petitioner was arrested in November, 2006. He was in custody for two years while awaiting trial and was sentenced in October, 2008. He has therefore been in incarceration for a period of nearly 14 years.

11. The proceedings of the trial court indicate that the petitioner was a first offender. I have however considered that the offence was aggravated by the vicious beating that the robbers visited on the watchman whereby they occasioned him fractures on the right hand and right leg. Such a barbaric attack calls for a commensurate sentence. Though I do not think that the circumstances of the case calls for a death sentence, I am of the view that a stiff sentence will serve the justice of the case. In that respect a sentence of 25 years imprisonment will be adequate punishment for the offence committed.

12. The upshot is that the sentence of death imposed on the petitioner is set aside and substituted with one of 25 years imprisonment commencing from the date of arrest on 6th November, 2006.

Delivered, dated and signed at Kakamega this 30th day of September, 2020.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Mutua for State/Respondent

Petitioner – Present through video link to GK Prison, Kakamega Court Assistant – Polycap

14 days right of appeal.