



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL PETITION NO. 06 OF 2019

ELIUD MACHARIA PETITIONER

VERSUS

REPUBLICRESPONDENT

JUDGMENT ON RE-SENTENCING

1. The petitioner was on the 20th August, 2007 convicted by a magistrate's court at Kakamega of the offence of robbery with violence contrary to section 296 (2) of the Penal Code and sentenced to death. His appeal to the High Court did not bear fruit. He has now approached this court for re-sentencing pursuant to 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 of the inherent discretion to impose a sentence other than the death sentence in an appropriate case. Subsequently the Court of Appeal in **William Okungu Kittiny -Vs- Republic (2018) eKLR** applied the Muruatetu case *mutandis mutatis* to the mandatory sentence for robbery with violence under the provisions of section 296 (2) of the Penal Code and declared the said section to be unconstitutional on the same reasons stated by the Supreme Court in the *Muruatetu case*. The said court accordingly held that the mandatory death sentence provided under section 296 (2) of the Penal Code for robbery with violence is a discretionary death sentence. In the premises a court can, in an appropriate case, impose a sentence other than the death sentence in a case of robbery with violence. The petitioner herein is seeking for re-sentencing and for the court to determine the most appropriate sentence in his case. In view of the above, the petition is properly before the court.

2. The petitioner mitigated that the period spent in prison custody is enough punishment for the offence committed. That he had a brother who was educating his children but the said brother died while he was in prison. Further that he has a mother.

3. The court called for a pre-sentencing report which was prepared by a Probation Officer, **Mr. Kennedy Achungo**. The report indicates that the petitioner is aged 42 years. That his wife got married elsewhere after he was sentenced. That he has 4 daughters two of whom are in secondary school.

4. The report further indicates that the local community of the petitioner is hostile towards him due to his ruthless criminal past within the area. That the victim in this matter was hospitalized for 3 months as a result of the serious injury that he sustained on the skull. That the area chief has indicated that the petitioner has been sending threats to kill him in case he was released from prison. That the petitioner's safety and that of the community cannot be guaranteed should the court consider releasing him. The report recommended that the petitioner continues to serve his current sentence.

5. The evidence adduced against the petitioner during his trial was that on the 10th April, 2006 he waylaid his victim and robbed him of a mobile phone, Ksh. 6,000/= in cash and gumboots. During the course of the robbery he cut him with a panga on the left side of the head, chopped off his left index finger and occasioned him fracture of the maxilla bone.

6. Sentencing is a discretion of the trial court. 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.

7. 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.

8. 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.

9. In **Nicholas Mukila Ndetei –V- Republic (2019) eKLR**, Odunga J. stated as follows:-

“In my view, fairness to the accused where a sentence re-hearing is considered appropriate would require a consideration of the circumstances prior to the commission of the offence, at the time of the trial and subsequent to conviction. The conduct of the accused during the three stages may therefore be a factor to be considered in determining the appropriate sentence. The need to protect the society clearly requires the court to consider the impact of the incarceration of the offender whether beneficial to him and the society or not hence the necessity for considering a pre-sentencing report.”

10. 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.

11. 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 Ndetei –V- Republic (Supra)** 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.

12. 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.

13. The petitioner has been in incarceration since the time of his arrest in June, 2006 which makes it a period of over 14 years. I have considered that his pre-sentencing report is unfavourable. The petitioner savagely attacked his victim with a panga during the robbery and occasioned him serious injuries that included chopping off of his finger and a fracture. The petitioner does not appear to be remorseful. In face of the unfavourable report and considering the nature of injury that the petitioner occasioned to his victim, I do not think that the period served is sufficient for the offence committed. Though I do not think that the offence warrants the imposition of the death sentence, it is my view that a stiff sentence will meet the justice of the case. I will re-sentence the petitioner to twenty five years imprisonment.

14. The upshot is that the sentence of death imposed by the trial court is set aside and substituted with one of twenty five (25) years imprisonment commencing from the date of arrest, i.e. on 9th June, 2006. It is so ordered.

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.