



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL PETITION NO. 44 OF 2019

PATRICK MUKALO AMUKATA.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT ON RE-SENTENCING

1. The petitioner was on the 28th September, 2005 convicted for the offence of robbery with violence and sentenced to death. His appeal to the High Court did not bear fruit. He has now approached this court 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 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.

2. In his mitigation the petitioner urged the court to consider an appropriate sentence and for the same to commence from the date of his arrest.

3. The court called for a pre-sentencing report which was prepared by **Mr. Kennedy Achungo**, Probation Officer. The report indicates that the petitioner is aged 39 years. That he has been in prison for a period of 15 years. That his parents are deceased and that he is the only son remaining in his family together with one sister. That he was married but he had divorced with his wife before he was arrested. That his parents owned ½ acre of land that is being taken care of by an elderly uncle. That nobody lives at the petitioner's home which is now abandoned. That his neighbours are not opposed to his release.

4. The report further indicates that the petitioner has been of good behaviour while serving sentence. That the victim of the offence was contacted through phone. He expressed fears for his life should the petitioner be released though he does not come from the locality of the petitioner.

5. The evidence adduced against the petitioner during his trial was that he was a member of a gang that on the 16th November, 2004 attacked and robbed their victim of a mobile phone, driving licence, car keys, identification card and Ksh. 3,800/= in cash. In the course of doing so they cut the victim with a panga on the right hand and fractured it.

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. Section 333 (2) of the Criminal Procedure Code requires a sentencing court to take into account the period spent in custody awaiting trial.

10. In **Nicholas Mukila Ndeti –V- Republic (2019) eKLR**, Odunga J. considered what the court has to consider in a re-sentencing hearing and held that:-

“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.”

11. I have considered all the above. I have also considered some comparative sentences imposed by courts after the Supreme Court judgment in the *Muruatetu Case*. In **Stephen Kimanathi Mutunga –V- Republic (2019) eKLR** the petitioner and his gang mates broke into the house of their victim and stole money and a motor vehicle. In the course of the robbery they hit the victim on the head with a stone and shot him on the leg with an arrow. The petitioner had been behind bars for 18 years. C. Kariuki J. re-sentenced the petitioner to the period served of 18 years.

12. In **Josphat Musyimi Makau –V- Director of Public Prosecutions (2020) eKLR** the petitioner and others had robbed the complainant of a motor cycle, one alarm control and a knife while armed with knives. The petitioner had been in prison custody for approximately 16 years including the pre-trial custody. Nyakundi J. re-sentenced him to the period already served.

13. The petitioner was arrested on 20th December, 2004. He has therefore been in incarceration for a period of close to 16 years. Taking into account the favourable pre-sentencing report and that the petitioner has been of good behavior while serving sentence, I am of the considered view that the period served is sufficient punishment for the offence committed.

14. The upshot is that the sentence of death imposed by the trial court is set aside and substituted with one of the period already served. The petitioner is set at liberty forthwith unless lawfully held.

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.