



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL PETITION NO. 58 OF 2019

TEDDY KINAMBUKA INYANGALA.....PETITIONER

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT ON RE-SENTENCING

1. The petitioner was on the 4th May, 2005 convicted of the offence of robbery with violence and sentenced to suffer 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 a death sentence in a case of robbery with violence. It is on this basis that the petitioner is seeking for re-sentencing.

2. The petitioner was arrested on the 30th September, 2004 and was in custody during the trial. He mitigated that the time he has spent in custody of 16 years is sufficient for the offence committed. That there are no aggravating circumstances that would justify a harsher penalty than would ordinarily be imposed. That he is remorseful and he is desirous to be enjoined with his family. He pleaded with the court to sentence him to the time already served.

3. The evidence adduced against the petitioner during the trial was that he was a member of a gang which while armed with pangas and iron bars attacked their victim at his shop and robbed him of Ksh. 50,000/= in cash, mobile phone, wrist watch, a torch, 5 mattresses, one car battery, one small radio, two wall clocks, one table clock, six shirts, four coats, four long trousers, six padlocks, one leather belt, one whip and assorted shop goods all valued at Ksh. 119,200/=. In the course of the robbery they cut their victim 4 times on the head, and also cut him on the lower back and right hand. They hit him with blunt objects on the ribs, chest, back and on the legs. The victim was admitted in hospital for 10 days. The degree of injury was classified as grievous harm.

4. The court called for a pre-sentencing report that was prepared by **Collins Gaunya**, Probation Officer. The report indicates that the petitioner is aged 40 years. That his immediate family do not object to his release. That they are willing to receive him and help him settle down should the court return a favourable finding. That his victim was reached on phone and indicated that he does not object to the release of the petitioner from custody as he believes that the long period of incarceration of the petitioner is adequate punishment to him.

5. The report further indicates that the petitioner has been of good behavior while in prison custody and that he has trained to the level of trade test grade I in carpentry.

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**, Odunga J. considered the factors that have to be considered in a re-sentencing hearing and 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 date of his arrest on 30th September, 2004. That makes it a period of 16 years. I am however of the considered view that the period of incarceration is not sufficient for the offence committed which offence was aggravated by the savage attack that the petitioner and his colleagues visited on their victim whereby they occasioned him grievous harm. It is incomprehensible that people can callously cut a person several times so as to steal from him. Though I do not think that a death sentence is warranted in the case, a stiff prison sentence is called for in the circumstances of the case. I am of the considered view that a sentence of 25 years imprisonment will serve the justice of the case.

14. The upshot is that the sentence of death imposed by the trial court is set aside and substituted with one of 25 years imprisonment commencing from the date of his arrest, i.e. on 30th September, 2004.

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.