



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL PETITION NO. 28 OF 2018**

**RODGERS SOITA WERE .....1<sup>ST</sup> PETITIONER**

**WYCLIFFE SITATI WERE.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**RULING ON RE-SENTENCING**

1. The petitioners were on the 19<sup>th</sup> October, 2012 sentenced to suffer death upon being convicted of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. Their appeals to the High Court and the Court of Appeal were unsuccessful. However the mandatory death sentence for the offence of robbery with violence has since been declared to be unconstitutional - See **William Okungu Kittiny –Vs- Republic (2018) eKLR**. The petitioners have now filed a petition dated 18<sup>th</sup> May, 2018 seeking for re-sentencing for the court to consider the most appropriate sentence in their case.

2. The facts of the case that led to the conviction of the petitioners were that the petitioners and another attacked the complainant and robbed him of a motor cycle valued at Ksh. 84,000/=. In the course of doing so they seriously injured their victim occasioning him head injuries, loss of 2 teeth, a broken tooth and multiple fractures of the jaw bones. The victim was admitted at Moi Teaching and Referral Hospital Eldoret for about 3 weeks. He continued with treatment at Webuye District Hospital.

3. The petitioners mitigated that they have been in prison since 19/10/12. That they are reformed and that the period served in prison is enough punishment for the offence committed. That the complainant in the case they were convicted of is a family member. That prior to the sentence there was bad blood between their family and the family of the complainant but that the rift has since healed. They further mitigated that they have wives and children.

4. The court called for pre-sentencing reports that were prepared by a probation officer, **Kennedy Achungo**. The reports indicate that the victim is a first cousin to the petitioners and that they are immediate neighbours. That the victim has since forgiven the petitioners and their families reconciled. That the petitioners related well with their neighbours and community who feel that the sentence served is sufficient punishment. That each of the petitioners has a wife and young children. The report urged the court to be lenient in re-sentencing the petitioners.

5. The petitioners cited several cases where sentences of death in robbery with violence cases were substituted with lesser sentences. One of these was **Javan Khaemba Nyongesa –V- Republic, Kakamega HC. Misc. Application No. 16 of 2018** where this court in an application for re-sentencing by the petitioners' co-accused imposed a sentence of 15 years imprisonment. The petitioners cited the case of **Sabastian Okwero Mrefu –V- Republic, Kakamega HC. Petition No. 151 of 2012** where Chitembwe J. considered that the petitioner had been in remand for a period of 3 years and substituted the death sentence with the period served of 8 years.

6. The petitioners further cited the case of **Robert Achapa Okello –V- Republic, Kisumu HC Petition No. 63 of 2018** where the court considered that the petitioner was in remand prison for a period of 1½ years awaiting trial and substituted the death sentence with the period already served of 14½ years.

7. Sentencing is a discretion of the trial court. The court is required to consider all the circumstances of the case before arriving at any given sentence. Section 333 (2) of the Criminal Procedure Code requires a sentencing court to take into account the period spent in custody awaiting trial.

8. In **Francis Karioko Muruatetu & Another –Vs- Republic** 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. 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.”***

10. I have considered the mitigation by the petitioners, the pre-sentencing reports and the cited authorities in respect to sentences imposed by courts in re-sentencing hearings for robbery with violence cases. The petitioners have been in custody for 8 years. They had been in remand for one year awaiting trial. That makes it a period of 9 years spent behind bars. I however do not think that the period served is sufficient sentence for the crime committed. The petitioners and their colleague seriously injured their victim during the robbery. A commensurate sentence is called for due to these aggravating circumstances.

11. In a separate re-hearing sentence in **Javan Khaemba Nyongesa –V- Republic, Kakamega HC. Misc. App. No. 16 of 2018** I re-sentenced the petitioners’ partner in crime to 15 years imprisonment. It is my considered view that the petitioners should get a similar sentence. The sentence of death imposed by the trial court is therefore set aside. I re-sentence each of the petitioners herein to fifteen (15) years imprisonment commencing from the date of sentence by the trial court, i.e. on 19/10/2012.

**Delivered, dated and signed at Kakamega this 29<sup>th</sup> day of October, 2020.**

**J. N. NJAGI**

**JUDGE**

In the presence of:

No appearance for Petitioners

Mr. Mutua for State through video link

Petitioners – present through video link to G. K. Prison Kakamega

Court Assistant - Polycap

14 days right of appeal.