



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 51 OF 2019

JAMES MOHAMED MOYU..... PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Petitioner in person

Mr. Alenga for the state

RE-SENTENCING

The instant petition for re-sentencing has been brought pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another –Vs- R Petition No. 15 of 2015 (2017) eKLR** where the minimum mandatory sentence for murder was declared unconstitutional. As a corollary, in the case of **William Okungu Kittiny –Vs- R Kisumu Criminal Appeal No. 56 of 2013 (2018) eKLR**, the Court of Appeal applied the **Muruatetu** decision **Mutatis Mutandis** to the provisions of Section 296 (2) of the Penal Code which imposes a mandatory death penalty for the offence of robbery with violence. The same was also extended cases of defilement by the Court of Appeal in **Christopher Ochieng v R (2019) eKLR**.

The petitioner was initially charged, convicted and sentence to serve life imprisonment for having committed the offence of robbery with violence contrary section 296 of the Penal Code. He appealed against the decision of the lower in both the high court and the court of appeal but the same was dismissed. The facts of the case at trial were that the Petitioner, while armed pangas, robbed the complainant's bicycles make unknown, valued at Kshs.6000/= and immediately before or immediately after the time of such robbery, murdered the said **Paul Kimani and Joseph**.

Sentencing is a notoriously problematic exercise. It is a balancing act. From time to time jurists have espoused brilliant philosophies around it. Guidelines have been developed. The legislature sometimes weighs in with mandatory minimum sentences for certain offences. There are certain basics. The penalty must fit the crime. The interests of the offender must be balanced against those of justice. It is not right that someone who has offended society should go scot free, or escape with a trivial sentence. But at the same time, he should not be penalized beyond what his misdeed befits. As a matter of principle, punishment should be less retributive and more rehabilitative.

There are more such philosophies or ideologies. But at the end of the day, after everything else has been considered and said, the judicial officer comes down to the hard facts before him; to the individual circumstances of the people before him – the offender and the victim. He cannot be dogmatic about anything. There is no room for an approach that is purely mathematical. A slavish adherence to precedence is manifestly injudicious. In sentencing, the ages of the accused and the victim are relevant. The younger the victim the harsher the sentence, and the older the accused the harsher the sentence.

The Court of Appeal **Thomas Mwambu Wenyi Vs R (2017) eKLR** cited the decision of the Supreme Court of India in **Alister Anthony Pereira Vs State of Mahareshtira at paragraph 70-71** where the court held the following on sentencing:-

“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most

relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.

In **Francis Karioko Muruatetu & Another –Vs- R (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 for the offence of robbery with violence. 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 demand 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.*

I have taken into account some of the cases where convicts for robbery with violence were re-sentenced after the **Muruatetu case**. In **Benjamin Kemboi Kipkone –Vs- R (2018) eKLR** where 3 robbers armed with an AK 47 rifle robbed the complainant of Ksh.250,000/= and a mobile phone, **Chemitei J.** substituted the death sentence with 20 years imprisonment. In **Paul Ouma Otieno –Vs- Republic (2018) eKLR** where the accused being armed with an AK 47 rifle and a kitchen knife robbed the complainant of Ksh.450,000/= and 3 mobile phones. **Majanja J.** substituted the death sentence with 20 years imprisonment. In **Wycliffe Wangugi Mafura –Vs- Republic Eldoret Criminal Appeal No. 22 of 2016 (2018)** the Court of Appeal imposed a sentence of 20 years imprisonment where the appellant was involved in robbing an Mpesa shop agent with the use of firearm.

In **Benson Ochieng & France Kibe –Vs- Republic (2018) eKLR**, **Joel Ngugi J.** re-sentenced the petitioners 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. I have also taken into account Section 333 (2) of the Criminal Procedure Code which requires a sentencing court to consider the period spent already spent in custody.

It must be said that robbery is a very serious offence which should attract a sufficiently deterrent sentence regard being had to the circumstances of the offence and the offender. I have noted that the incident that transpired in this matter was a very unfortunate one. The robbery herein resulted in the murder of the aforementioned deceased persons. The killing of two individuals for mere bicycles and the amputation of their body parts is quite egregious that it must definitely deserve the very stiff sentence. I find no mitigating circumstances in the instant case. I therefore find that the sentence appropriate for an offence of this gravity is 28 years imprisonment from the date of arraignment of the charge.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 26TH DAY OF OCTOBER 2020

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R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Alenga for the state
2. The petitioner