



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 5 OF 2020

BERNARD MUTUA MATHEKA.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Petitioner in person

Mr. Alenga for the state

RE-SENTENCING

The petitioner herein was initially charged, convicted and sentenced to life imprisonment for the offence of Robbery with violence contrary to section 296 (2) of the Penal Code. He was aggrieved by the decision of the lower court and subsequently appealed to both appellate courts where the same was dismissed. The instant petition for re-sentencing has been necessitated by the Supreme Court decision in **Francis Karioko Muruatetu & Another –Vs- Republic Petition No. 15 of 2015 (2017) eKLR** whereby the mandatory death sentence for the offence of murder was declared unconstitutional. As a corollary, in the case of **William Okungu Kittiny –Vs- Republic 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 petitioner is seeking that the death sentence meted out on him be set aside and for the court to impose an appropriate sentence.

The facts of the case laid against the appellant were that the Petitioner while armed with a knife robbed the first complainant of cash Ksh.5,000/=, a mobile phone, make sendos 300 valued at around Kshs.5,000/= and a bicycle and that immediately before or immediately after the time of such robbery threatened to stab the complainant with a knife.

In sentencing an offender, the sentence meted out on an accused person must 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. (See **Ambani Vs Republic**). The Court of Appeal **Thomas Mwambu Wenyi Vs Republic (2017) eKLR** cited the decision of the Supreme Court of India in **Alister Anthony Pereira Vs State of Mahareshra** 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- 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 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- Republic {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 looked into the circumstances under which the robbery was committed. The complainant's experience must have been traumatic after having lost his property coupled with threat to his life. Juxtaposing the aforementioned cases to the matter at hand, it is clear that the robbery was a simple one. No actual violence was visited upon the complainant and the value of the properties he lost was quite minimal. 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. The Petitioner has already spent 14 years imprisonment.

For the reasons aforementioned, the sentence of life imprisonment imposed by the lower court is set aside and substituted with a sentence of the period already served. The petitioner is to be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF OCTOBER 2020

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R. NYAKUNDI

JUDGE

In the presence of:

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