



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 6 OF 2020**

**SUNDAY LEWA DANIEL..... 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 petitioner was involved in the series of robberies at Katendwa and Kidemu trading centres in Bamba village of the then Kilifi District within the then Coast Province. The robberies were committed in the dead of the night in November 2007 when all the complainants were fished out of their beds. In the tribulation, the robbers forced the complainants to part with their monies, mobile phones, personal effects. Some were even frog marched to the shops they operated in the shopping centres and assorted shop items stolen therefrom.

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 considered the petition herein, the supporting affidavit and the judgements of both the lower and appellate courts. As seen in the background facts of the robbery case, the offence was committed in somewhat aggravating circumstances. Several items were violently taken away and one of the complainants was injured. There were dangerous weapons claimed to have been used in executing the 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. The petitioner has already spent approximately 12 years imprisonment.

For the reasons aforementioned, in light of the **Muruatetu Case**, the death sentence imposed by the lower court and affirmed by both the High Court and the Court of Appeal 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 23<sup>RD</sup> DAY OF OCTOBER 2020**

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**R. NYAKUNDI**

**JUDGE**

**In the presence of**

1. Mr. Alenga for the state

## 2. The petitioner