



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 42 OF 2019

ISAAC MTURI MBUNI.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Petitioner in person

Mr. Alenga for the respondent

RE-SENTENCING

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. He now filed a mitigation under **Francis Karioko Muruatetu & Another v R (2017) eKLR**. He implored the court take his mitigation into account given the remarks and jurisprudential development which was brought about by the Supreme Court in **Muruatetu**. In that case, the Supreme Court declared mandatory death sentence unconstitutional on the basis that it deprives judges and judicial officers the discretion to mete out appropriate sentence depending on the peculiar circumstances of each individual case.

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 Mahareshtra** 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.**

In mitigation, the Petitioner asked the court note of the fact that he is a first offender with no previous criminal record. For that reason, he is adamant that he deserves to benefit to the least severe form of punishment. He has urged the court to consider the period he has already spent in custody which is about 10 years and his character and record while in prison which he touts to be disciplined and generous. Lastly, he also submitted that his achievements while in prison, to wit, vocational training in the industry specifically carpentry and joinery certificate warrants him a second chance.

In aggravation, the court notes that the Petitioner and his colleagues were armed with rifles and pangas. They visited violence upon the victims and inflicted some injuries. They ransacked the house and took away with them two mobile phones and cash Kshs.700/-. It was a quite scary and traumatizing experience which the victims went through. The Petitioner caused considerable emotional and psychological harm upon the victim such even now she indicated some signs of being traumatized and she says she had to forgo her job and moved to Mombasa due to the robbery experience.

I have taken into consideration the victim impact assessment report. It established that the victim is now well having so far physically healed from the injuries sustained from the violence visited upon her by the robbers. The victim indicated that she feels safe knowing the petitioner is in prison and she expressed uncertainty as regards his rehabilitation. However, it is noted that the Petitioner's family have over times approached the victim's family for reconciliatory talks which have always been turned down by the victim's family noting that they are content with the sentence meted out by the court.

In terms of section 96(2) of the Penal Code, the sentence for robbery with violence is death. In Kenya, death sentences are usually commuted to life imprisonment by administrative fiat. However, the sentence under Section 96(2) was a minimum mandatory sentence which was condemned by the Supreme Court in **Muruatetu (supra)**, the reason being that the court did not have powers to exercise discretion to mete out appropriate sentences. As result, the sentencing court now possesses discretion to impose an appropriate sentence depending on the circumstance of each individual case.

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 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.

In the petition at hand, the offence was committed in aggravating circumstances. There was no evidence as regards the use of the firearm. The robbers used a pangas to inflict injuries on the victim. Unlike the cases above, the injuries caused were not grievous and the properties stolen were valued at about Kshs.4,700.00. The sentence of life imprisonment meted out on the petitioner is hereby vacated. I therefore, re-

sentence the petitioner to serve eighteen (18) years imprisonment commencing from the date of arrest.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MALINDI THIS 27TH OF NOVEMBER 2020

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R. NYAKUNDI

JUDGE