



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITUI**

**MISC CRIMINAL APPLICATION NO. 8 OF 2019**

**(From Original Conviction and Sentence in Criminal Kitui**

**Chief Magistrate's Court Criminal Case no.233 of 2000)**

**IN THE MATTER OF AN INTENDED APPEAL**

**BETWEEN**

**1. TITUS MUNYOKI MWELWA**

**2. DANIEL MUNYWOKI NYANZA**

**3. JOHN MUASYA NDEMWA.....APPLICANTS**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT**

**R U L I N G**

**1. Titus Munyoki Mwelwa, Daniel Munywoki Nyanza and John Muasya Ndemwa the Applicants** herein were all charged and convicted of robbery with violence contrary to **Section 296 (2)** of the **Penal Code** *vide* **Kitui Principal Magistrate's Court Criminal Case No.233 of 2000**. They were sentenced to death. There subsequent appeal to the High Court *vide* **Nairobi High Court Criminal Appeal No.410 of 2001** was dismissed. There 2<sup>nd</sup> appeal to the **Court of Appeal** *vide* **Criminal Appeal No.134 of 2005** also failed. Their windows of appeals have therefore been exhausted.

2. They have now moved this court for re-sentence following the Supreme Court decision in the case of **Francis Karioko Muruatetu** which *inter alia* found that the mandatory nature of death sentence prescribed by statute is not binding to a trial court and that taking away of the discretionary power of a court in sentencing was unconstitutional.

3. The **Applicants** have based their application on that decision and have asked this court to re-sentence them taking into account the period that have so far served in jail

**4. Titus Munyoki Mwelwa**, for his part told this court that though the death sentence handed to them was commuted to life sentence by President Mwai Kibaki, he had served 21 years in prison. He told this court that he has reformed and that he is now aged 68 years old and not likely to go back to his old habit. He regretted having committed the offence and expressed his profound remorsefulness. He further urged this court to take into consideration the fact that while in prison he has reformed and transformed to become a musician. He told this court that if released he would use the opportunity to preach to the youth that crime does not pay and to prove that he was now a musician, he did a number in the open court to the amusement of the court users at the time. He asked this court to release him in order to enable him record his music and sell for upkeep.

**5. Daniel Munyoki Nyanza** on his part also asked for pardon stating that he committed the crime when he was a youngman. He told this court that he is over 60 years old now and that he had learned to design false teeth which he stated can earn him a living as the same is a hit among the youth. He further stated that he left children who now have children of their own making him a grandfather. He asked this court to release him so that he can go and spend his time with his grandchildren. He expressed remorse adding that he has now learnt that crime does not pay.

**6. John Muasya Ndemwa** on his part also asked for leniency stating that he has now spent 21 years in jail. He told this court that both his

parents and wife have since died as he served his sentence in jail. He added that he learnt carpentry while in prison and stated that the prison authorities had recommended parole for him. He further stated that he is now 62 years and having spent 21 years in prison he has reflected on his crime and vowed never to commit any crime again. He further told this court that he has had to endure ill health in prison and asked this court to release him to enable him get proper treatment.

7. Mr. Okwema learned counsel for the State/Respondent supported the **Applicants'** application for re-sentence stating that the **Applicants** have exhausted all avenues of appeal. He also based his non objection on the judiciary sentencing policy pointing out the long period served by applicants in jail and the fact that the Applicants are remorseful and worthy of consideration by this court.

8. This court upon hearing the **Applicants** directed the County Probation Officer to conduct a social inquiry on all the three Applicants and avail a report on all of them. I have perused through the Probation Reports and find that the reports are favourable to all the three **Applicants**. The Probation Officer opines that the period the **Applicants** have served in jail is enough punishment to them and reported that the reports from the prison authorities regarding their respective conducts in prison are positive.

9. This court has considered this matter and the basis for resentence and finds that this is a classic success story of our penal institution, prison. The prison authorities have really transformed the once feared gang into a transformed and useful people. This court gave the opportunity to the 1<sup>st</sup> Applicant to show that he had reformed and he took the chance enthusiastically and really showed his prowess in Music. When I saw him bellowing out his favorite song in the dock, I asked him if he could play any music instrument. He excitedly asked for time to get his guitar and I obliged and gave the chance. The following day (11.11.2020) he appeared in court armed with his guitar and when he got the chance to play it he simply blew it away and impressed this court. If he continues that way he will go far notwithstanding his advanced age.

10. All the **Applicant** struck this court as convicts who have truly reformed and given their advanced age this court finds that they have made a good case for resentence. I find merit in their application in the premises this court hereby sets aside the sentence imposed on them on 8<sup>th</sup> March 2001 and its place sentence them to the period already served. They are therefore to be released forthwith unless lawfully held.

**Dated, Signed and Delivered at Kitui this 12<sup>th</sup> day of November, 2020.**

**R. K. LIMO**

**JUDGE**