



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NANYUKI**

**NYERI CRIMINAL APPEAL NO 270 OF 1999**

**(From original Conviction and Sentence in Nanyuki SRM**

**Criminal Case No 690 of 1998 – M K Rintari, SRM)**

**ABDI HUSSEIN KAIMOI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING AND RE-SENTENCING**

**(Done at the High Court of Kenya, Nanyuki)**

1. The Appellant herein, **ABDI HUSSEIN KAIMOI**, was convicted of one count of **robbery with violence** contrary to **section 296(2)** of the **Penal Code** and sentenced to death as by law provided. He was also convicted of two other counts of **being in possession of a firearm and ammunition without a firearm certificate** contrary to **section 4(1)** of the **Firearms Act** and sentenced to serve two (2) years imprisonment on each.
2. The Appellant's first appeal herein against the convictions and sentences was dismissed in its entirety in a judgment delivered on 01/12/2000 (Juma & Tuiyot, JJ). His second appeal to the **Court of Appeal at Nyeri** vide **Criminal Appeal No 47 of 2001** was also dismissed in a judgment dated and delivered on 13/05/2005.
3. Following certain developments in the law, the Appellant applied to this court vide **Misc. Criminal Application No 21 of 2018** for re-sentencing. Those developments are that the **Supreme Court of Kenya** in **Petition No 15 of 2015 (Consolidated with Petition No 16 of 2015), Francis Karioko Muruatetu & Another –VS- Republic (2017) eKLR**, in its judgment dated 14/12/2017 declared as unconstitutional the mandatory nature of the death sentence provided for under **section 204** of the **Penal Code** for the offence of **murder** under **section 203** of the same Code. For avoidance of doubt, that apex court also stated that its said declaration did not affect the validity of the death sentence as contemplated under **Article 26(3)** of the **Constitution of Kenya, 2010**. The court remitted back the matter to the **High Court** for re-hearing on sentence only.
4. By parity of reasoning, the said declaration by the **Supreme Court** must no doubt apply in equal measure to the mandatory nature of the death sentence under section 296(2) of the Penal Code. Hence the present application by the Appellant.
5. This being the first appellate court, it has the same sentencing power as the trial court. I therefore considered it more expedient that this court should do the re-sentencing sought by the Appellant rather than remitting the matter back to the trial court, particularly considering the age of the matter. It was also appropriate that the re-sentencing be done in this appeal file rather than in the application file in order to avoid confusion and possible mischief.
6. I have considered the Appellant's submissions as well as those of the learned counsel for the Respondent. I have also seen and read the pre-sentencing report on the Appellant by the **Probation and Aftercare Service** dated 06/02/2020.
7. Finally, I have considered the circumstances of the crime committed. The robbery was a terrifying and traumatizing incident for the victims. There was at least one firearm involved which was fired. There were injuries to several victims. There is thus no gainsaying the fact that this was indeed a robbery with violence perpetrated in aggravated circumstances.
8. On the other hand, the Appellant was a first offender and a young man aged about 22 years at the time of the offence. Everybody deserved a second chance, and a fairly long custodial sentence would have served the ends of justice in this matter.

9. The Appellant has now been in prison for about 22 years. That is a long time, and I hold that he has already paid his debt to society. It is meet and just that at about 45 years of age now he should have a fresh start at upright living.

10. In the circumstances I will set aside the sentence of death imposed upon the Appellant (which I understand was subsequently commuted to life imprisonment by executive clemency). I will substitute therefor a term of imprisonment for the time already served. That means therefore that the Appellant shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

**DATED AND SIGNED AT NANYUKI THIS 19<sup>TH</sup> DAY OF MARCH 2020**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT NANYUKI THIS 17<sup>TH</sup> DAY OF DECEMBER 2020**