



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

PETITION NO.7 OF 2018

IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010 (SUPERVISORY, JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF AN INDIVIDUAL) HIGH COURT PROCEDURE PRACTICE AND PROCEDURE RULES 2013

AND

IN THE MATTER OF: ARTICLE 22(1) OF THE CONSTITUTION

AND

IN THE MATTER OF: ARTICLE 23(1) OF THE CONSTITUTION

AND

IN THE MATTER OF: ARTICLE 19,20,21,22,23,24,25,27, 28, 48, 50, 258 AND 259 OF THE CONSTITUTION

BETWEEN

CHIGAMBA JUMA BIDU.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT ON RESENTENCING

1. From the record of proceedings of the trial court in **Mombasa CM Criminal Case No.1734 of 2020**, the accused was charged with the offence of **Robbery with Violence contrary to Section 296(2) of the Penal Code**.
2. The particulars of offence were that on the **11th day of April 2000** at **Mwaluganje Travellers Camp** in **Kinango Location, Kwale District** of the **Coast Province**, the accused jointly with others being armed with offensive weapons namely pangas, simis and swords, robbed **Ali Said Ndekwe** of cash **Kshs.60,000/=**, a bank cheque of **Kshs.6,000/=**, **pocket phone** made **Motorolla**, all valued at **Kshs.105,000/=** and at or immediately before or after the time of such robbery used actual violence to the said **Ali Said Ndukwe**.
3. The prosecution's case was that the Complainant **Ali Said Ndukwe (PW1)** was working as a security officer at **Mwalughanje Travellers Camp**. The whole camp is fenced. On the material date that is on **11th April 2000** at about **3.00am** while in the sentry box, he saw a figure about 25 meters away, bending. He thought it was a Leopard. His colleague one **Mwabuta** was in another section. After about 3 minutes the door to the sentry box was pushed. He got hold of it and pushed it outside. A little while later he saw a torch light. He thought it was his colleague. However, he heard a voice of one of the members of the gang shout, **"come out"**. He sensed danger. He refused to come out. They struggled over the door till finally it fell outside. He had a panga. He blocked it. On doing so, he was cut on the hands, head and back severely.
4. He started running away but unfortunately fell in a pit. They got hold of him and ordered him to give them money. He told them he was only a security officer and did not know where the management kept the money. All this time, he was shouting to alert his colleague **Mwabuta** but surprisingly he did not come to his assistance. The thugs had pangas, bows and arrows. They tied his hands backwards and cut him on the face near the left eye. They took him back to the reception area of the **Travellers Camp**. By then, security lights were on. They told him to show them the Manager. He said he did not know where he was. One of them picked a huge stone and smashed the door to the Manager's office open. They carried the cash box. That was where the money was. They forced the Complainant to follow them. After about 1km, they stopped and broke the box open. They removed all the cash, cheque and even removed the **Complainant's 400/=** from his pocket.

5. The Petitioner was tried and convicted and jailed to death.

6. The Petitioner is now in court for purposes of resentencing pursuant to the Supreme court in **Francis Karioko Muruatetu & Another – vs- Republic[2017] eKLR**, in which the apex Court found that the mandatory nature of the death sentence was unconstitutional and struck down **Section 204** of the **Penal Code** to the extent that it prescribed mandatory death sentence upon conviction for murder.

7. The reasoning in **Muruatetu Case** respecting **Section 204** of the **Penal Code** (the penalty section for murder), has been extended by the Court of Appeal to the mandatory death penalty in Robbery with Violence cases and probably all other similar mandatory death sentences. That was in **William Okungu Kittiny –vs- R [2018]eKLR**.

8. It is for this reason that I take jurisdiction to re-consider the sentence on the Applicant herein following the **Muruateru Case**.

9. **M/S. Balongo**, Learned State Counsel, conceded that the circumstances of this case did not warrant to death sentence under our emerging jurisprudence. However, he enumerated several factors he considered aggravating which he wanted the court to consider. He pointed out the following:-

a) That the Applicants were armed with offensive weapons namely sword, panga and metal bars during the Robbery.

b) In the course of the robbery, they slapped the Complainant with the side of the panga.

c) There were more than three attackers.

d) The items robbed were worth more than Kshs.200,000/=.

10. **M/S Balongo** submitted that looking at the circumstances, 30 years imprisonment would be appropriate sentence, including the 20 years already served.

11. On the other hand, the following extenuating circumstances are present here:-

a) The Petitioner is demonstrably remorseful;

b) He was a first offender;

12. Taking all these factors into consideration, I do not find the robbery committed by the Petitioners to be particularly heinous as to attract the ultimate penalty of death. Indeed, while there is evidence that actual violence was used, the violence used was minimal. There was no gratuitous use of violence or any sadistic infliction of harm.

13. I believe that in this particular case, the time served in prison by the Petitioner of **20 years** would, given the circumstances here, serve all the sentencing objectives considering the nature of the offence, the circumstances in which it was committed, the circumstances of the Applicant, and the societal interests in denouncing the crime of Robbery with Violence.

14. I therefore, substitute the death sentence imposed on the Petitioner with a sentence equal to the time already served. Consequently, the Petitioner shall be released from prison unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at MOMBASA on this 15th day of December, 2020.

E. K. OGOLA

JUDGE

Judgment delivered in chambers via MS Teams in the presence of:

Mr. Fedha for State

Petitioner in person

NOTE:

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Judgment has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all Judgments and Rulings be pronounced in open Court.

E. K. OGOLA

JUDGE