



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**MISC. CRIMINAL APPLICATION NO. 138 OF 2018**

**NICHOLAS AMBUGA LIMANYE.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT UPON APPLICATION FOR RE-SENTENCING**

1. On 29/09/2004 at about 6:30pm, Joseph Njunge's motor vehicle Registration No. KAC 139F stalled at Section 58 within the municipality of Nakuru. It had run out of fuel. A container in hand, he went to purchase some fuel from a nearby petrol station. On his way back, he met Jane Wangari Maina, his tenant. She was accompanied by her four-year old daughter. He offered them a lift. They trooped together to the stalled motor vehicle.

2. As soon as Joseph had finished refueling, three strangers emerged abruptly. They turned out to be robbers. They bundled Joseph, Jane and the young girl to the back seat of the car. One of them commandeered the vehicle. One of them sat at the front passenger seat. One of them sat at the back seat with the victims. The one who sat at the back seat threatening the victims with a pistol is the Applicant in this case, Nicholas Ambuga Limanye.

3. The Applicant and his colleagues robbed Joseph and Jane of money, car radio, and a wrist watch all valued at Kshs. 200,000/-. They then used Joseph's motor vehicle to block another motor vehicle which they took control of and went with the car keys to Joseph's motor vehicle. In the short ride before abandoning them, the Applicant sprinkled tobacco on the eyes of the three victims ostensibly to prevent them from seeing the attackers.

4. The Applicant was unfortunate enough to be arrested in connection with the robbery. His colleagues escaped and have never been arrested. The Applicant faced trial in which he denied the charges but was convicted after a full trial. His appeals to the High Court and the Court of Appeal did not yield much. His conviction on two counts of robbery with violence was affirmed. So did the death sentence with respect to the first count. The Court of Appeal held in abeyance the sentence for the second count.

5. The Applicant approached this Court for re-sentencing following the window opened up by the Supreme Court in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR**. He seeks for substitution of the death penalty he received with a prison term. In the **Muruatetu Case**, the Supreme Court outlawed mandatory death penalty for murder as unconstitutional and struck down section 204 of the Penal Code to the extent that it prescribed mandatory death sentence upon conviction for murder.

6. 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 v R [2018] eKLR**.

7. In **Benson Ochieng & Another v Republic (Nakuru High Court Misc. Application No. 45 of 2018)**, I reached the conclusion that the High Court can invoke its original jurisdiction bequeathed to it in Article 165(3)(a) of the Constitution to re-sentence persons on death row who were sentenced pursuant to the mandatory death penalty provisions which have been declared unconstitutional. Addressing the advisory by the Supreme Court to those on death row pursuant to the mandatory death penalty provisions the Supreme Court had just declared unconstitutional that they should await a Taskforce ordered by the Supreme Court and not approach the Supreme Court with individual petitions, I had this to say:

*As I understand it, this Application is pivoted on Article 165(3)(a) of the Constitution. That clause gives the High Court unlimited original jurisdiction in criminal and civil matters. On the other hand, the Supreme Court advised similarly-positioned would-be Petitioners to await the formation of the Taskforce which will recommend the way forward for the thousands of prisoners presently serving the death sentence. However, the position of the Supreme Court was quite specific: it indicated that it will not consider individual Petitions presented to it by the prisoners after enunciating the constitutionality of the mandatory death sentence.*

*I have taken the position that the Supreme Court neither intended nor achieved the purpose of limiting the jurisdiction of this Court to consider applications for re-sentencing by individuals such as the Applicants who were sentenced to death under the then mandatory provisions of the Penal Code. A progressive and purposive reading of the constitutional provisions relied on by the Supreme Court to reach its outcome in the **Muruatetu Case** would lead us to this conclusion. The Court, may, of course, determine for prudential reasons, to await the work of the Taskforce or other docket management considerations.*

8. It is for this reason that I take jurisdiction to re-consider the sentence imposed on the Applicant herein following the **Muruatetu Case**.
9. In mitigation to urge the Court to set aside the death sentences imposed on him, the Applicant informed the Court that he had a difficult upbringing which affected his worldview; that his parents were separated and could not afford to pay school fees for him in secondary school; that this pushed him to a life of crime.
10. The Appellant informed the Court that since his sentence was commuted to life, he has been going through various trainings. He has attained Grade 1 status in both carpentry and upholstery while in prison. He hopes to use these skills to cater for himself if released.
11. The Applicant further submitted that he is now fully reformed and rehabilitated; that he has been cooperative with prison authorities; and that he became a Christian. He produced various certificates from Theological colleges to demonstrate this. He also produced a letter from the Officer in-Charge, Naivasha prison which is glowing in its recommendation.
12. Finally, the Applicant expressed genuine remorse for his actions.
13. Mr. Chigiti, the Prosecutor, conceded that the Applicant seemed honest and applauded him for not persisting in denying that he was involved in the robbery. He urged the Court to strike a fair balance. He pointed out that two people were subjected to a lot of cruelty: there was robbery; the Applicant sprinkled tobacco in the eyes of the victims to prevent them from pursuing them.
14. Mr. Chigiti further submitted that several offences were committed including abduction and assault. The first complainant was hit with a gun. This is an indication that the Applicant subjected the complainant to degrading treatment. There was also pistol involved.
15. Mr. Chigiti further submitted that the other robbers are still at large as they were never arrested and there is a risk that the Applicant might rejoin them. While conceding that the Applicant was a first offender, Mr. Chigiti was of the view that 30 years imprisonment would be the appropriate sentence in this case.
16. A point of convergence between the Applicant and the Prosecution is that the death penalty would be disproportionate in this case. The death penalty is reserved for the most heinous aggravated robberies. This was not one such.
17. So what would be the appropriate prison term for the Applicant in this case?
18. I have taken into consideration the mitigating circumstances: that the Applicant is a first offender; that he is remorseful; that he has reformed while in prison and he stands a good chance to remain crime-free if released.
19. On the other hand, I have taken into consideration the aggravating circumstances in this case: that the Applicant was a member of an organized gang; that he was armed with a pistol; that he assaulted the victims; that there was a young child aged only four years old who was a victim; that in addition to the robbery, the Applicant and his colleagues abducted the victims. These are substantial aggravating circumstances.
20. **In view of these aggravating circumstances, after taking into consideration the mitigating circumstances and the time the Applicant was in remand during the pendency of his case, I sentence the Applicant to twenty-four (24) years imprisonment for each of the two counts of robbery with violence. The two terms will run concurrently. The prison term will be computed commencing on 21/12/2005 when the Applicant was convicted and sentenced.**
21. Orders accordingly.

**Dated and delivered at Nakuru this 31<sup>st</sup> day of January, 2019**

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**JOEL NGUGI**

**JUDGE**