REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. CRIMINAL APPLICATION NO. 88 OF 2018

BKM.....APPLICANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGEMENT ON APPLICATION FOR RESENTENCING

1. The Applicant, BKM, was arraigned before the Molo Law Courts charged with a single count of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars contained in the charge sheet were that on 18/10/03 at Tayari Farm, Molo Nakuru District jointly with others not before Court, while armed with dangerous weapons namely a homemade toy gun, Pangas and Rungus, the Applicant and his colleagues robbed Margaret Muthoni Mugo of cash Ksh 400/= one centrifuge machine, a TV Set, three blanket, 10 sufurias, 6 hand bags, a mobile phone, a wall clock and three mattress all valued at Ksh 43,000/= and that at the time threatened to use personal violence against the victim.

2. After a fully-fledged trial which followed a not-guilty plea by the Applicant, the Trial Court convicted the Applicant. It proceeded to sentence him to the death penalty as the law then provided. An appeal by the Applicant to both the High Court and the Court of Appeal were futile: both the conviction and sentence were affirmed.

3. Relief for the Applicant only came on 17/12/2017 in the form of the Supreme Court decision in ***Francis Karioko Muruatetu & Another v Republic [2017] eKLR***. 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.

4. 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***.

5. 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 adviced 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.*
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> *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.*

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

7. In his Application, the Applicant seeks the substitution of the death penalty they received with a prison term. He hopes that after due

analysis the Court will conclude that the time served in custody is sufficient punishment.

8. To determine whether the Application is meritorious and to what extent, the Court must look at the circumstances surrounding the commission of the offence, the circumstances related to the victims of the offence as well as the circumstances related to the Applicant himself.

9. The robbery happened on 18/10/2003. It was around 10:30pm. The Complainant, Margaret Muthoni Mwangi and her friend, Waithera, were walking towards Margaret's house at Tayari Farm, Molo. Three men accosted them. They were armed with pangas, rungus and what seemed to them like a pistol. Margaret was threatened by a panga and told to surrender all the money in her possession. She complied. She handed her handbag to one of the robbers. Inside the handbag was the key to her house. When she reached home, she discovered that the house had been opened using the key and several items stolen from the house including her radio, TV set, speakers, a wall clock, 10 sufurias, a centrifugal machine, mattresses and beddings.

10. The Applicant was arrested in possession of the centrifugal machine. Unable to satisfactorily explain how he had come to be in its possession, he was convicted on the strength of the doctrine of recent possession. The High Court and the Court of Appeal affirmed the conviction and death sentence.

11. In mitigation, the Applicant raised the following factors:

a. That he is a first offender;

b. That he is very remorseful for the part he played in the robbery;

c. That he was the first born and his parents were already dead;

d. That he had been misled by his colleagues but that they did not hurt the Complainant;

e. That he is youthful; he was only 26 years old at the time of his arrest;

f. That he was sodomized while in prison as a result of which he contracted HIV/AIDS. He now lives with HIV;

g. That he is fully reformed. He has been made to be in-charge of others and has been made him to be made a trustee. He has taken several courses while in Prison.

12. Ms. Odero, the Prosecution Counsel, conceded that there are weighty mitigating circumstances. She, however, reminded the Court that the offence was serious and that the Applicant's gang had what looked like a gun to the Complainant; that the Complainant was so shaken and traumatized by the robbery so much that she could not sleep in her house the following night. However, Ms. Odero conceded that the Applicant is well reformed. She, however, recommended imprisonment of 25 years.

13. According to the Judiciary *Sentencing Policy and Guidelines* (See para. 4.1), a Court imposes a sentence on an offender for one or more of the following purposes:

a. To ensure that the offender is adequately punished for the offence;

b. To deter the offender or other people from committing the same or similar offences;

c. To protect the community from the offender;

d. To rehabilitate the offender;

e. To denounce, condemn or censure the conduct of the offender;

f. To restore justice and relations by making the offender accountable for his or her actions and to recognize the harm done to the victim of the crime and to the community.

14. Arising from these purposes, a number of principles underpin the sentencing process and must be borne in mind in crafting an appropriate sentence in a given case. They include the following three:

a. *Proportionality*: that the overall punishment must be proportionate to the gravity of the offending behaviour;

b. *Parsimony*: that the sentence must be no more severe than is necessary to meet the purposes of sentencing;

c. *Parity*: the principle that similar sentences should be imposed for similar offences committed by offenders in similar circumstances

15. Ultimately, as many courts have pointed out, the fundamental and immutable principle of sentencing is that the sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence

passed and the circumstances of the crime committed.

16. Looking at the circumstances of this case, I am persuaded that the Applicant is remorseful. He is also a first offender. He made a terrible mistake but he is now reformed. The recommendation letter from the Prison Authorities is quite clear about this. The Applicant was youthful when the incident happened. It is true that he was in the company of two others making this an organized crime – but it is telling that the Applicant and his colleagues did not harm the Deceased during the robbery. While the offence is grave, it did not involve the use of excessive force or gratuitous violence.

17. Taking all these factors into consideration, I have determined that the crime committed here does not proportionately call for the imposition of the death sentence. Consequently, the death sentence imposed in this case is hereby set aside. In its place, there shall be a sentence of imprisonment for eighteen (18) years. The time shall be computed to commence on 29/01/2004 when the sentence at the Trial Court was imposed.

18. Orders accordingly.

Delivered at Nakuru this 28th day of March, 2019.

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JOEL NGUGI

JUDGE