REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 66 OF 2018

RICHARD MUTHAMA NYANGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the judgement and re-sentencing of Hon A. Kibiru (C.M.) delivered on 30/07/2018 in Machakos Chief Magistrate's Court Criminal Case No.4045 of 2004)

JUDGEMENT

1. Richard Muthama Nyanga, the Appellant, was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The Appellant was convicted and sentenced to death as was mandatorily required by statute at the time. The honourable Chief Magistrate upon directions from the High Court for re-sentencing sentenced him to 15 years imprisonment from the date the sentence of death was passed.

2. The particulars of the offence were that on 31st August, 2004 at Ngangani Village, Yathui Location in Machakos District within Eastern Province, jointly with others not before the Court, being armed with dangerous weapons namely bows, arrows and pangas, robbed Fredrick Maundu Mutua of cash Kshs 30,800/-; Sony Ericson Mobile Phone; one Artech Radio; two pairs of black shoes; two jeans trousers; two trousers; one radio speaker; three head caps and one godfather hat all valued at Kshs 52,500/- and immediately before or immediately after such robbery, threatened to use violence to the said Fredrick Maundu Mutua.

3. After a fully-fledged trial, the Appellant was convicted and sentenced to death by the Trial Court. After the honourable Chief Magistrate acted upon directions from the High Court for re-sentencing, the appellant was sentenced to 15 years imprisonment from the date the sentence of death was passed.

4. The Appellant has approached this Court vide application filed on 4th August, 2018, following the decision by the learned Chief Magistrate seeking that the 15 years sentence do start from the date of arrest. The parties appeared before me on 26.11.18 for oral submissions.

5. The appellant submitted that he was arrested in 2004 and has been in custody since then, He sought to rely on section 333(2) of the Criminal Procedure Code to urge the court to order that the sentence run from the date of his arrest so that he serves the reminder of the sentence with ease. He further submitted that he was arrested while unarmed and sought leniency for while in jail he had reformed and attained shoe-making skills and he has also received spiritual nourishment and in addition, the complainant was not injured during the robbery. He sought to rely on the case of **Daniel Gichimu Githinji & another v Republic [2018] eKLR** where the court of appeal in a second appeal interfered with the lawful mandatory death sentence and substituted it with a sentence of 15 years to run from the date of arrest. He also sought to rely on the case of **Robert Mutashi Auda v R, Court of Appeal Criminal Appela No. 247 of 2014**, where the court of appeal in a second appeal interfered with the lawful mandatory death sentence and substituted it with a sentence of 20 years to run from the date of arrest.

6. Learned Counsel Machogu for the state submitted that the appellant was a simple robber, the complainant did not sustain injuries and urged court to make a finding that the duration served in custody is enough punishment for the offence committed and that the lower court did not call for the probation officer's report on the appellant.

7. The issue for determination is whether the court can grant the order sought. The law of the land as it stands today is that the maximum penalty for both murder (under section 204 of the Penal Code) and robbery with violence (under section 296(2) of the Penal Code) is the death penalty but the Sentencing Court has discretion to impose any other penalty that it deems fit and just in the circumstances and based on the decisions that he has quoted and Section 333(2) of the Criminal Procedure Code. In the case of **Robert Mutashi Auda v R, Court of Appeal Criminal Appela No. 247 of 2014**, the court of appeal in a second appeal interfered with the lawful mandatory death sentence and substituted it with a sentence of 20 years to run from the date of arrest; In the case of **Daniel Gichimu Githinji & another v Republic [2018] eKLR** the court of appeal in a second appeal interfered with the lawful mandatory death sentence and substituted it with a sentence of

15 years to run from the date of arrest. Whereas I agree with the reasoning in the quoted cases, I disagree with their applicability to the instant appeal.

8. The appellant has quoted Sections 362 and 364 of the Criminal Procedure Code in his appeal and Section 333(2) in his submissions. *In the case* ***of Director of Public Prosecutions v. Samuel Kimuchu & Anor.*** **[2012] eKLR**, Justice Odunga observed that

"I join **Ochieng, J** in ***Livingstone Maina Ngare's Case (supra)*** in holding that the High Court should exercise its jurisdiction if satisfied that any finding, sentence or order recorded or passed; or the regularity of any proceedings of any court subordinate to the High Court, did not meet the required standards of correctness, legality and propriety. I therefore find and hold that this Court has jurisdiction to entertain the application for revision. I, however, agree that the jurisdiction should not be invoked so as to micro-manage the Lower Courts in the conduct and management of their proceedings for the simple reason that if every ruling of the Lower Court and which went against a party were to be subjected to the revisional jurisdiction of the Court, floodgates would be opened and the Court would be inundated with such applications thus making it practically impossible for the Lower Courts to proceed with any case to its logical conclusion. The revisional jurisdiction of the High Court should only be invoked where there are glaring acts or omissions but should not be a substitute for an appeal. In other words parties should not argue an appeal under the guise of a revision. It is for this reason that the decision whether or not to hear the parties or their advocates is discretionary save for where the orders intended to be made will prejudice the accused person. As was stated by the High Court of Malaysia in **Public Prosecutor vs. Muhari bin Mohd Jani and Another [1996] 4 LRC 728 at 734, 735:**

> **"The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of "paternal or supervisory jurisdiction" in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice…If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion…This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammeled and free, so as to be fairly exercised according to the exigencies of each case".**

9. It is for this reason that I take jurisdiction to re-consider the re-sentence imposed on the Appellant herein. The facts of the armed robbery that are relevant for sentencing purposes can be gleaned from the graphic testimony of the Complainant in the Trial Court which was accepted by all three Courts as credible. He described the robbery in the following terms:

> "*I was woken up by the thugs at 2 am...i saw 3 people, one was armed with a panga and three others were pointing arrows at me I recognized Richard Muthama….they had been engaged to work for my father...i was ordered to sleep the big man opened the boxes near my bed… they locked me inside the house.*

10. The prosecution has submitted that the complainant sustained no injuries and stated that the offence committed "is simple" robbery under section 296(1) of the Penal Code. I have looked at the section and noted that the same attracts a minimum sentence of fourteen years imprisonment. Nevertheless, Section 364**(5) of the Criminal Procedure Code provides that when an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed**. This position means that this argument is not available to the appellant and the prosecution in the instant application.

11. In the present case, the probation officer's report dated 16.1.2019 was not available during re-sentencing has now been placed on record. I appreciate that the learned Chief Magistrate was exercising his discretion in light of the information that was available on record and placed before him as at the material time therefore ought not to be demonized for doing the same. From the said report I have identified the following mitigating circumstances:

a. ***The Appellant was reported to have been of good behavior prior to the incident;***

b. The victim was not injured and he and the family hold no grudge against him and are not opposed to him being given a chance to reconstruct his life;

c. The Appellant has demonstrated capacity for reform and rehabilitation through his skills training in shoe-making; singing skills; and

d. The Appellant has been in custody for about 14 years.

12. I also identified the following aggravating factors:

a. ***The Appellant was armed – with a panga;***

b. The Appellant was part of a seemingly well-organized gang;

c. The assailants threatened violence on the Complainant.

13. Taking all these factors into consideration, I find that after giving due weight to the mitigating circumstances in light of the aggravating circumstances in this case and while accepting that the Appellant is rehabilitated and reformed, it is important for the Court to consider the societal sentiments on the appellant. It is noted that the appellant had arrest on 31/08/2004 to date. The sentence imposed by the lower court on re-sentencing is reasonable and should imposed by take from the date of arrest. The pre–sentence report is favourable and further the appellant has reformed his crime. The community and the family of the victim appear to have forgiven him and are ready to receive him

back into the society. This court finds that the re-sentencing order the lower court must be interfered with by reducing the resentence period of 15 years to 14 years from the date of arrest so that the duration in custody by appellant be deemed as sufficient punishment.

14. In the result the Appellant's appeal is merited. The re-sentence by the lower court of 15 years imprisonment dated 30/7/2018 is set aside and substituted with a re-sentence of 14 years imprisonment from the 31/08/2004. As the period has been fully served the appellant is hereby ordered to be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

Dated and delivered at **Machakos** this **26th** day of **March, 2019.**

D.K. KEMEI

JUDGE