



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. CRIMINAL APPLICATION NO. 91 OF 2018

JOSEPH MAGE OMBIMAAPPLICANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT UPON APPLICATION FOR RE-SENTENCING

1. In the night of 17th/18th May, 2004 at Munju Farm in Molo, Geoffrey Munyinyi and his wife were attacked by a group of assailants at their home. The robbers were armed with pangas and rungas. They terrorized the family, demanded cash and made off with cash Ksh 14,460/=, TV set, video deck, mobile phone, radio cassette and iron box and other household goods all valued at Ksh 66,460/=. During the robbery, one of them also hit Geoffrey Munyinyi with the flat side of a panga.

2. Before fleeing, the robbers threatened the family with dire consequences if they raised alarm.

3. Shortly, thereafter, the gang robbed Robert Kabiu Njenga of two bags containing assorted clothings all valued at Kshs. 30,000/-. During that second robbery, they injured one John Rorin Nami. Mr. Nami was a watchman in Robert Kabiu Njenga's farm.

4. The Applicant in this Application, Joseph Mage Ombima, was one of the robbers who committed both heinous crimes. This was established by the Molo Senior Resident Magistrate's Court in Criminal Case No. 1567 of 2004 where the Applicant was charged with two counts of robbery with violence contrary to section 296(2) of the Penal Code. The High Court affirmed the convictions in both counts upon an appeal by the Applicant. The Court of Appeal quashed the conviction with respect to the first count. In the end, the Applicant was left with a conviction with respect to the second count – and a death sentence with respect thereto. In arguing the present Application, the Applicant freely admitted to having been part of the gang that committed both robberies.

5. Having exhausted his legal options and having been given a new option by the Supreme Court in ***Francis Karioko Muruatetu & Another v Republic [2017] eKLR***, the Petitioner filed the present Application. His prayer is that the Court be pleased to substitute the death penalty imposed 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. The Applicant told the Court that he has come to regret his actions. He said that he has fully reformed and that he would never participate in crime again. He expressed his remorse and stated that he is fully rehabilitated. He said that he has spent his time in Prison committed to growing in two areas: In terms of his spiritual transformation, the Applicant said that he has now given his life to Christ and become a Christian. He has done no fewer than twenty theological courses remotely from different Christian Ministry organizations. He produced copies of the Certificates to prove this. He also produced a letter of reference from a Chaplain at Naivasha Maximum Prison to attest to the Applicant's spiritual growth.
10. In terms of his vocational growth, the Applicant has done training in welding. He produced three Certificates from the National Industrial Training Authority (NITA) for Grades I; II; and III in arc welding.
11. The Applicant also produced an official recommendation letter from prison authorities. He told the Court that he now has enough skills to survive out there. He told the Court that he has a lot to offer the society. He would like to go teaching young people that crime does not pay. He begged for an opportunity to go marry and bring up children and "teach them the right things."
12. Mr. Omutelema, the State Counsel, asked the Court to consider three aggravating factors in fashioning the appropriate sentence:
 - a. Victims were assaulted and one was wounded.
 - b. The assailants were armed with crude weapons.
 - c. The Applicant was also in the group of six assailants.
13. I have considered aggravating factors. I have also considered the following extenuating circumstances which are present here:
 - a. The Applicant is demonstrably remorseful;
 - b. The Applicant is a first offender;
 - c. The Applicant has demonstrated capacity for reform and rehabilitation through the various courses and trainings he has received while in prison;
14. In the **Benson Ochieng' Case**, I explained the position that the appropriate entry point for sentencing for robbery with violence is fourteen years. This is because "simple" robbery under section 296(1) of the Penal Code attracts a minimum sentence of fourteen years imprisonment. It therefore seems logical that the minimum sentence for robbery with violence should be fourteen years imprisonment. This is because robbery with violence under section 296(2) is, by definition, an aggravated robbery which has been singled out by the Legislature for enhanced penalty due to the impact of the crime on the victim and the society. This position is in accord with other decisions of the High Court on this point. See, for example, decisions by Majanja J. in **Michael Kathewa Laichena and Another v Attorney General MERU High Court Crim. Pet. No. 19 of 2018 (UR)** and **John Kathia M'itobi v Republic [2018] eKLR**. An entry point of fourteen years for robbery with violence, in my view, is also appropriate for reason of uniformity and parity in sentencing.
15. Taking all these factors into consideration, I find that the robbery committed by the Applicant was not particularly heinous as to attract the ultimate penalty of death. Indeed, while there is evidence that actual violence was used, the violence used was not excessive or sadistic.
16. **All considered, therefore, I will substitute the death sentence imposed on the Applicant with a sentence eighteen (18) years imprisonment. The prison term will be computed to begin on 03/11/2004 when the Applicant was first sentenced.**
17. Orders accordingly.

Dated and delivered in Nakuru this 30th day of May, 2019

.....

JOEL NGUGI

JUDGE