



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**MISC. CRIMINAL NO. 78 OF 2018**

**PETER SAMSON NANJERO .....1<sup>ST</sup> APPELLANT**

**LAWRENCE ASUNDA KULALI .....2<sup>ND</sup> APPELLANT**

**KENNEDY AMIRA AMBATSA.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**REPUBLIC .....STATE**

**JUDGMENT UPON APPLICATION FOR RE-SENTENCING**

1. In *Nakuru Chief Magistrate's Court Criminal Case No. 2570 of 2001*, the four Applicants were charged with a single charge with the following six counts:

***Count I: Robbery with Violence contrary to Section 296(2) of the Penal Code.***

***Particulars:***

*On the 20<sup>th</sup> day of November, 2001 at Saibaba Enterprises, Maasai Avenue, Nakuru Township, in Nakuru District of the Rift Valley Province, jointly with others not before court, while armed with dangerous weapons namely pistols and pangas, Robbed one Nileshe Kantilala Amin of one Panasonic television set, one Panasonic video deck, one sony 3 C.D charger serial number 3301241 mode HCD GR x 8, one speaker, one Motorola mobile phone, one golden Chain, 25C.D Cassettes, 50 Audio – Cassettes and cash money Ksh 45,000/= all to the total value of Ksh 160,000/= and at or immediately before or immediately after the time of such Robbery threatened to use actual violence to the said Nileshe Kantilala Amin.*

***Alternative Charge:***

***Handling stolen property contrary to Section 322(2) of the penal code***

*On the 2<sup>nd</sup> day of December, 2001 at Bondeni Estate within Nakuru Municipality in Nakuru District of the Rift Valley Province, otherwise than in the cause of stealing jointly dishonestly handled one Sony 3 C.D charger Serial Number 3301241 mode HCD GR X and one speaker the property of Nileshe Kantilala Amin knowing or having reasons to believe them to be stolen property or unlawfully obtained.*

***Count II:***

***Robbery with violence contrary to Section 296(2) of the Penal Code***

*On the 29<sup>th</sup> day of November, 2001 at Mwariki Estate within Nakuru Municipality in Nakuru District of the Rift Valley Province, jointly with other not before court, while armed with dangerous weapons namely pistols and pangas robbed one Juma Kimani Matenja of his motor vehicle registration number, KAM 890V make Mazda Mini bus valued at Ksh 1,500,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Juma Kimani Matenja.*

***Count III:***

***Robbery with violence contrary to Section 296(2) of the Penal Code***

On the 29<sup>th</sup> day of November, 2001 at Mwariki Estate within Nakuru Municipality in Nakuru District of the Rift Valley Province, jointly with other not before court, while armed with dangerous weapons namely pistols and pangas robbed Elvis Eliakim Butiko of his Sony car radio cassette serial No. 66786 one Seiko 5 wrist watch and a wallet with cash Ksh 2,500/= all to the total value of Ksh 9,500/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Elvis Eliakim Butiko.

***Alternative Charge:***

***Handling stolen property to Section 322(2) of the Penal Code***

**Kennedy Amira Ambatsa**

On the 3<sup>rd</sup> day of December, 2001 at Kayole Estate within Nairobi City in Nairobi Area otherwise than in the cause of stealing dishonestly handled one Sony car radio Serion No. 66786 the property of Elvis Eliakim Butiko knowing or having reasons to believe it to be stolen property or unlawfully obtained.

***Count IV:***

***Bing in possession of a firearm without firearm certificate contrary to Section 4(1) as read with Section 3(2) of the firearm Act Cap 114 Laws of Kenya***

**Kennedy Amira Ambatsa**

On the 2<sup>nd</sup> day of December, 2001 at Bondeni Mosque Area within Nakuru Municipality in Nakuru District of the Rift Valley Province, was found in possession of one Ceska Pistol magazine without firearm certificate.

***Count V:***

***Bing in possession of a firearm without firearm certificate contrary to Section 4(1) as read with Section 3(2) of the firearm Act Cap 114 Laws of Kenya***

The three Accused persons: On the 2<sup>nd</sup> day of December, 2001 at Nakuru fire station in Bondeni Estate within Nakuru Municipality in Nakuru District of the Rift Valley Province, jointly were found in possession of one pistol Ceska with a magazine serial No. 9805 model 469 without firearm certificate.

***Count VI:***

***Having in possession of Public Stores contrary to Section 324(2) of the Penal Code***

The three accused persons: On the 2<sup>nd</sup> day of December, 2001 at Bondeni Estate within Nakuru Municipality in Nakuru District of the Rift Valley Province, jointly had in their possession public stores namely one handcuff Serial No. KPS 3359/91 of the Kenya Prisons Department such property being reasonable suspected of having been stolen or unlawfully obtained.

2. The three Applicants pleaded not guilty and a fully-fledged trial ensued. At the conclusion of that trial, the Learned Trial Magistrate convicted the three Applicants in Counts 2, 3, 4, 5 and 6. The Learned Trial Magistrate sentenced the three Applicants to death with respect to Counts 2 and 3 and discharged them with respect to the remaining counts.

3. The three Applicants were dissatisfied with the conviction and sentences and appealed to the High Court. The High Court affirmed convictions in Counts 3, 4, 5 and 6. It overturned the conviction with respect to Count 2.

4. A further appeal to the Court of Appeal was dismissed. The Applicants have now 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.

5. 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*.

6. 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.*

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

8. The 1<sup>st</sup> Applicant is Peter Samson Nanjero. In urging his application for re-sentencing, he told the Court that he now accepted that he committed the offence. He begged for forgiveness. He said that he was genuinely remorseful. He asked for a second chance. He asked for forgiveness from the victims. He stated that he has fully reformed after being in prison for 14 years. To illustrate this, he indicated that he has done vocational training in carpentry and that Prisons authorities have noted his good conduct and reformation and made him a trustee in prison in charge of his fellow inmates.

9. Similarly, the 2<sup>nd</sup> Applicant, Lawrence Asunda Kulali, admitted that he committed the offence. He conceded that he had pleaded not guilty throughout but said that he was now ready to accept his role in committing the offence. He claimed that he fell into bad company and that he was acting out of youthful ignorance. He said that he was now fully reformed: he has now learnt carpentry and upholstery in Prison. He produced certificates to prove this. He pledged to use his new skills learnt in Prison to go through life. He asked for a second chance stating that he has a wife and one child. His wife has cancer and he wanted to go and take care of her. He stated that his father and sister, who were in Court, are willing to help him re-start life after prison. He said that he was very remorseful for the offence; but that he was glad for the time he had spent in Prison because he had learnt very useful skills. He produced a letter of recommendation from Prison Authorities as well as the Certificates from the vocational training he has done.

10. Kennedy Amira Ambatsa, the 3<sup>rd</sup> Applicant, similarly expressed his remorse for his actions. He said he was foolish and ignorant when he committed the offence but that he was now fully reformed. He has learnt many things in Prison. This includes tailoring and dress making. He produced certificates to demonstrate this. The 3<sup>rd</sup> Applicant asked for forgiveness. He pledged to reach out to the youth to teach them that crime does not pay. He reported that he is a Trustee in Prison, a sign of the trust the Prison Authorities have in him. He wishes to be given a second chance to go and be a father to his son.

11. Mr. Maragia, Counsel for the three Applicants submitted that the Appellants are first offenders. He stated that although they were charged with 6 counts they were convicted of Count 3 only after the High Court and that there were no injuries to the claimants. He referred the Court to **Crim. App No. 247 of 2017** where the Court of Appeal looked into the circumstances of robbery and sentenced the Appellant to 13 years. He argued that although the Applicants had pistols, they did not use them. He asked the Court to consider that the Applicants have been in custody since 2001 and stated that that is enough time in Prison for the crime they have committed.

12. Mr. Chigiti, the Prosecutor, disagreed. He thought that thirty (30) years imprisonment is a more suitable sentence. He pointed out that the Applicants were armed with dangerous weapons to wit pistols and *pangas*; that they brandished these weapons; that the victims were greatly traumatized.

13. Mr. Chigiti told the Court that there is need to consider the triangle of rights those of the Accused, victims and public safety. He urged the Court to consider that the Applicants were members of a gang and that they might re-join the others who are still at large.

14. I have carefully considered all the mitigating and aggravating factors presented by the Applicants and the Prosecution. I am in agreement with both sides that the death penalty would be a disproportionate sentence in the circumstances. I hereby set aside the death sentence and substitute it with a prison term.

15. What would be the appropriate Prison term? I am persuaded that the remorse expressed by each of the Applicants is sincere. I am also persuaded that they have reformed. I have looked at the many Certificates they have accumulated in Prison as evidence of this. More importantly, however, I have considered the glowing recommendation letters they have received from the Prison Authorities about their character and reform. The 1<sup>st</sup> and 3<sup>rd</sup> Applicants are Trustees – the highest trust and honour the Prison Authorities can place on an inmate. The 2<sup>nd</sup> Applicant is a teacher of carpentry to his fellow inmates.

16. All in all, I think there are positive indications that the three Applicants have capacity to live crime-free lives if released. I am also buoyed in this assessment by the fact the families of each of the Applicant has shown committed willingness to embrace them.

17. However, it is important not to lose sight of the seriously aggravating factors present in this case. They include the fact that including the fact that the Applicants were operating as part of a notorious organized gang that terrorized the denizens of Nakuru for a long time. They were armed with dangerous weapons which included pistols and *pangas*. They also seriously terrorized and traumatized their victims. Their reign of violent terror cannot and should not be minimized. Any punishment they receive must be proportionate to these grim facts.

**18. All considered, therefore, I have formed the view that the death penalty would be a disproportionate sentence in the**

circumstances. I hereby substitute it with a prison term. I further find that the prison term which balances the mitigating and aggravating circumstances and takes into account the essential nature of the charged crime – robbery with violence – is a prison term of twenty five (25) years. I therefore sentence each of the three Applicants to imprisonment for twenty-five (25) years. The prison term shall be computed beginning on 18/12/2001 when the Applicants were first arraigned in Court.

19. Orders accordingly.

Dated and delivered at Nakuru this 30<sup>th</sup> day of May, 2019.

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JOEL NGUGI

JUDGE