



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**CRIMINAL APPEALS NO. 115 AND 118 OF 2017**

**(CONSOLIDATED)**

**EDWINE OTIENO OBARA.....1<sup>ST</sup> APPLICANT**

**WILLIAM OCHIENG OGOMBE.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Appeals arising from the judgment, conviction and sentence passed in Siaya Principal Magistrate's Court Criminal Case Nos 631 and 661 of 2016: Republic versus William Ochieng Ogumbe and Edwin Otieno Obara delivered on 20<sup>th</sup> November, 2017 by Hon. J. Ongondo, Principal Magistrate)**

**RESENTENCING**

1. On 5<sup>th</sup> November 2018, I delivered judgment in this Criminal appeal, dismissing the Appellant's appeals on conviction. I upheld the conviction by the trial Court. The trial Court sentenced the Appellants to death on 20.11.2017 after finding them guilty of Robbery with Violence contrary to section 296(2) of the Penal Code as charged.
2. In mitigation before the Lower Court, the Appellant No. 1 stated that he needed legal aid whereas the 2<sup>nd</sup> Appellant left it to Court.
3. The Prosecution remarked that although they did not have previous records on the accused persons, the Court's hands were tied with regard to sentence, having found the accused persons guilty of the offence of Robbery with Violence.
4. In the appeal before me, I found the conviction of the appellants by the trial Court sound. However, I ordered that the appellants do mitigate before I can consider whether to interfere with the sentence meted out on the appellants by the trial Court. There were three counts of robbery with violence.
5. My reserving of the sentencing was informed by the decisions of the Supreme Court in the **Francis Karioko Muruatetu Case Vs. Republic SC Pet. No. 16 of 2015** wherein the Supreme Court made it clear that death sentence for the trial Court was not mandatory, albeit in appropriate cases the Court would impose the same having regard to the circumstances of the case.
6. I therefore accorded the appellants herein an opportunity to mitigate which they did on 5.11.2018 and this Court also ordered for a Probation Officer's Report and Police records on the appellants' past. The Police have not filed any records on the Appellants despite several adjournments to avail the same.
7. The 1<sup>st</sup> Appellant Edwin Otieno in his mitigation stated that he is remorseful. That he has a family and that his parents died. That his family depends on him. That he was working at the Kawere Bus Service prior to the incident and prayed for non-custodial sentence. That he is 41 years old and that previously he was charged with an election offence which the State withdrew.
8. In the Probation report dated 18.4.2019, the 1st appellant is said to be aged 40 years and dropped out of school for lack of interest, at Form 3. He worked as a booking clerk at the Siaya Bus Stage. He has 5 children and a wife who feeds for the Children. His character is said to be that of a pampered child who was given lots of money by his able well to do parents at an early age. He was left to live a carefree life by his parents. He is associated with robberies in the County albeit he was never convicted as his late father always intervened to have him released each time he was arrested.

9. The victim of the offence is bitter as he suffered financial loss and trauma during the robbery. The appellant has a supportive family. The parents who shielded him from consequences of his criminal actions have since died and so the appellant is exposed. The Probation Officer leaves the matter to the Court to decide.

10. On the part of the 2<sup>nd</sup> appellant William Ochieng Ogumbe, he mitigated stating that he prayed for a non-custodial sentence. He is 43 years old, married with 3 Children. That his wife died in 2016 January and he is the sole bread winner. He has been in jail since July 2016. He regrets the offence. That he has learnt that being in jail is bad as his Children cannot go to school. He misses his family. That he has never been charged with any Criminal Offence.

11. The Probation Officer's Report filed in Court on 23.4.2019 shows that the Appellant has previously been processed for Robbery with Violence related Offences but the previous records of conviction are not available. His spouse died. His Children live with their grandparents. Concerning his conduct and character, the Appellant is reported to be "**He is not of good reputation.**"

12. That the Police associate him with a number of Robbery cases in the Sub-County. However, they could not avail a certificate of previous convictions from criminal records. The second appellant does not have strong community ties as he divided his Children between his mother and his mother-in-law. The community treat him with suspicion as nobody knows what he does for a living. He is not an open person. Having left his employment in upholstery, no one knows what he was doing prior to his arrest. He is perceived as having left his trade for the allure of quick riches to be found in gangland. The Police are apprehensive of him as he is associated with a number of robberies within the Sub-County.

13. The Probation Officer leaves it to the discretion of the Court in resentencing the appellant. I have carefully considered the two Appellants Officers' pre resentencing Reports dated 18.4.2019 filed by Mr. Omolo Nyagigo the Siaya County Director of probation. I observe that the offence of robbery with violence carries up to a maximum of death sentences and that there is no minimum sentence.

14. I have taken time to observe the demeanor of the Appellants who were self-represented in this consolidated appeal. I am in total agreement with the Probation Officer's Report that the Appellants are not open. They appear very evasive even as they prayed for leniency. They are entitled to maintain their innocence yes but they did not impress the Court as persons who care for life and limb. The offence with which they were charged and convicted, consisting of three counts of Robbery with Violence is a serious and rampant offence in this jurisdiction and is even committed in broad daylight. No one is safe if ordinary persons who have no authority to hold a firearm obtain such lethal weapons and in the company of others waylay innocent citizens going about their businesses and threaten their lives and steal their property. His is what the appellants herein did and are known to be dangerous criminals who bought their liberties because of being connected.

15. Live and let live is the overriding statement that everyone must appreciate. Respect for life and property of others is not a choice. There is no shortcut to riches. One must work hard and eke a living from his own sweat not to let others work and his is to use violence to take away hard earned resources of other people.

16. None of the robbed properties were recovered. The Probation Officer is a social worker and observed from his social inquiry that the appellants cannot be trusted to live in the society. They are dangerous human beings who deserve to be kept away from the community. They are a bad influence to the younger people.

17. Deterrent sentence is deserved in such circumstances. As death sentence is not mandatory, and as sentencing is in the discretion of the court, and taking into account the sentencing guidelines, and circumstances of the offence and the appellants' mitigations, I find that the appellants deserve a deterrent sentence to keep them away from the society which they have demonstrated, that they can harm without mercy and/or remorse.

18. The appellants did not demonstrate any remorse before this Court. The death sentence imposed on them is lawful, I however exercise discretion and substitute death sentence and resentence the Appellants to serve life imprisonment.

19. I so order.

**Dated, Signed and Delivered at Siaya this 27<sup>th</sup> day of May, 2019.**

**R. E. ABURILI**

**JUDGE**

**In the presence of:**

The appellants in person

Mr. Okachi SPPC for the state

CA: Brenda and Modestar