



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL PETITION NO. 46 OF 2018

CYPRIAN INGIRA IKOBWA..... PETITIONER

VERSUS

REPUBLIC..... RESPONDENT

RULING

1. The petitioner was convicted of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code and sentenced to death. His appeals to the High Court and the Court of Appeal were unsuccessful.
2. The petitioner has now approached this court for re-sentencing following the Supreme Court decision in Francis Karioko Muruatetu.
3. The petitioners have now filed the instant application seeking for re-sentencing which has been necessitated by the Supreme Court decision in **Francis Karioko Muruatetu & Another –Vs- Republic Petition No. 15 of 2015 (2017) eKLR** whereby the mandatory death sentence for the offence of murder was declared unconstitutional. As a corollary, in the case of **William Okungu Kittiny –Vs- Republic Kisumu Criminal Appeal No. 56 of 2013 (2018) eKLR**, the Court of Appeal applied the Muruatetu decision *mutatis mutandis* to the provisions of Section 296 (2) of the Penal Code which imposes a mandatory death penalty for the offence of robbery with violence. The petitioners are seeking that the death sentences imposed on them be set aside and for the court to impose an appropriate sentence.
3. The facts of the case against the appellant were that on the 7th February, 2005 he and others while armed with a pistol robbed the first complainant of cash Ksh. 11,000/= and the second complainant of one mobile phone make Alcatel valued at Ksh. 5,500/= and that immediately before or immediately after the time of such robbery threatened to shoot the two complainants. Two of the colleagues of the petitioner were beaten to death by the members of the public after the robbery whilst the petitioner and a colleague were arrested.
4. The petitioner and his colleague were sentenced by the magistrate’s court on 28th June, 2006. The petitioner has thereby been in custody for 14 months while awaiting his trial and has now been in jail for 13 years.
5. The petitioner mitigated that he has a son who has completed form 4 and that the other one is in class 8. That he has a good record with the prison authorities. That he has grade tests in polishing. He urged the court to consider the period that he has been in custody.
6. The court called for a pre-sentencing report. A comprehensive report was compiled by a probation officer Bernard Wangatia. The report indicates that the appellant is aged 49 years. That he has a wife and 2 children. That his wife does petty trading for a living. That the petitioner is remorseful for committing the offence. That he suffers from ulcers. That the prison authorities described him as very disciplined as a result of which he had been made a head prefect of other prisoners with a title of “trustee”.
7. The report recommends a probation sentence on the petitioner. It notes that the petitioner has strong family and community ties that will can facilitate his rehabilitation and resettlement on release. That his family members are willing to help him morally and financially in his rehabilitation. That his community members are not opposed to his release since the offence in question was committed for away from home.
8. Sentencing is a discretion of the trial court. In **Ambani Vs Republic**, the High Court stated that a sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and that the court should look at the facts and the circumstances of the case in its entirety before settling for any given sentence.
9. The Court of Appeal **Thomas Mwambu Wenyi Vs Republic (2017) eKLR** cited the decision of the Supreme Court of India in **Alister Anthony Pereira Vs State of Maharashtra** at paragraph 70-71 where the court held the following on sentencing:-

“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in

which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.

10. In **Francis Karioko Muruatetu & Another –Vs- Republic (Supra)** the Supreme Court stated the following guidelines as mitigating factors in a re-hearing sentence for the conviction of a murder charge:-

(a) age of the offender;

(b) being a first offender;

(c) whether the offender pleaded guilty;

(d) character and record of the offender;

(e) commission of the offence in response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender and

(h) any other factor that the court considers relevant.

These factors are also applicable in a re-sentencing for the offence of robbery with violence.

11. The Judiciary Sentencing Policy Guidelines lists the objectives of sentencing at page 15 paragraph 4.1 as follows:

1. **Retribution:** To punish the offender for his/her criminal conduct in a just manner.

2. **Deterrence:** To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

3. **Rehabilitation:** To enable the offender reform from his criminal disposition and become a law abiding person.

4. **Restorative Justice:** To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims, communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.

5. **Community protection:** To protect the community by incapacitating the offender.

6. **Denunciation:** To communicate the community's condemnation of the criminal conduct.

12. I have considered other cases where convicts for robbery with violence were re-sentenced after the *Muruatetu case*. In **Benjamin Kemboi Kipkone –Vs- Republic (2018) eKLR** where 3 robbers armed with an AK 47 rifle robbed the complainant of Ksh. 250,000/= and a mobile phone, Chemitei J. substituted the death sentence with 20 years imprisonment.

13. In **Paul Ouma Otieno –Vs- Republic (2018) eKLR** where the accused being armed with an AK 47 rifle and a kitchen knife robbed the complainant of Ksh. 450,000/= and 3 mobile phones. Majanja J. substituted the death sentence with 20 years imprisonment.

14. In **Wycliffe Wangugi Mafura –Vs- Republic Eldoret Criminal Appeal No. 22 of 2016 (2018)** the Court of Appeal imposed a sentence of 20 years imprisonment where the appellant was involved in robbing an Mpesa shop agent with the use of firearm.

15. In **Benson Ochieng & France Kibe –Vs- Republic (2018) eKLR**, Joel Ngugi J. re-sentenced the petitioners to 20 years imprisonment upon considering that the offence was aggravated by the use of multiple guns by an organized gang to commit armed robbery.

16. Section 333 (2) of the Criminal Procedure Code requires a sentencing court to consider the period spent in custody awaiting trial.

17. I have considered the above stated principles of sentencing and that the appellant has been incarcerated for a period of 14 years. I have also considered that he has an exemplary record from prison authorities. I have considered the circumstances in which the offence was committed. The offence in this case was aggravated by the use of a firearm. The robbers fired at their victims. Two of the petitioner's colleagues lost their lives during the robbery. I do not think that the period served in prison is sufficient for the serious offence committed by the petitioner.

18. Upon considering the sentences in the above cited authorities where the accused persons were armed with fire arms during the robberies, I am of the view that the petitioner deserves a sentence of at least 20 years imprisonment. He had been in custody for more than a year awaiting trial. The sentence of death imposed on the petitioner is hereby set aside. I re-sentence the petitioner to serve eighteen years imprisonment commencing from the date of sentence by the trial court.

Delivered, dated and signed in open court at Kakamega this 19th day of June, 2019.

J. NJAGI

JUDGE

In the presence of:

Miss Rotich for respondent

Petitioner - present

Court Assistant - George