



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CONSTITUTIONAL PETITION NO. 22 OF 2018

DANIEL SIFUNA JUMA.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The petitioner was on the 7th January, 2005 convicted of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code and sentenced to death. His appeal to the High Court and the Court of Appeal were unsuccessful.
2. The petitioner has approached this court in the aftermath of the Supreme Court decision in **Francis Karioko Muruatetu & Another –Vs- Republic Petition No. 5 of 2015 (2017) eKLR** in which the court declared the death sentence for murder under Section 204 of the Penal Code to be unconstitutional. As a corollary, the Court of Appeal in **William Okungu Kittuny –Vs- Republic (2018 eKLR** considered the effect of the Supreme Court decision in the *Muruatetu case* on the offence of robbery with violence under Section 296 (2) of the Penal Code and held that the death sentence under the said section was inconsistent with the Constitution and therefore that the death sentence provided under S. 296 (2) of the Penal Code is a discretionary maximum sentence. In face of the said decision the petitioner is seeking for a re-sentencing.
3. The brief facts of the case against the petitioner were that on the night of 6/7th July, 2003 the petitioner was in a gang of robbers who invaded the house of the complainant while armed with pangas and rungu. They hit the complainant with a rungu on his leg and cut him on the head and left hand. His wife received a cut on the upper lip. They stole a TV, a radio cassette, mattress, a bicycle and some other household goods. The petitioner was thereafter arrested and charged.
4. In mitigation the petitioner said that he was seeking for a lenient sentence.
5. This court called for a pre-sentencing report that was prepared by a probation officer Mr. Masingila M. Gregory. The report indicates that the petitioner is 46 years of age. That his wife died when he was in prison and left behind two children who are staying with the maternal relatives. That his family members are ready to support him in settling back into the community in case he is released. That he has had a good record for his period in jail.
6. The report also indicates that the complainant is not opposed to the petitioner being given a lenient sentence.
7. 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.
8. 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.

9. 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.

10. Section 333 (2) of the Criminal Procedure Code requires a sentencing court to take into account the period spent in custody awaiting trial.

11. I have considered some sentences meted out by courts during re-sentencing of robbery convicts after the Supreme Court decision in the *Muruatetu case*.

12. In **Douglas Muthaura Ntoribi –Vs- Republic Meru High Court Misc. Criminal Application No. 4 of 2015** Chitembwe J. substituted the death sentence with a prison term of 15 years after considering that the robbers were armed with a panga, stole only Ksh. 500/= from the victim who had sustained minor injuries.

13. In **Robert Achapa Okelo –Vs- Republic Kisumu High Court Petition No. 63 of 2018** Cherere J. considered that the petitioner had been in custody for 14½ years and sentenced him to the period already served.

14. The petitioner has been in prison for 14½ years. He was in remand for 1½ years before he was sentenced. That makes it a period of 16 years in incarceration.

15. The pre-sentencing report recommends the reduction of the petitioner's sentence and more particularly for him to be released on probation. The complainant in the case is not opposed to a lenient sentence being imposed on the appellant.

16. The petitioner is now aged 46 years. He and his accomplices stole goods valued at Ksh. 20,000/= from the complainant. He has been in incarceration for a period of 16 years. I am of the considered view that period of incarceration is enough prison punishment for the offence committed. The sentence of death is thereby set aside. I order for the petitioner to be released from prison and be placed to serve two years probation under the supervision of probation officer Kakamega Central.

Delivered, dated and signed in open court at Kakamega this 31st day of July, 2019.

J. NJAGI

JUDGE

In the presence of:

Miss Omondi for state

Petitioner - present

Court Assistant - George

14 days right of appeal.