



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CONSTITUTIONAL PETITION NO. 16 OF 2018

(AS CONSOLIDATED WITH CONSTITUTIONAL PET. NO. 15 OF 2018)

ERNEST OTENYO KEYA1ST PETITIONER

SULEIMAN OSUNDWA2ND PETITIONER

VERSUS

REPUBLICRESPONDENT

RULING

1. The petitioners were on the 1st June, 2005 convicted of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code and sentenced to death. Their appeals to the High Court and the Court of Appeal were unsuccessful. They have now 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** where the court declared the sentence of death 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 sentence of death for robbery with violence under Section 297 (2) of the Penal Code to be unconstitutional and held that the sentence under the section is a discretionary maximum sentence. The petitioners are now seeking for fresh re-sentencing.

3. The brief facts of the case against the petitioners were that on the 6/7/2004 the petitioners were among members of a gang of 3 people who attacked the complainant at the petrol station where he was working. One of the gang members shot he complainant on the chest. They stole Ksh. 22,495/= from the complainant. The complainant was taken to hospital with a bullet shot through the chest into the lungs. He was admitted for one month. The petitioners were arrested and charged. They were tried and found guilty. Each was sentenced to death.

4. The petitioners mitigated in their petition that they have been in prison 15 years and about one year in remand prison while awaiting trial. They argued that the period they have stayed in prison is sufficient punishment. They urged the court to pardon them and release them. They said that they are remorseful for the offence committed and that they have been of good conduct while in prison. They further said that they have done various courses while in prison.

5. The court called for pre-sentencing reports that were prepared by a probation officer Mr. Bernard Wangatia. The report of the first petitioner, Ernest Otenya Keya, indicated that he was a youthman when convicted now aged 40 years. That his stay in prison has reformed him. That his family and community is ready to receive him as they are of the opinion that the period he has served in prison is enough punishment for the offence committed.

6. The report for the 2nd petitioner, Suleiman Osundwa, indicated that he is aged 39 years. That he has learnt various courses in prison and has no criminal record while in prison. That his family is willing to help him settle and earn a honest living. That he was a youthful offender when he was convicted.

7. Both reports recommended the release of the petitioners. The reports indicated that the victim's family who were neighbours to the 2nd petitioner sold their parcel of land and migrated to Uganda after the petitioners were sentenced to death.

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 Mahareshra** 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. 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.

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

12. I have considered some authorities where High Court Judges re-sentenced convicts of robbery with violence after the Supreme Court ruling in the *Muruatetu case*. In **Benjamin Kemboi Kipkone –Vs- republic (2018) eKLR** where 3 robbers while armed with an AK 47 rifle robbed a complainant of Ksh. 250,000/= and a mobile phone, Chemitei J. substituted the death sentence with 20 years imprisonment. In **Paul Ouma Otieno –Vs- Republic (2018) eKLR** in which the accused person was armed with an AK 47 rifle and a kitchen knife and robbed the complainant of Ksh. 450,000/= and 3 mobile phones, Majanja J. substituted the death sentence with 20 years imprisonment commencing on the date of the sentence by the trial court.

13. In **Wycliffe Wangugi Mafura –Vs- Republic, Eldoret Criminal Appeal No. 22 of 2016 (2018) eKLR** 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.

14. In **Michael Kathewa Laichena –Vs- Republic (2018) eKLR** where the petitioner was in a gang that was armed with a gun and knives, Mabeya J. re-sentenced the petitioner to a prison term of 15 years after considering that he had been in custody for 5 years pending trial.

15. In **Benson Ochieng & France Kibe –Vs- Republic (2018) eKLR** Joel Ngugi J, re-sentenced each of 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. The petitioners were armed with a gun when they robbed the complainant. They shot him through the chest into his lungs. The offence committed by the appellants was aggravated by the shooting of the complainant with the use of a gun. It is by mere luck that the complainant survived the bullet wound. The act of shooting the complainant shows that the petitioners were people who were ready to kill for money. Any sentence imposed on them should be commensurate with the gravity of the offence that they committed. I however do not think that the sentence of death is warranted. The death sentence imposed on them is hereby set aside. I re-sentence each of the petitioners to serve twenty five years imprisonment commencing from the date of sentence by the trial court.

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

Petitioners - present

Court Assistant - George

14 days right of appeal.