



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL PETITION NO. 37 OF 2018**

**KEVIN OTIENO MULECHI.....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 the mandatory death sentence. His appeals to the High Court and the Court of Appeal were unsuccessful.

2. The petitioner is now seeking 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 death sentence for the offence of murder under Section 204 of the Penal Code to be inconsistent with the constitution and invalid to the extent that it provides for mandatory death sentence for murder. As a corollary, the Court of Appeal in **William Okungu Kittiny –Vs- Republic Kisumu Criminal Appeal No. 56 of 2013 (2018) eKLR** considered the effect of the *Muratetu Case* on sentence for the offence of robbery with violence contrary to Section 296 (2) and attempted robbery with violence under Section 297 (2) of the Penal Code and held that:-

***“...the sentence of death under Section 296 (2) and Section 297 (2) of the Penal Code is discretionary maximum punishment. To the extent that Section 296 (2) and 297 (2) of the Penal Code provides for mandatory death sentence the Sections are inconsistent with Constitution.”***

3. In the premises the death sentence for the offence of robbery with violence as provided in Section 296 (2) of the Penal Code is a discretionary maximum sentence. The court has discretion to impose a lesser sentence other than a death sentence. The petition for re-sentencing is therefore well founded.

4. The brief facts of the case against the petitioner were that on the night of 8<sup>th</sup>/9<sup>th</sup> November, 2009, the petitioner was in a gang of robbers that attacked passengers in a bus that was plying from Nairobi to Kakamega. They were armed with metal bars and a toy pistol. They robbed the driver and the passengers of money and valuables. Later in the day the petitioner and others were found in possession of goods stolen from some of the passengers in the bus. He was charged with the offence. He was found guilty of three counts of robbery with violence and convicted accordingly. He was sentenced to death on the first count and the sentence on the other two counts was left in abeyance.

5. 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.

6. 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.***

7. 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.

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

9. The petitioner was sentenced by the magistrate's court on the 28/10/2010. Mr. Malala advocate for the petitioner in this petition mitigated that the petitioner was a first offender when he committed the offence. That he has been in custody for 10 years which is adequate punishment for the offence. That he is a young man full of potential and a bright future. That he is remorseful and is fully reformed and rehabilitated. That he has been an exemplary prisoner with no disciplinary issues while in prison. The advocate urged the court to reduce the sentence that was imposed on the petitioner.

10. The court called for a pre-sentencing report that was prepared by a probation officer, Mr. Bernard Wangatia. The report indicates that the petitioner is now aged 34 years. That his wife died while he was serving in prison leaving behind three children who are staying with relatives. That his family and community are ready to receive him as they feel that he has served enough punishment for the offence committed. The report however does not mention anything about the victims of the crime.

11. Mr. Malala referred to several authorities among them **Sabastian Okwero Mrefu –Vs- Republic, Petition No. 151 of 2012 (2014) eKLR** where Chitembwe J. substituted a sentence of death for robbery with violence with the period served of 8 years and three others in remand. He also cited the case of **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 wherein Chemitei J. substituted the death sentence with 20 years imprisonment. He referred to the case of **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.

12. 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.

13. 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.

The State did not make any submissions in this petition.

14. I have considered the principles of sentencing stated above. I have also considered the circumstances of the case and that the petitioner had been in remand for nearly a year awaiting trial.

15. The petitioner robbed the three complainants of total cash of Ksh. 10,500/= and personal effects. He and his gang were armed with a toy pistol. I am of the considered view that a death sentence is not warranted in the circumstances of the case. The sentence of death is thereby set aside.

16. Upon considering the sentences imposed by courts in the authorities cited above where convicts were armed with firearms during the robberies, I am of the view that the period so far served in prison is not adequate for the offences committed. I re-sentence the petitioner to nineteen years imprisonment on each of the three counts of robbery with violence commencing from the date of sentence by the trial court. The sentence to run concurrently.

**Delivered, dated and signed in open court at Kakamega this 30<sup>th</sup> day of July, 2019.**

**J. NJAGI**

**JUDGE**

In the presence of:

Miss Omondi for respondent

Miss Mburu for petitioner

Petitioner - present

Court Assistant - George

14 days right of appeal.