



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**MISC. CRIMINAL APPLICATION NO. 54 OF 2018**

**BENARD OTUNGA.....APPLICANT**

**VERSUS**

**REPUBLIC .....STATE**

**JUDGEMENT**

1. Bernard Otunga and Charles Amunge Kaliche were charged, tried and convicted on a charge of Robbery with Violence contrary to Section 296(2) of the Penal Code. They were sentenced to suffer death. The two also faced alternative but separate counts of handling stolen property contrary to Section 322(2) of the Penal Code but no findings were made thereon, in view of the conviction and sentence on the robbery charge.
2. The particulars of the robbery charge were that on the 21<sup>st</sup> day of December 2002 at Pondali Estate of Nakuru District within the Rift Valley Province, the Applicant, jointly with at least three others, and while armed with pangas and simis robbed Fredrick Ochieng' of 1 Sharp TV set, one Panasonic Radio Cassette; 7 shirts; 10 long trousers; and Kshs. 1000/- in cash all valued at Kshs. 17,400/-. The Applicant and his colleagues are alleged to have used actual violence on the victim.
3. The Applicant and his Co-Accused pleaded not guilty to the charge and the case proceeded to full hearing. At the conclusion, the Court convicted both Accused Person and sentenced them to death as the law by then provided.
4. Evidence accepted by all the three Courts that dealt with the case shows that the Complainant in the case was awoken at 3:30am in the night of the robbery by a loud sound. When he looked out, he saw six people who suddenly happened by his bed. He was instinctively screaming for help. A panga was placed on his neck and an order instructed him to keep quiet. He got the cue. One assailant held his leg; the other retained the panga on his neck. A third one beat him up even as they ransacked his house for all valuables. They left after some time making off with the items indicated above.
5. With all the levels of appeal having affirmed the conviction and sentence, the Applicant has only accessed this Court on a plea for reconsideration of his sentence by dint of the rule of law announced by the Supreme Court in ***Francis Karioko Muruatetu & Another v Republic [2017] eKLR***. In the ***Muruatetu Case***, the Supreme Court outlawed mandatory death penalty for murder as unconstitutional and struck down section 204 of the Penal Code to the extent that it prescribed mandatory death sentence upon conviction for murder.
6. The reasoning in ***Muruatetu Case*** respecting section 204 of the Penal Code (the penalty section for murder), has been extended by the Court of Appeal to the mandatory death penalty in robbery with violence cases and probably all other similar mandatory death sentences. That was in ***William Okungu Kittiny v R [2018] eKLR***.
7. In ***Benson Ochieng & Another v Republic (Nakuru High Court Misc. Application No. 45 of 2018)***, I reached the conclusion that the High Court can invoke its original jurisdiction bequeathed to it in Article 165(3)(a) of the Constitution to re-sentence persons on death row who were sentenced pursuant to the mandatory death penalty provisions which have been declared unconstitutional. Addressing the advisory by the Supreme Court to those on death row pursuant to the mandatory death penalty provisions the Supreme Court had just declared unconstitutional that they should await a Taskforce ordered by the Supreme Court and not approach the Supreme Court with individual petitions, I had this to say:

*As I understand it, this Application is pivoted on Article 165(3)(a) of the Constitution. That clause gives the High Court unlimited original jurisdiction in criminal and civil matters. On the other hand, the Supreme Court advised similarly-positioned would-be Petitioners to await the formation of the Taskforce which will recommend the way forward for the thousands of prisoners presently serving the death sentence. However, the position of the Supreme Court was quite specific: it indicated that it will not consider individual Petitions presented to it by the prisoners after enunciating the constitutionality of the mandatory death sentence.*

*I have taken the position that the Supreme Court neither intended nor achieved the purpose of limiting the jurisdiction of this Court to consider applications for re-sentencing by individuals such as the Applicants who were sentenced to death under the then mandatory provisions of the Penal Code. A progressive and purposive reading of the constitutional provisions relied on by the Supreme Court to reach its outcome in the **Muruatetu Case** would lead us to this conclusion. The Court, may, of course, determine for prudential reasons, to await the work of the Taskforce or other docket management considerations.*

8. It is for this reason that I properly seize jurisdiction to re-consider the sentence imposed on the Applicant herein following the **Muruatetu Case**.

9. The Applicant told the Court that he is very remorseful for his participation in the robbery; that he was young and youthful; that he is a first offender; and that he has fully reformed. He told the Court that he has taken advantage of his time in Prison to undertake courses in masonry and plumbing and that he is NITA-tested for them. He produced certificates to demonstrate this.

10. Mr. Chigiti, the Prosecution Counsel told the Court that the case presented two weighty aggravating factors. First, that the Applicant was a member of a notorious gang. Two, that the manner in which the robbery was conducted was cruel and cold blooded and should invite the highest sentence. Mr. Chigiti recommended a sentence of forty (40) years imprisonment.

11. I have now considered the totality of circumstances in the case and weighed the aggravating circumstances against the mitigating ones. As both parties agree, this is not one of the rarest cases which should attract the highest form of social opprobrium by imposing the death sentence. I will therefore set aside the death sentence imposed. Weighing all the circumstances, I would think that a sentence of twenty-five (25) years is an appropriate balance between all the factors.

12. **In my view, therefore, considering the entirety of the facts, it is appropriate to substitute the death sentence pronounced on the Applicant in this case. In its place, I will impose a sentence of twenty-five (25) years imprisonment commencing on the date the sentence was imposed in the Magistrate's Court.**

13. Orders accordingly.

**Dated and delivered at Nakuru this 7<sup>th</sup> August, 2019**

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**JOEL NGUGI**

**JUDGE**