



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. CRIMINAL APPLICATION NO. 48 OF 2018

PAUL KELLY KILOVIAAPPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Applicant herein is Paul Kelly Kilovia. He was convicted of the offence of robbery with violence contrary to section 296(2) of the Penal Code after a fully-fledged trial at the Nakuru Chief Magistrate's Court.
2. The particulars of the charge stated in the Charge Sheet were that on the nights of 9th and 10th August 2001, at the Nakuru General Post Office, Nakuru town, Nakuru District within the Rift Valley Province, the Applicant, together with others not before the Court and while armed with dangerous weapons namely pistols and iron bars robbed Julius Ongwenyi Omae cash Kshs. 2,300/- and at or immediately after the time of such robbery threatened to use personal violence to the said Julius Ongwenyi Omae.
3. Evidence accepted by the Trial Court and affirmed by the High Court and the Court of Appeal showed that the Applicant was in the company of at least seven other assailants. They attacked the regular guard at the Post Office and stole his uniform so as to raise least amount of suspicion. They tied the guard with his own tie as they went about their business. Evidence showed that they used a gas flame to break into the safe where they made off with more than Kshs. 956,000/- in cash.
4. After the conviction in the Lower Court, the Applicant was sentenced to death. He appealed against both the conviction and sentence. Both were affirmed by the High Court. A further appeal to the Court of Appeal was equally unsuccessful.
5. The Applicant was given a lifeline by the recent decision 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. In support of his prayer to substitute the death sentence earlier imposed on him with a prison term, the Applicant sought to demonstrate the following before me:

- a. That he is a first offender;
- b. That he is very remorseful for his actions;
- c. That he was young and “stupid” when he committed the offence but that he has now mature and has changed ways;
- d. That he is fully rehabilitated now. He has successfully completed a vocational course in upholstery and is now NITA-tested in it. He has various other certificates in theological studies and spiritual growth.

10. The Prosecution Counsel, Mr. Chigiti asked the Court to consider the aggravating circumstances in the case. They include the following:

- a. That the robbery was perpetrated by an organized group;
- b. That they were armed with a firearm and other crude weapons;
- c. That they visited actual violence on one victim;
- d. That the economic loss – to the public since this was a Post Office – was huge – to the tune of Kshs. 1 Million.

11. Based on these aggravating factors, Mr. Chigiti urged that the Court considers imposing a sentence of forty years imprisonment.

12. 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.

13. **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.**

14. Orders accordingly.

Dated and delivered at Nakuru this 7th day of August, 2019

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JOEL NGUGI

JUDGE