REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. APPLICATION NO.147 OF 2018

NDIRANGU NDERITU MURIITHI.....1ST APPLICANT

JOSEPH MAINA MWANGI.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. On 20/08/1998, the two Applicants attempted a daring robbery. In the glare of sunlight during the day at Kuweka Traders Limited within Nakuru Township, they attempted to rob John Kiprono Birir of cash, Kshs. 520,000/-. The victim had been sent by his employer to go deposit the amount at the bank. As he sat waiting in a car, the Applicants pounced. They were three, probably four and at least one was armed with a pistol.

2. Unfortunately for the Applicants, the robbery was botched. John Birir proved more than an unwitting and hapless victim of a robbery: he actively resisted. He held on to the box that had the cash. He then grabbed the 1st Applicant's throat and a deadly struggle ensued. The two ended up in a trench. Fortunately for the victim, help had arrived. The 1st Applicant was arrested. His accomplice, the 2nd Applicant, was arrested later.

3. They were each charged with the offence of attempted robbery with violence contrary to section 297(2) of the Penal Code. The 2nd Appellant faced two other less serious counts.

4. After a fully-fledged trial, the Trial Court convicted the Applicants and sentenced them to death as the law then provided. The Applicants appeal to the Court of Appeal was dismissed in its entirety.

5. Luckily for the Appellants, the Supreme Court opened another door for them 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 adviced 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 am seized of jurisdiction to re-consider the sentence imposed on the Applicant herein following the ***Muruatetu Case***.

9. The Applicants plead with the Court to take away the death sentence and, instead, to substitute it with a Prison term; and they hope that the time they have served would be sufficient.

10. In mitigation, the 1st Applicant says that:

a. He is remorseful;

b. He has fully rehabilitated and a letter of reference from the Officer in Charge, Nakuru GK Prison confirms his impeccable conduct in Prison;

c. He has undertaken vocational courses in upholstery and polishing and is NITA-tested in both.

d. He has also done quite a good number of course like paralegal training and theological studies;

e. He is a first offender;

f. He says he was very young when he was incarcerated so he has already lived his prime in Prison.

11. Similarly, the 2nd Applicant pleaded with the Court to give him a second chance in life. He also presented a recommendation letter from the Officer-in-charge, Nakuru Prison. He, too, has done a number of vocational courses such as upholstery and polishing. He has also taken a number of courses by correspondence. He is also a first offender.

12. Ms. Kibiru, Prosecuting Counsel, while pointing that this was a serious crime conceded that the Applicants had placed enough materials before the Court to support a finding that they are reformed. However, she thought that the offence should attract thirty years imprisonment.

13. I begin by noting that the charged offence here was attempted robbery – not robbery with violence. In the recent past, there has been some controversy whether the penalty section for this offence is section 389 of the Penal Code because it provides a lesser sentence of seven years imprisonment. I propose not to wade into that controversy here. This is because, looking at the totality of circumstances in this case, two conclusions can be drawn. First, even if the ultimate punishment for attempted robbery with violence is death penalty, the circumstances here do not verge on the level of aggravation that attracts the death penalty.

14. Second, it is important to note that no gratuitous person violence was used, that the firearm was never used; and that ultimately no money was lost.

15. These two factors coupled by the mitigating circumstances in this case -- including the fact that the Applicants have been in custody for more than twenty (20) years and that they are fully and demonstrably reformed – have persuaded me that the time served in prison is sufficient for the crime committed in the present circumstances.

16. **In my view, therefore, considering the entirety of the facts, it is appropriate to substitute the death sentences pronounced on the two Applicants in this case. In its place, I will sentence each of the Applicants to a Prison term equal to the time already served. The Applicants shall, therefore, be set at liberty forthwith unless otherwise lawfully held in custody.**

17. Orders accordingly.

Dated and delivered at Nakuru this 7th August, 2019

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JOEL NGUGI

JUDGE