REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

MISC. CRIMINAL APPL. NO.116 OF 2018

PETER MWANGI MUTHAMA.....APPLICANT

VERSUS

REPUBLIC.....STATE

JUDGMENT

1. The Applicant herein is Peter Mwangi Muthama. He was convicted by the Principal Magistrate, Narok of a single count of robbery with violence contrary to section 296(2) of the Penal Code. The particulars were that on the 5th day of March, 2007 at Highlife Bar and Restaurant within Narok Township in Narok District of the Rift Valley Province jointly with another not before court robbed Humphery Wangahu Kamau of cash Ksh 15,100/= and at the immediately before or immediately after the time of robbery used actual violence on the said Humphrey Wangahu.

2. After the Applicant pleaded not guilty to the charge, a fully fledged trial ensued in which he was convicted and sentenced to death as mandatorily required by law at the time. Both the High Court and the Court of Appeal confirmed the convictions and sentence.

3. 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.

4. 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***.

5. 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.*
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> *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.*

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

7. In essence, the Applicant seeks the substitution of the death penalty he received with a prison term. To determine the merit of the Application, the Court must look at the circumstances surrounding the commission of the offence, the circumstances related to the victims of the offence as well as the circumstances related to the Applicant himself.

8. Evidence showed that the Applicant and the Complainant had been contracted to burn charcoal in the Kisima area of Narok. They worked

together for three months. When they finished the assignment, they headed to Narok town where the Complainant was paid Kshs. 15,000/- by the hirer. The Applicant was present when the money was handed over to the Complainant. The two of them checked into a hotel room in Narok. The Applicant knew the Complainant's room. Later that night, accompanied by a second person, the Applicant forced his way into the Complainant's room. They roughed him up, ransacked the room and found the Kshs. 15,000/-. They fled with it. Unfortunately for the Applicant, both the Complainant and the guard at the hotel had seen him very clearly. It was their identification evidence that sealed his fate.

9. In support of his application, the Applicant says that:

a. He was very drunk when he committed the offence, and while that does not obviate criminal charges he apologizes for his actions;

b. He has been of good conduct since he has been in prison;

c. He was a first offender;

d. He is fully reformed now. He produced a letter from the Chaplain in-charge of Naivasha Maximum Security Prison as a testimonial.

e. He is remorseful for his actions.

10. Mr. Chigiti, the Prosecutor, pointed out that the Applicant and his colleague were armed with offensive weapons – a pen knife. He also asked the Court to consider that they assaulted the Complainant though they did not harm him. He thought a sentence of twenty-five years imprisonment would be sufficient in the circumstances.

11. In previous cases, I have explained the position that the appropriate entry point for sentencing for robbery with violence is fifteen years. This is because "simple" robbery under section 296(1) of the Penal Code attracts a minimum sentence of fourteen years imprisonment. It therefore seems logical that the minimum sentence for robbery with violence should be fourteen years imprisonment. This is because robbery with violence under section 296(2) is, by definition, an aggravated robbery which has been singled out by the Legislature for enhanced penalty due to the impact of the crime on the victim and the society. This position is in accord with other decisions of the High Court on this point. See, for example, decisions by Majanja J. in ***Michael Kathewa Laichena and Another v Attorney General MERU High Court Crim. Pet. No. 19 of 2018 (UR)*** and ***John Kathia M'itobi v Republic [2018] eKLR***. An entry point of fourteen years for robbery with violence, in my view, is also appropriate for reason of uniformity and parity in sentencing.

12. This case presents both aggravating and extenuating circumstances. In the present case, both parties agree that this is a fit case for the substitution of the death sentence imposed with a prison term: The death penalty should be reserved only for the worst form and most vicious of robberies. There was no evidence here that the robbery was committed in a particularly heinous, cruel or depraved manner.

13. So what term of imprisonment is appropriate in this case. There is evidence here that the Applicant is remorseful; is a first offender; and has been rehabilitated. On the other hand, he was in the company of another when they committed the offence and they used an offensive weapon. All in all, however, there was no gratuitous use of violence in this case. I do not think the factors here warrant this case should attract more than the minimum appropriate sentence: fifteen years.

14. **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 fifteen (15) years imprisonment commencing on 26/06/2009 – the date the sentence was imposed.**

15. Orders accordingly.

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

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JOEL NGUGI

JUDGE