



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. CRIMINAL APPLICATION NO. 172 OF 2018

SIMON KIMANI MWANGI..... APPLICANT

VERSUS

REPUBLICSTATE

JUDGMENT

1. The Applicant herein was convicted of the offence of robbery with Violence contrary to Section 296(2) of the Penal Code at the Chief Magistrate's Court, Nakuru after a full trial. His name is Simon Kamau Mwangi.
2. Evidence adduced during his trial and confirmed by both the High Court and the Court of Appeal showed that the Applicant attacked one, Paul Kimani Njuguna and robbed him of various items including a Motor Vehicle, driving licence, phone and national identity card.
3. The incident took place on 24/02/2007 at Karagita Trading Centre in Naivasha. The Applicant and his colleague pretended to be customers of cement in the business owned by Paul's employer. Paul was instructed to deliver the cement to them. However, on getting to a place they shepherded Paul to, they pounced, knocking him with a hammer and otherwise roughing up. They took control of the motor vehicle, robbed Paul of everything of value he had and then left him for the dead.
4. The evidence presented in the trial Court was sufficient to convict the Applicant. He was also sentenced to death as the law then provided. The High Court and the Court of Appeal affirmed both the conviction and the sentence.
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 take jurisdiction to re-consider the sentence imposed on the Applicant herein following the *Muruatetu Case*.
9. 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.
10. In support of his Application, the Applicant submitted that:
- i. He is extremely remorseful for what he did;
 - ii. He was a first offender;
 - iii. He has become a changed man in prison. He says that he has become a Christian and lives by His creed. He produced a recommendation letter from the Prison authorities.
 - iv. He is NITA-tested and qualified in Motor Vehicle Mechanics.
11. During the hearing of the Application, the Applicant's wife addressed the Court and urged for the release of the Applicant. The wife believes that her husband has already learnt his lesson – and that he is sorely missed at home.
12. Mr. Chigiti, the Prosecutor, reminded the Court that violence was used in the commission of the crime and that a hammer was used to hit one of the victims. He thought a sentence of twenty-five years imprisonment would be sufficient in the circumstances.
13. 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.
14. In the present case, taking into consideration the aggravating and mitigating circumstances listed above, it appears clear, as both parties agree, that 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.
15. As for Prison term, it is important to recall that the Applicant was in the company of at least one other person and that they were armed for the heinous crime. However, they did not use any kind of depraved violence on the victim – although they certainly hit the Complainant. All considered, I think a prison term of eighteen (18) years is comparatively appropriate in the circumstances of this case.
16. **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 eighteen (18) years imprisonment commencing on 30/05/2008 – the date the sentence was imposed.**
17. Orders accordingly.

Dated and delivered at Nakuru this 7th August, 2019

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JOEL NGUGI

JUDGE