



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL PETITION NO. 13 OF 2018

(AS CONSOLIDATED WITH PETITIONS NO.

24 OF 2018, 44 OF 2018, 45 OF 2018 AND MISC.

CRIMINAL APPLICATIONS NO. 14 OF 2018, 34 OF 2018 AND 31 OF 2018

MICHAEL MULAMA alias BAHATI.....1ST PETITIONER

OSCAR ASHIVAKA.....2ND PETITIONER

ABINAYO AMBOSO.....3RD PETITIONER

VITALIS SHIANGALA.....4TH PETITIONER

ERICK ILUSA SHIHANI.....5TH PETITIONER

ANDRIAN VEMBO.....6TH PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The six petitioners were convicted by the subordinate court at Kakamega of two counts of robbery with violence contrary to Section 296 (2) of the Penal Code and each of them sentenced to death. Their appeals to the High Court and the Court of Appeal were unsuccessful. They have now approached this court seeking for re-hearing of their mitigation and for re-sentencing. This arises from the Supreme Court decision in the **Francis Karioko Muruatetu & Another – Vs- Republic (2017) eKLR** where the said court declared Section 204 of the Penal Code to be inconsistent with the Constitution and invalid to the extent that it provides for mandatory death sentence for murder. As a corollary, the Court of Appeal in **William Okungu Kittiny –Vs- Republic, Kisumu Criminal Appeal No. 56 of 2013 (2018) eKLR** applied the decision in the *Muruatetu* case *mutatis mutandis* to Section 296 (2) of the Penal Code and held that the mandatory death sentence for the offence of robbery with violence as provided in Section 296 (2) of the Penal Code is inconsistent with the Constitution and thus that the sentence provided therein is a discretionary mandatory sentence. This means that in a conviction for the offence of robbery with violence under S. 296 (2) of the Penal Code the trial court may impose any other appropriate sentence other than the death sentence. It is on that basis that the petitioners are seeking for re-sentencing since they were sentenced before the Supreme Court decision in the *Muruatetu* case when the legal position was that the death sentence was deemed to be mandatory under both Sections 204 and 292 (2) of the Penal Code.

2. The brief facts of the case were that the two complainants were operating a hotel kiosk near Sigalagala market. That on the night of 13th July, 2009 at 3 a.m. they were at their kiosk baking *mandazis* for sale on the following day when they were attacked by a gang of people. They identified the people as the petitioners. The petitioners were armed with a gun and pangas. They cut both complainants and robbed them of a total of Ksh. 7,850/= and a Nokia Mobile phone. They took hot oil and poured it on them. After the robbers escaped the complainants reported to the police. They were taken to Kakamega Provincial General Hospital where they were admitted. The degree of injury suffered was classified as grievous harm. The petitioners were thereafter arrested and charged. They were tried, convicted and sentenced as earlier stated.

3. The 1st and the 6th petitioners were represented by **Mr. Munyendo** advocate while **Miss Ashitsa** appeared for the 2nd and 3rd petitioners. The 4th and 5th petitioners appeared in person.

4. Mr. Munyendo submitted that the 1st and 6th petitioners are remorseful. That they are young men who have been in custody since 2009. He urged the court to sentence them to the time spent in custody. The advocate relied on the case of **Sebastian Okweru Murefu –Vs- Republic, Kakamega Petition No. 151 of 2012** where Chitembwe J. substituted a death sentence for robbery with violence to the time served in prison of 8 years upon considering that the petitioner had stayed in remand for 3 years awaiting trial. The advocate also cited the case of **Robert Achapa Okelo –Vs- Republic, Kisumu High Court Petitioner No. 63 of 2018** where Cherere J. considered that the petitioner had been in prison custody for 13 years and another 1½ years during the trial and substituted the sentence of death to the period already served.

5. Miss Ashitsa submitted that the 2nd and 3rd petitioners are brothers. That they lost their father in the year 2004. That they have an elderly mother who is in need of care. That they are unmarried. That the period of 10 years that they have served has served the objectives of sentencing. That they are remorseful and have reformed. She urged the court to sentence them to the period already served. She cited the case of **Anthony Mutua Nzuki –Vs- Republic, Machakos High Court Criminal Appeal No. 51 of 2016 (2018) eKLR** where the robbers while armed with a toy pistol, knife and metal bars, cut complainant and robbed him and his wife of two mobile phones, cash Ksh. 7,000/=, a wedding ring and a motor cycle. Odunga J. substituted the death sentence with 15 years imprisonment upon considering that some of the stolen items were recovered and that the injuries on the complainant were classified as harm. The advocate also cited the case of **Rajab Malik Wanjala –Vs- Republic Kakamega High Court Petition No. 41 of 2016** where the petitioner was armed with a rifle during the robbery and robbed the complainants of a motor vehicle and mobile phones. In the case the petitioner had been in custody for close to 2 years awaiting trial and had served 13 ½ years. This court re-sentenced the petitioner therein to 17 years imprisonment commencing from the date of sentence by the trial court.

6. In his submissions the 4th petitioner, Vitalis Shiangila, made reliance on some of the authorities already cited above. He urged the court to review his sentence to the period already served.

7. The 5th petitioner, Erick Isula Shihani mitigated that he was arrested at the age of 21 years. That he had no family of his own. That he has acquired skills in prison that has equipped him to face life outside prison. He implored the court to consider the period he has spent in prison and give him a second chance.

8. The court called for pre-sentence reports that were prepared by probation officers from Kakamega Central Probation office. The report for the 1st petitioner **Michael Mulama** indicates that he is 34 years old. That he has a wife and three children who are being taken care of by his brother. That he is remorseful for the offence committed. That his community is not opposed to his release.

9. The report for the 2nd petitioner, **Oscar Ashivaka**, indicates that he is aged 43 years. That he never married. That he has undergone religious training in Biblical studies while in prison. That his family is willing to support him to settle down.

10. The 3rd petitioner, **Abinayo Imboso**, is reported to be aged 37 years. That he had a wife and one child. That the whereabouts of the wife are not clear but the child is under the care of its maternal grandmother. That the family is willing to support him.

11. The 4th petitioner, **Vitalis Shiangala**, was said to be 44 years old. That he has a wife and 5 children. That before he was incarcerated he was supplying building materials in construction sites. That his absence has taken a toll on his family. That his community does not have any problem if he is released.

12. The 5th petitioner, **Erick Ilusa Shihani**, is reported to be aged 32 years. That he was raised by an abusive step-mother and was doing menial jobs. That he has undergone trainings in Biblical Studies while in prison. That his family and community are willing to help him settle down.

13. The 6th petitioner, **Andrian Vembo**, is said to be 27 years of age and that he was single at the time of his incarceration. That his mother passed away while he was in prison. That he was a first offender and that he is remorseful. That the court can be lenient on him in re-sentencing.

14. The reports indicate that the complainant relocated from the place of the attack and was not traced for interview.

15. Sentencing is a discretion of the trial court. In **Ambani –Vs- Republic (1990) KLR 161**, Bosire J. (as he then was) stated that a sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and that the court should look at the facts and the circumstances of the case in its entirety before settling for any given sentence.

16. The Court of Appeal in **Thomas Mwambu Wenyi Vs Republic (2017) eKLR** cited the decision of the Supreme Court of India in **Alister Anthony Pereira Vs State of Maharashtra** at paragraph 70-71 where the court held the following on sentencing:-

“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.”

17. In **Francis Karioko Muruatetu & Another –Vs- Republic (Supra)** the Supreme Court stated the following guidelines as mitigating

factors in a re-hearing sentence for the conviction of a murder charge:-

- (a) age of the offender;*
- (b) being a first offender;*
- (c) whether the offender pleaded guilty;*
- (d) character and record of the offender;*
- (e) commission of the offence in response to gender-based violence;*
- (f) remorsefulness of the offender;*
- (g) the possibility of reform and social re-adaptation of the offender and*
- (h) any other factor that the court considers relevant.*

These factors are also applicable in a re-sentencing hearing for the offence of robbery with violence.

18. Section 333 (2) of the Penal Code requires a court when sentencing an accused person to take into account the time spent in custody awaiting trial.

19. I have considered other cases where convicts of robbery with violence were re-sentenced after the *Muruatetu* case. In **Wycliffe Wangugi Mafura –Vs- Republic Eldoret Criminal Appeal No. 22 of 2016 (2018)** the Court of Appeal imposed a sentence of 20 years imprisonment where the appellant was involved in robbing an Mpesa shop agent with the use of firearm.

20. In **Benson Ochieng & France Kibe –Vs- Republic (2018) eKLR**, Joel Ngugi J. re-sentenced the petitioners to 20 years imprisonment upon considering that the offence was aggravated by the use of multiple guns by an organized gang to commit armed robbery.

21. I have considered the principles of sentencing set out above, the mitigation by the petitioners and the circumstances of the case. The offence committed by the petitioners was aggravated by the fact that they meted out savage violence on the complainants thereby occasioning them grievous harm. Worse is that they poured hot oil on them. In face of this and even though the petitioners gave moving mitigation I do not think that the period served of 10 years is sufficient punishment for the serious offence that they committed. The death sentences were however unwarranted and they are accordingly set aside.

22. Having considered that the petitioners were in remand prison for 16 months awaiting trial, I re-sentence each of them to seventeen (17) years imprisonment on each of the two counts of robbery with violence commencing from the date of sentence by the trial court. Sentence to run concurrently.

Delivered, dated and signed in open court at Kakamega this 26th day of September, 2019.

J. NJAGI

JUDGE

In the presence of:

Mr. Munyendo for 1st and 6th petitioners

No appearance for 2nd and 3rd petitioners

Miss Kibet for State

Petitioners

Court Assistant - George

14 days right of appeal.