



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL PETITION NO. 36 OF 2018

JUMA IDDI MUSTAPHA.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The petitioner herein was convicted of two counts of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code and sentenced to death. His appeals to the High Court against the conviction and the sentence were unsuccessful. He now has filed the instant petition before this court seeking for re-sentencing arising from the Supreme Court decision in **Francis Karioko Muruatetu & Another –Vs- Republic (2017) eKLR** where the said court declared that the mandatory death sentence under Section 204 of the Penal Code is unconstitutional. As a corollary, the Court of Appeal in **William Okungu Kittiny –Vs- Republic (2018) eKLR** held that:-

“...the sentence of death under Section 296 (2) and Section 297 (2) of the Penal Code is discretionary maximum punishment. To the extent that Section 296 (2) and 297 (2) of the Penal Code provides for mandatory death sentence the Sections are inconsistent with Constitution.”

2. In view of the above the sentence of death provided under Section 296 (2) for robbery with violence is a discretionary death sentence. A sentencing court in cases of robbery with violence has the discretion to impose any other sentence other than a death sentence. The petitioner herein was sentenced before the decision in the *Muruatetu* case was delivered. The thinking then was that the death sentence under Section 296 (2) of the Penal Code was mandatory despite the mitigating circumstances. Since that position is no longer the prevailing law, the petition herein for re-hearing of mitigation and for a re-sentencing is well grounded in law.

3. The petitioner is praying for orders that the court sentences him to the period spent in prison of 7 years and order for his release.

4. The advocate for the petitioner, **Mr. Malalah**, mitigated that the petitioner was arrested in 2012 and convicted in 2013. That he has served 7 years in prison. That he was a first offender at the time that he was convicted. That he is a reformed citizen.

5. Mr. Malalah cited several authorities where sentences for convicts of robbery with violence were reduced. In **Douglas Muthaura Ntoribi –Vs- Republic, Meru High Court, Misc. Criminal Appeal No. 4 of 2015** where the robbers while armed with a panga stole Ksh. 500/= from the victim and occasioned him minor injuries Chitembwe J. substituted the death sentence with a prison term of 5 years.

6. Also cited was the case of **Benjamin Kemboi Kipkone –Vs- Republic (2018) eKLR** where three robbers while armed with an AK 47 rifle robbed the complainant of Ksh. 250,000/= and a mobile phone wherein Chemitei J. substituted the death sentence with 20 years imprisonment.

7. Additionally in **Paul Ouma Otieno –Vs- Republic (2018) eKLR** where the accused while armed with an AK 47 rifle and a kitchen knife robbed the complainant of Ksh. 450,000/= and 3 mobile phones wherein Majanja J. substituted the death sentence with 20 years imprisonment

8. The court ordered for a pre-sentence report that was prepared by a probation officer, Mr. Bernard Wangatia. The report indicates that at the time of his arrest the petitioner was married with two children. That the children are now in lower primary school and stay with their mother. That the petitioner has gone through the prison correction system for a good number of years which have reformed him and taught him a lesson the hard way. That his family and community are ready to receive him as they are of the opinion that he has had enough punishment for the offence committed. That the petitioner has not had any criminal record while in prison. The report recommended leniency in sentencing. The victim of the offence was not traced at the time of preparing the report.

9. The petitioner was convicted in count 1 of robbing the complainant of a chloride oxide battery valued at Ksh. 8,000/= and one mobile phone valued at Ksh. 4,500/=. In count 2 he was convicted of robbing the complainant therein of cash of Ksh. 600/=. They were said to have been armed with pangas, knives, rungas and iron bars at the time of the robbery. The complainant in count 1 was hit with a stick during the robbery while the complainant in count 2 was slapped.

10. Sentencing is a discretion of the trial court. In **Ambani –Vs- Republic (1990) eKLR**, 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.

11. The Court of Appeal **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.

12. The Judiciary Sentencing Policy Guidelines lists the objectives of sentencing at page 15 paragraph 4.1 as follows:

1. **Retribution:** To punish the offender for his/her criminal conduct in a just manner.
2. **Deterrence:** To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
3. **Rehabilitation:** To enable the offender reform from his criminal disposition and become a law abiding person.
4. **Restorative Justice:** To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims, communities’ and offenders’ needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender’s contribution towards meeting the victims’ needs.
5. **Community protection:** To protect the community by incapacitating the offender.
6. **Denunciation:** To communicate the community’s condemnation of the criminal conduct.

13. Section 333 (2) of the Criminal Procedure Code requires a sentencing court to take into account the period spent in custody awaiting trial.

14. I have considered the above stated principles of sentencing. I have considered the mitigation by the petitioner together with the authorities cited by his advocate.

15. The petitioner was aged 22 years at the time that he committed the offence. He is now aged 29 years. He has been in incarceration for a period of 7 years. The facts of the case shows that the robbers used minimal violence on the complainants during the robbery. The value of the stolen property was no more than Ksh. 13,000/=. In the premises there were no aggravating circumstances in the manner the robbery was executed that necessitated for a sentence of death being imposed on the petitioner. I take the view that a sentence of ten (10) years imprisonment is adequate punishment for the offence committed by the petitioner.

16. The upshot is that the sentence of death imposed on the petitioner is set aside and substituted with one of ten (10) years imprisonment commencing from the date of sentence by the trial court.

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

J. NJAGI

JUDGE

In the presence of:

Miss Mburu for petitioner

Miss Kibet for respondent/State

Petitioner

Court Assistant - George

14 days right of appeal.