



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL PETITION NO. 14 OF 2018

CHARLES ESHITEMI BULIMO.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The petitioner was convicted by a magistrate's court 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 and the Court of appeal were unsuccessful. He has now filed an undated application seeking for re-hearing of his sentence following the Supreme Court decision in **Francis Karioko Muruatetu & Another – Vs- Republic (2007) eKLR** where the said court declared the death sentence for murder to be unconstitutional. In consequence thereof the Court of Appeal in **William Okungu Kittiny –Vs- Republic, Kisumu Criminal Appeal No. 56 of 2013 (2018) eKLR** applied the decision in *Muruatetu* case *mutatis mutandis* to the provisions of Section 296 (2) of the Penal Code and held that the said section is inconsistent with the Constitution and thus that the sentence provided therein is a discretionary maximum sentence. It is on this background that the petitioner has filed his petition for re-sentencing.

2. The brief facts of the case against the petitioner were that the petitioner and the complainant in the case were neighbours. That on the evening of 27th June, 2010 the complainant was on his way home from a local trading centre when the appellant and another person attacked him. They cut him with a panga on the upper part of the hand, on the left hand palm and left thumb. They robbed him of Ksh. 500/=. During the incident the complainant managed to cut the petitioner with a pen knife on his left hand and on the right eye. The petitioner was arrested while seeking treatment in a nearby health centre. He was charged, convicted and sentenced to death.

3. The Petitioner mitigates that he was imprisoned on 29th October, 2010. That the period that he has served in prison custody is sufficient punishment. He relied on the case of **Douglas Muthaura Ntoribi, Meru High Court Misc. App. No. 4 of 2015** where the accused had been sentenced to death and Chitembwe J. substituted the sentence with a prison term of 15 years upon considering that the robbers stole a paltry Ksh. 500/= and that the victim sustained minor injuries. The petitioner also cited the case of **Sebastian Okweru Museto Petition No. 151 of 2012** where Chitembwe J. considered that the petitioner had stayed in remand for 3 years awaiting trial and had served for 8 years. He accordingly substituted the death sentence with the period served.

4. This court called for a pre-sentencing report that was prepared by a Probation officer, Mr. Bernard Wangatia. The report indicates that the petitioner is aged 29 years. That he was a first offender when he was convicted. That he has had no criminal record while serving time in prison. That he is a reformed man. That his family and community is ready to receive him if released as they are of the view that he has had enough punishment for the offence committed. That the complainant in the case has no problem if the court decides to give the petitioner an alternative sentence.

5. 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.

6. 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.

7. 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.

8. 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.

9. I have considered that the petitioner was in remand prison for 4 months awaiting trial. He was sentenced on 29th October, 2010. He has thereby served nearly 9 years in prison. He was aged around 21 years when he committed the offence. Though the petitioner and his accomplice cut the complainant with a panga during the robbery, they stole a paltry Ksh. 500/= from the complainant. The petitioner was a young person barely out of his teens when he committed the offence. The death sentence imposed on the petitioner was unwarranted in the circumstances of the case. Taking all the above into consideration I am of the view that the incarceration for a period of 9 years is sufficient punishment for the offence committed by the petitioner. The death sentence is therefore set aside. I re-sentence the petitioner to the period served in prison. The petitioner is therefore to be released from prison forthwith unless lawfully held.

Delivered, dated and signed in open court at Kakamega this 25th day of September, 2019.

J. NJAGI

JUDGE

In the presence of:

Miss Kibet for State Petitioner

Court Assistant - George

14 days right of appeal.