



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL PETITION NO. 43 OF 2018

BENEDICTO KWARULA INGOSI..... PETITIONER

VERSUS

REPUBLIC..... RESPONDENT

RULING

1. The petitioner herein was on the 12/7/2005 convicted by a magistrate's court for 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 the instant Petition seeking for re-sentencing. This follows the Supreme Court decision in **Francis Karioko Muruatetu & Another – Vs- Republic (2017) eKLR** in which the said court declared the death sentence for murder to be unconstitutional. As a corollary, the Court of Appeal in **William Akungu Kittiny –Vs- Republic (2018) eKLR** held that the mandatory death sentence for robbery with violence under Section 296 (2) of the Penal Code was inconsistent with the constitution and that the death sentence under Section 296 (2) of the Penal Code is a discretionary maximum sentence. It is on that basis that the petitioner has filed the instant application for re-sentencing.

2. The brief fact of the case against the petitioner were that the complainant in the case used to hawk shop goods on a bicycle in Ivihiga location in Kakamega District. That on the evening of 9/11/2004 he was returning to his base when he was attacked by 4 people and robbed of assorted shop goods, a bicycle and cash Ksh. 8,000/=. The robbers feared that he had recognized them and as a result they cut him on the head, right scapula bone, forearms, right knee and right ankle. They left him for the dead. On the following day the complainant was picked from the scene of the attack and taken to hospital. An X-ray was taken that revealed a fracture of the right tibia and fibula bones. The degree of injury was classified as grievous harm. The petitioner and his accomplices were arrested and charged. The petitioner was convicted and sentenced as aforesaid.

3. The Petitioner is seeking that the court imposes an appropriate sentence on him in this re-sentencing. He relied on the case of **Douglas Muthaura Ntoribi, Meru High Court Misc. Application No. 4 of 2015** where Chitembwe J. substituted the death sentence for robbery with violence with a prison term of 15 years. The court therein considered that the robbers stole only Ksh. 500/= from the victim and had only occasioned him minor injuries.

4. This court called for a pre-sentencing report that was prepared by a probation officer, Mr. Francis Misiku Okumu. The report indicates that the petitioner is aged 51 years. That he has a wife and 2 children. That he has done government grade test 2 and 1 in carpentry and joinery in prison and has no criminal record while serving sentence. That his relatives and the local community are not opposed to the release of the petitioner if the court decides to do so. That the victim in the case relocated to Kapsabet and was not found for interview. The pre-sentencing report recommends that the petitioner be placed on probation.

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 with 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 set out the following guidelines as mitigating factors in a re-sentencing hearing 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 Criminal Procedure Code requires a court sentencing an accused person to take into account the period spent in custody awaiting trial.

9. The petitioner was convicted on the 12/7/2005. He has therefore been in prison for 14 years. Before he was sentenced he was in remand for 8 months while awaiting trial.

10. I have considered other cases where convicts serving sentences for robbery with violence were re-sentenced after the Supreme Court decision in the *Muruatetu* case.

11. In **Michael Kathewa Laichena –Vs- Republic (2018) eKLR** where the petitioner was in a gang that was armed with a gun and knives, Mabeya J. re-sentenced the petitioner to a prison term of 15 years after considering that he had been in custody for 5 years pending trial.

12. In **Benjamin Kemboi Kipkone –Vs- Republic (2018) eKLR** where 3 robbers armed with an AK 47 rifle robbed the complainant of Ksh. 250,000/= and a mobile phone Chemitei J. substituted the death sentence with 20 years imprisonment.

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

14. 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 appellants were involved in robbing an Mpesa shop agent with the use of firearm.

15. I have considered all the circumstances of this case. The offence was aggravated by the serious injuries that were occasioned on the victim. The intention of the robbers was no doubt to kill the victim because he had recognized them.

16. Though the robbers occasioned the complainant serious injuries I nevertheless do not think that the sentence of death was warranted in the case. I however take the view that the period so far served in prison is not enough for the serious offence committed by the petitioner. I consider that a sentence of twenty (20) years imprisonment is sufficient sentence for the crime committed. The sentence of death is therefore set aside and substituted with a sentence of 20 years imprisonment commencing from the date of sentence by the trial court.

Delivered, dated and signed in open court at Kakamega this 24th day of September, 2019.

J. NJAGI

JUDGE

In the presence of:

Miss Omondi for State

Petitioner

Court Assistant - George

14 days right of appeal.