

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL PETITIONS NOS. 39 OF 2018 AND 18 OF 2019

DANIEL MBAE NG'ANG'A.....1ST PETITIONER

DAVID OWUOR.....2ND PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The petitioners herein had been convicted in Kakamega CMCCRC No. 3213 of 2003 of robbery with violence and was sentenced to death. His appeals to the High Court and the Court of Appeal, in Kakamega HCCRAS Nos. 73, 74 and 75 of 2005 and Kisumu CACRA No. 215 of 2009, were dismissed.
2. They have moved the court for re-hearing with respect to sentencing. No doubt this was prompted by the recent developments in the Kenyan law with respect to mandatory sentences. The sentence prescribed in law for robbery with violence is mandatory death.
3. My attention has been brought to Kakamega HC Petition No. 41 of 2016, which had been filed by Rajab Malik Wanjala, who was the petitioners' accomplice, and who was party to. Kakamega CMCCRC No. 3213 of 2003, Kakamega HCCRAS Nos. 73, 74 and 75 of 2005 and Kisumu CACRA No. 215 of 2009. The matter was handled by my brother Judge, Njagi J, who delivered a ruling on 20th November 2018, substituting the death sentence with a sentence seventeen (17) years imprisonment from the date of conviction on 15th June 2005.
4. The petitioners have invited me to consider applying the sentence imposed by Njagi J. in Kakamega HC Petition No. 41 of 2016. Ms. Omondi for the state urged me not to be swayed by the eloquence of the petitioners but to look at the circumstances of the commission of the offence and the fact that the ultimate penalty for it remains death. I had called for a pre-sentence report from the probation office. Two reports in respect of the two petitioners were filed. I have gone through them. Both indicate that the two petitioners are remorseful and regret the time they have spent behind bars. The probation office recommends that the two be put on probation service.
5. I would echo the sentiments by Ms. Omondi. The offence of robbery with violence attracts the penalty of death. The petitioners were armed with dangerous weapons, AK47 rifles. They terrorized people within the community, and carried the complainant around with them in a stolen vehicle. That, no doubt, put his life in grave danger in the event of any exchange of fire with the police. A non-custodial sentence would not be feasible in the circumstances.
6. In this case my hands are tied. The petitioners in this cause were together with the petitioner in Kakamega HC Petition No. 41 of 2016. It is only proper and right that similar sentences be meted out for the same or similar offences. That being the case, the sentences to be given to the petitioners herein should be commensurate with that given to their co-accused in Kakamega CMCCRC No. 3213 of 2003 in Kakamega HC Petition No. 41 of 2016.
7. I shall, accordingly, set aside the death penalty that was imposed on the petitioners herein on 15th June 2005 in Kakamega CMCCRC No. 3213 of 2003, and in its place I shall sentence them to serve seventeen (17) years imprisonment, effective from 15th June 2005. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2019

W. MUSYOKA

JUDGE