



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**PETITION NO. 16 OF 2018**

**(FORMERLY MOMBASA PET. 35 OF 2018)**

**BENARD AKUSIMBA KEYA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT UPON APPLICATION FOR RE-SENTENCING**

1. Bernard Akusimba Keya, the Applicant herein, was arraigned before the Chief Magistrate's Court at Nakuru on two counts of robbery with violence contrary to section 296(2) of the Penal Code and on two other counts of being in possession of a firearm and ammunition without a Firearm Certificate. He was convicted on all the counts. For the robbery convictions, he was sentenced to death as the law then mandatorily provided.
2. The Applicant's appeal to the High Court and the Court of Appeal were unsuccessful. He has now brought an Applicant for resentencing pursuant to the Supreme Court decision in *Francis Karioko Muruatetu & Another v Republic [2017] eKLR*. He seeks for substitution of the death penalty he received with a prison term. In the *Muruatetu Case*, the Supreme Court outlawed mandatory death penalty for murder as unconstitutional and struck down section 204 of the Penal Code to the extent that it prescribed mandatory death sentence upon conviction for murder.
3. The reasoning in *Muruatetu Case* respecting section 204 of the Penal Code (the penalty section for murder), has been extended by the Court of Appeal to the mandatory death penalty in robbery with violence cases and probably all other similar mandatory death sentences. That was in *William Okungu Kittiny v R [2018] eKLR*.
4. In *Benson Ochieng & Another v Republic (Nakuru High Court Misc. Application No. 45 of 2018)*, I reached the conclusion that the High Court can invoke its original jurisdiction bequeathed to it in Article 165(3)(a) of the Constitution to re-sentence persons on death row who were sentenced pursuant to the mandatory death penalty provisions which have been declared unconstitutional.
5. In support of the Application, the Applicant urged the following mitigating factors:
  - a. First, that he was extremely young and impressionable when he committed the offence since he was only 22 and had fallen into bad company;
  - b. Second, that he is remorseful for his actions. He now accepts his role in the robbery and he regrets his actions very much. He asked for forgiveness from the Complainant, the Court and the public.
  - c. Third, that he has reformed during his stay in Prison.
  - d. Fourth, that he was a first offender and had good antecedents.
6. For the Prosecution, Mr. Chigiti told the Court that there were serious aggravating circumstances. He listed them as follows:
  - a. That the Applicant was a member of a gang;
  - b. That the gang assaulted and seriously injured the victim;

- c. That the victim was a member of the Police Force;
- d. That the robbers were armed with pangas, rungas and swords;
- e. That they stole a Police firearm during the robbery.

7. Mr. Chigiti conceded that the death sentence should be set aside. He, however, recommended a sentence of 35 years imprisonment.

8. I have now considered these mitigating and aggravating circumstances in the case. I begin by agreeing with Mr. Chigiti that the nature of this robbery does not call for invocation of the death penalty. There are serious aggravating circumstances as listed by Mr. Chigiti. These are, however, counter-balanced by the mitigating circumstances in the case. They include the relative age of the Applicant (at only 22 years old at the time of the commission of the offence); being a first offender; and remorse expressed. While it is true that some violence was used, it was not of the depraved kind. An important factor to consider is that the victim was a Police Officer and that the Applicant and his colleagues stole a firearm.

**9. All considered, I find that it is appropriate to substitute the death sentence pronounced on the Applicant in this case. In its place, I will impose a sentence of twenty (20) years imprisonment. The Prison term will be computed from 04/10/2001 when the Applicant was convicted.**

10. Orders accordingly.

**Dated and Delivered at Nakuru this 19<sup>th</sup> day of December, 2019**

.....

**JOEL NGUGI**

**JUDGE**