



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. APPLICATION NO. 66 OF 2018

JAMES NDERITU GICHIGO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Applicant, James Nderitu Gichigo, together with another person, were charged with the offence of robbery with Violence contrary to Section 296(2) of the Penal Code. The charge sheet stated that on the 27th of February, 2000 at Ngata Farm Nakuru District the Appellant jointly with others not before Court while armed with dangerous weapons namely pangas, rungas, simis, axes, swords and arrows, broke into the house of John Nganga Wachira and robbed him of his motor vehicle KLU 253 Peugeot 4040 Pick-up, kitchen utensils and house hold goods all valued at Ksh 448, 230/= and at or immediately before or immediately after the time of such robbery, used actual violence to the said John Wachira Nganga.
2. The Applicant and his Co-Accused denied the charges and the case proceeded to full hearing. They were both convicted at the conclusion of the trial. Their convictions were affirmed by both the High Court and the Court of Appeal. Both Superior Courts affirmed the death sentences imposed on the Applicant and his Co-Accused.
3. The Applicant now seeks to be resentenced 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.
4. 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*.
5. 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.
6. To determine whether the Application is meritorious and to what extent, the Court must look at the circumstances surrounding the commission of the offence, the circumstances related to the victims of the offence as well as the circumstances related to the Applicant himself.
7. Evidence adduced at the trial showed that the Applicant and his colleagues broke into the house of the Complainant on 27/02/2000 shortly after midnight. They cut through window grills of his house and forced the Complainant to open the door. They were eight in number. They demanded for money from the Complainant. They beat him up with a rungu. They threatened to shoot him with a gun. They then robbed him of household and personal goods before packing them in the Complainant's motor vehicle and sped off. Unfortunately for the robbers, the motor vehicle was involved in an accident. The Applicant and his Co-Accused were in the motor vehicle at the time of the accident. That is how they were arrested.
8. In his submission in support of his Application, the Applicant says that he is very remorseful for his actions. He begged for leniency given his advanced age of 71. He says that he wishes to go back to society and hopefully teach young people about consequences of bad choices. He said that he has two remaining daughters he hopes to go back and be a parent to. His two brothers are willing to take him in and help him ease into life outside prison. He further said that he is now reformed.
9. Mr. Chigiti, the Prosecutor, submitted that there were aggravating circumstances which the Court should consider:

- a. First, that the Appellant and his group broke into the house.
- b. Second, that it was a gang.
- c. Third, that one was armed with a gun.
- d. Fourth, that they assaulted one of the victims.

10. Mr. Chigiti submitted that in view of all these aggravating circumstances, the death sentence should be substituted with a sentence of imprisonment for 30 years.

11. I have now considered all the aggravating and mitigating circumstances in the case. I have noted the aggravating circumstances pointed out by Mr. Chigiti. I have also noted that the State agrees that the offence here is not of the category that should attract the death sentence. I have noted that the Applicant has been in custody since they were arrested in January, 2000 – nineteen years ago. I have also noted that the Prison authorities say that he has reformed. Finally, I have also noted his advanced age at seventy-one years old. Finally, I have noted that the Applicant has family members who are willing to take him in and help him ease into life out of prison. At his age, I am of the opinion that no further sentencing objectives will be served by his continued incarceration.

12. Consequently, I hereby substitute the death sentence imposed on the Applicant with a term sentence of imprisonment equal to the term already served. The Applicant shall, therefore, be released from Prison forthwith unless otherwise lawfully held.

13. Orders accordingly.

Dated at Nakuru this 19th day of December, 2019

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JOEL NGUGI

JUDGE