



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 306 OF 2008

STANLEY NJOGU NDUTA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from judgment of the Principal Magistrate Hon. Soita delivered on 23rd October, 2008 in Molo Cr. Case No. 1473 of 2007.)

JUDGMENT

1. Stanley Njogu Nduta (Appellant) was arraigned before the Chief Magistrate's Court in Molo and charged with a single count of robbery with violence. It was alleged that on 19th day of August, 2007, at Kamirithu Village in Molo within Nakuru County, while armed with dangerous weapons namely pangas he, together with other people, jointly robbed Nathan Njoroge Kinyua of a mobile phone, 2 blankets, 2 T-shirts, leather shoes, a short (pair of) trousers, 4 shirts and 5 long trousers all valued at Kshs. 15,000/- and at or immediately after the time of such robbery threatened to use actual violence to the said, Nathan Njoroge Kinyua.

2. The Appellant had been charged jointly with three others. At the conclusion of a fully-fledged trial in which they each had pleaded not guilty, the Trial Court found the Appellant guilty of the offence. It sentenced him to death as the law, then, mandatorily provided.

3. Before he was sentenced, the Appellant was given an opportunity to mitigate. The record shows that he informed the Court that he had been unwell at the time he committed the offence. The nature of the sickness the Appellant was suffering from became clear during the hearing of this Application.

4. The Appellant filed an appeal against both conviction and sentence. However, when the matter came up for hearing before me on 21/03/2019, the Appellant informed the Court that he did not wish to pursue the appeal. Instead, he wished to ask for a review of his sentence. The appeal against conviction was marked as withdrawn and the Court proceeded to hear the appeal against sentence.

5. The Appellant submitted that he was sick when he committed the offence. He was suffering from Bipolar 1 or Mood Disorder. It was not under control at the time. The Court ordered that a comprehensive mental assessment be done on the Appellant. As a result, Dr. J.W. Njau, a Consultant Psychiatrist, filed a report dated 30/08/2019. It concluded that the Appellant suffers from Mood Disorder or Bipolar 1 disorder but that it is currently stable. The Appellant's mother appeared during the hearing and brought original copies of Hospital Treatment Cards which showed that the Appellant was under treatment for mental health around the time of his arrest.

6. The Appellant also filed a Progress Report by the Officer-in-Charge, Nakuru Main Prison. The Report states, in pertinent part, that:

The Applicant has been in custody for a period of more than eleven years. His conduct and character has been above reproach as evidenced by the fact that he never committed any offence against the prison discipline.

He has fruitfully engaged in various trainings in our penal facilities. His commitment to these trainings has enabled him to successfully attain KCSE (D Plain); Certificate of Participation from Financial Education for Women and Youth; Cheti Cha Masomo ya Biblia; and Certificate from Family Transformation Ministries (Men of Honour).

In my view, I am indubitably convinced that the prisoner is well reformed and remorseful and therefore an exceptional candidate for pardon.

7. In his oral address to the Court, the Appellant told the Court that he was very remorseful for his actions and that he has now learnt how to control his anger. He told the Court that he had gone to the Complainant's house to demand for his money which the Complainant owed but

he used the wrong means due to his illness. He stated that he now has his disorder under control and has learnt practical techniques for managing it. He begged the Court to permit him to go back to his young family and child. He told the Court that his wife, mother and sister (who were all in Court) were ready to accept him back and help him ease into life outside Prison.

8. On her part, the State Prosecutor, Ms. Nyakira, told the Court to consider that there were aggravating circumstances in the case. These included, she said, the fact that the Appellant was armed with a panga and the fact that the victim was accosted in the company of a baby who was only 3 months old.

9. The Appellant is entitled to a reconsideration of the death sentence following 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.

10. 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***.

11. I have now considered these mitigating and aggravating circumstances in the case. The circumstances here are not such that the death penalty is called for. Although the Appellant used an offensive weapon and was in a gang, there is no evidence of the use of gratuitous violence or depraved inhuman treatment in the commission of the crime. Further, there is demonstrated evidence that the Appellant had serious mental health issues which were unresolved at the time. Finally, Prison Authorities are persuaded that the Appellant is fully rehabilitated and reformed.

12. In the face of all this evidence, it is the Court's considered opinion that no sentencing objectives will be served by further incarceration of the Appellant. The eleven (11) years he has been in custody is sufficient.

13. I, therefore, substitute the death sentence pronounced on the Appellant in this case. In its place, I will impose a sentence equal to the time already served. Consequently, the Appellant shall be released from Prison forthwith unless otherwise lawfully held.

14. Orders accordingly.

Dated and Delivered at Nakuru this 19th day of December, 2019.

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JOEL NGUGI

JUDGE