



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL PETITION NO. 35 OF 2019

MORRIS ANDABO MUKANDAAPPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Petitioner was on the 8th October, 2015 convicted by the lower court of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code and sentenced to death. His appeal to the High Court was unsuccessful. He has now filed a notice of motion dated 8th March, 2019 seeking for re-hearing of the sentence imposed on him. 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 as provided in Section 203 of the Penal Code to be unconstitutional. Following that decision the Court of Appeal in **William Okungu Kittiny (2018) eKLR** applied the *Muruatetu Case mutatis mutandis* to the offence of robbery with violence under Section 296 (2) of the penal Code and declared the mandatory death sentence as provided in that section to be inconsistent with the constitution. The court held that the said sentence is a discretionary maximum sentence. It is on that basis that the petitioner has filed his petition for re-sentencing.
2. The evidence against the petitioner was that on the 7/6/2010 he was a member of a gang of people that attacked the complainant in the case and robbed him of a motorcycle. The gang at the same time injured the complainant and a colleague. The complainant's colleague suffered cut wounds on the head, cut wounds on the left finger and fractures of left index finger. The degree of injury on him was classified as harm.
3. The petitioner did not make any mitigation in this petition. He however cited the case of **Douglas Muthaura Ntoribi –Vs- Republic, 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 upon considering that the robbers had stolen a paltry Ksh. 500/= from the victim and had only occasioned him minor injuries.
4. The court called for a pre-sentencing report that was prepared by a probation officer, **Francis Misiko Okumu**. The report indicates that the petitioner is 32 years old. That he was married when he was sentenced but the wife got married elsewhere after the petitioner was sentenced to death. That his relatives and the local community are not opposed to his release. That the petitioner has served 4 years in prison and has been of good conduct while serving sentence. The report recommended that the petitioner be released 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. In **Republic –Vs- Jagani & Another (2001) KLR 590**, it was held that:-

“The purpose of sentence is usually to disapprove or denounce unlawful conduct as a deterrent to deter the offender from committing the offence, to separate offenders from society if necessary to assist in rehabilitation of offenders, and in rehabilitation by providing for reparation for harm done to victims in particular to and to society in general. This is also seen as promoting a source of responsibility in offenders.”
7. Section 333 (2) of the Criminal Procedure Code requires a court while sentencing an accused person to take into account the period spent in custody awaiting trial.
8. I have considered some sentences imposed by courts in re-sentencing cases for robbery with violence after the Supreme Court decision in the *Muruatetu Case*. 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.

9. 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.

10. 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.

11. 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 appellant was involved in robbing an Mpesa shop agent with the use of firearm.

12. The appellant and the members of his gang robbed the complainant of a motor cycle and in the course of the robbery seriously injured the complainant’s colleague. The petitioner has as of now served 4 years in prison. He was in custody for nearly 5 years awaiting trial. I am of the considered view that the period served is not sufficient for the serious offence committed by the appellant. The offence was aggravated by the fact that the appellant and his gang members assaulted the complainant’s colleague and occasioned him injuries amounting to maim. I however do not think that the death sentence is warranted in the case. Taking all the matters into consideration I re-sentence the appellant to 15 years imprisonment commencing from the date of sentence by the lower court.

Delivered, dated and signed in open court at Kakamega this 17th day of December, 2019.

J. NJAGI

JUDGE

In the presence of:

Miss Omindi.....for State/Republic

PetitionerPresent.....

Court AssistantPolycap.....

14 days right of appeal.