Nyoike v Republic (Criminal Petition E001 of 2022) [2024] KEHC 6660 (KLR) (7 June 2024) (Judgment)

Neutral citation: [2024] KEHC 6660 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL PETITION E001 OF 2022

JRA WANANDA, J

JUNE 7, 2024

BETWEEN

PETER GIKONYO NYOIKE .... PETITIONER

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. The Application before Court is the Petitioner's Notice of Motion dated 12/01/2022 seeking review of the sentence of death imposed on him upon conviction for the offence of robbery with violence. Although it is not so mentioned, it is evident that the basis behind the Application is the now famous Supreme Court case of Francis Karioko Muruatetu & Another vs Republic [2017] eKLR (commonly referred to as Muruatetu).

2. The background of the matter is that Petitioner and 2 other co-accused persons were charged in Eldoret Senior Principal Magistrate's Court Criminal Case No. 3513 of 1999 with two counts of the offence of robbery with violence contrary to Section 296(2) of the Penal Code. Read together, the particulars of the offence were that on 29/08/1999 along the Eldoret-Nakuru road near Mlango Moja in Koibatek within the Rift Valley Province, they jointly, while armed with dangerous or offensive weapons, namely, home-made gun, rungus and simis robbed two victims, respectively, of cash and other personal items and at or immediately after the time of such robbery, used actual violence to the victims.

3. The Petitioner and his co-accused, all pleaded not guilty and the matter then proceeded to trial. Upon considering the testimonies of the witnesses and the evidence tendered in Court, the trial Magistrate, on 14/03/2002, convicted each one of them for the offence of robbery with violence and sentenced each to death. They were however acquitted on the second charge of being in possession of a firearm without a certificate.

4. Aggrieved with the decision of the trial Court, the Petitioner and his co-Accused, instituted respective Appeals to this High Court against both conviction and sentence. The same were consolidated under Eldoret High Court Criminal Appeal No. 25 of 2002 and by the Judgment delivered on 23/01/2003 by a 2-Judge bench (A. Etyang and O. Tunya, JJ), the conviction and sentence were upheld and the appeals dismissed in entirety. Undeterred, the Petitioner and his c-Accused filed a second appeal, namely, Eldoret Court of Appeal Criminal Appeal No. 258 of 2003. Once again, this Appeal was dismissed on 23/09/2005.

5. In the present Application, the Petitioner has urged that he be re-sentenced to a non-custodial sentence, that he is a first offender and begs for leniency, he is remorseful and repentant, he is a young man and prays to be "re-constituted" in the society to serve as a role model and a teacher/mentor to others with similar behaviour. He also cited the proviso to Section 333(2) of the Penal Code which obligates the Court to take into account the period served in remand custody in sentencing.

6. In his Submissions, the Petitioner basically reiterated the matters stated in the Application and added that he has (by the date of the Application, 12/01/2022), already served 23 years since being sentenced. He added that he is now religious having "received and accepted Jesus Christ as my personal saviour while in prison", that he has obtained a diploma and certificates in theology, he has also obtained vocational training in tailoring and Grade Tests and that he is now a Senior Pastor.

7. The State (Respondent) did not file a formal Response but Ms. Okok, Prosecution Counsel opted to address the Court orally. In her address, regarding the Petitioner's claim that the death penalty is unconstitutional, she cited the case of Eldoret Court of Appeal Criminal Appeal No. 260 of 2019 – Oprodi Peter Omukanga v R and submitted that in that decision, the Court agreed that the death penalty for robbery with violence convicts is necessary and reduced a death sentence to 30 years. She also observed that in this case, the Petitioner and his co-accused raided victims – driver and turnboy - and robbed them, that although they were armed, they did not harm the victims, and the value of the property stolen was minimal. She therefore agreed that the death sentence be reduced.

Determination

8. The issue for determination herein is "whether this Court should review the death sentence imposed by the trial Magistrate's Court for the offence of robbery with violence."

9. The offence or robbery is defined under Section 295 of the Penal Code as follows;

> " Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery."

10. Section 296(2) of the Code then defines "robbery with violence" and also sets out the sentence to be meted out to the offender as follows;

    (2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

11. It is therefore clear that the prescribed mandatory maximum sentence for the offence of "robbery with violence" as per the provisions of Section 296(2) of the Penal Code is therefore the death sentence. It

is evident that the trial Magistrate imposed the death sentence on the basis that the same was the only sentence available upon conviction for the offence of robbery with violence, thus mandatory sentence.

12. It is now however, generally agreed that in spite of the mandatory language employed by the statute, the Courts nevertheless still possess discretion in sentencing of offenders convicted of the offence. It is on this basis that in the case of Francis Karioko Muruatetu & Another v Republic [2017] eKLR), although dealing with a case of murder, and not robbery with violence, the Supreme Court of Kenya declared the mandatory death sentence unconstitutional. This is how the Supreme Court put it:

> "(66) It is not in dispute that article 26(3) of *the Constitution* permits the deprivation of life within the confines of the law. We are unconvinced that the wording of that article permits the mandatory death sentence. The pronouncement of a death sentence upon conviction is therefore permissible only if there has been a fair trial, which is a non-derogable right. A fair hearing as enshrined in article 50(1) of *the Constitution* must be read to mean a hearing of both sides. A murder convict whose mitigation circumstances cannot be taken into account due to the mandatory nature of the death sentence cannot be said to have been accorded a fair hearing."

13. I am also guided by the Court of Appeal decision in the case of Paul Ouma Otieno –Vs- Republic (2018) eKLR where the Court applied the Muruatetu decision mutatis mutandis to the provisions of Section 296(2) of the Penal Code which imposes the mandatory death penalty for the offence of robbery with violence and substituted the death sentence for a similar offence with a sentence of 20 years imprisonment.

14. Closer home, the High Court, too, in the case of James Kariuki Wagana vs Republic [2018] eKLR, Prof. Ngugi J (as he then was) observed that while the death sentence is the maximum penalty for both murder and robbery with violence, the Court has the discretion to impose any other penalty that it deems fit and just in the circumstances. He further observed that the death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder.

15. Regarding sentence, Majanja J, quoting Muruatetu 1, in the case of Michael Kathewa Laichena & another v Republic [2018] eKLR, stated as follows:

> "The Sentencing Policy Guidelines, 2016 ("the Guidelines") published by the Kenya Judiciary provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. Since the Guidelines did not take into account the fact that the death penalty would be declared unconstitutional, the Court in the Muruatetu Case (Supra, para. 71), considered that in re-sentencing in a case of murder, the following mitigating factors would be applicable;
>
> (a) age of the offender;
>
> (b) being a first offender;
>
> (c) whether the offender pleaded guilty;
>
> (d) character and record of the offender;
>
> (e) commission of the offence in response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender;

(h) any other factor that the Court considers relevant.

16. Applying these guidelines, the Court of Appeal has on several occasions reduced sentences imposed on convicts for the offence of robbery with violence. For instance, in Wycliffe Wangusi Mafura v Republic ELD CA Criminal Appeal No. 22 of 2016 [2018] eKLR, the Court of Appeal set aside a death sentence and substituted it with a prison sentence of 20 years. The Court noted that the robbery was at a Mpesa shop, considered the circumstances of how the robbery was committed and took into account the fact that although the Appellant was armed with a gun, with which he threatened the Mpesa attendant, he was subdued before he used it.

17. It should however be recalled that the decision of the Supreme Court in Francis Karioko Muruatetu & Another v Republic (supra) [2017] eKLR only faulted the mandatory nature of the death sentence in Section 204 of the Penal Code and which it termed inconsistent with *the Constitution*. The Court did not therefore outlaw the death sentence but held that the Court has the discretion to impose a sentence other than death in accordance with the circumstances of the case. The death penalty is therefore still prescribed in Kenyan law and can still, in appropriate cases, be imposed.

18. Coming back to this case, having been sentenced on 14/03/2002, the Petitioner is now serving his 22nd year in prison, that is a long time. I however also note, as a mitigating factor, and as submitted by Ms Okok, that in executing the robbery, although the Petitioner and his co-Accused were armed with dangerous weapons, they never harmed or injured their victims. I note that in the case of Paul Ouma Otieno alias Collera and Another v Republic (supra), as aforesaid, the Court of Appeal set aside a sentence of death on a conviction for the charge of robbery with violence and substituted it with one of 20 years imprisonment. This is despite the Court observing that the Appellants were armed with guns.

19. In the circumstances, and having taken into account all the factors mentioned hereinabove, I am of the view that the sentence of death ought to be reduced. I am also of the view that the Petitioner has suffered sufficient retribution for his actions.

Final Orders

20. In the circumstances, considering the degree of gravity of the offence and the manner in which it was committed, I hold that the aggregate period of about 22 years that the Petitioner has already served both in remand and in prison custody is sufficient punishment. I therefore order as follows:

    i. The death sentence is reviewed and commuted to the period already served in custody.

    ii. In the premises, the Petitioner is ordered to be set at liberty forthwith and released from prison unless otherwise lawfully held.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 7TH DAY OF JUNE 2024

WANANDA J. R. ANURO

JUDGE

Delivered in the Presence of:

Mr. Mugun for State

Petitioner (virtually from Naivasha Main Prison