



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Wafula v Republic (Criminal Appeal 145 of 2010)
[2023] KEHC 20732 (KLR) (20 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20732 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL APPEAL 145 OF 2010**

HM NYAGA, J

JULY 20, 2023

BETWEEN

DAVID WAFULA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence arising from the judgment delivered on 22nd April, 2010 by Hon. W. Kagendo S.R.M. in Nakuru Chief Magistrate's Court Criminal case No 5777/2009)

JUDGMENT

1. The Appellant David Wafula was charged with the offence of Robbery with Violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on 2nd October, 2009, at Ronda Estate in Nakuru Municipality within Rift Valley Province, jointly with others not before court, while armed with dangerous weapons namely pangas, robbed Caroly Lunyaji Katsemba Ksh. 6,550/= and at or immediately after the time of such robbery, threatened to use actual violence to the said Caroly Lunyaji Katsemba.
2. After a full trial, the Appellant was found guilty. He was duly convicted and sentenced to suffer death on 22nd April, 2010.
3. Being dissatisfied with the trial court's decision, he lodged an appeal against both conviction and sentence before this court. However, on 30th May, 2022 he withdrew his appeal against conviction. He then told this court to re-sentence him in view of the Supreme Court's decision in *Francis K. Muruatetu & Another -Vs- Republic* [2017] eKLR.
4. The state does not oppose the appeal on the sentence meted out on the Appellant but proposes that the same be commuted to a life sentence.



5. In his Written Submissions filed on 29th May, 2023, the Appellant submits that the death sentence is cruel, inhuman and degrading punishment which violated his rights. He states that this court has jurisdiction under Article 20(4)(a), 22(1), (2), (b) and 23(1) of the Constitution 2010 to provide redress for violation, denial, infringement and continued threat to his fundamental rights.
6. The Applicant admits that he committed the offence and is remorseful. He attributes his involvement in the crime to poverty, joblessness and peer pressure. He urges the court to consider that he is a young man who needs a family and who needs to help his elderly parents. He promises to be a law abiding citizen if given another chance.
7. He submitted that in the 14 years' he has been in custody he has undergone rehabilitation programmes which have transformed his life in all dimensions. He contends that he is ready to be re-integrated back to society so as to utilize the skills learned in prison.
8. Lastly the applicant urges that the court regards the criteria developed in; Martin Babati Makoha & another v Republic [2018] eKLR - where the court re-sentenced the applicants who had been charged with Robbery with violence to the period already served of ten years and two days George Munyinyi Kibuyu v Republic [2018] eKLR where the court on appeal substituted the death sentence imposed on the appellant who had been charged with Robbery with violence to the period already served of 7 years John Kathia M'itobi v Republic [2018] eKLR - where the court re-sentenced the petitioner who had been charged with Robbery with violence to the period 15 years John Kirema Kaibi v Republic [2018] eKLR - where the court re-sentence the petitioner who had been charged with murder to 13 years' imprisonment.

The appellant also asked the court to invoke the provisions of Section 333 (2) of the Criminal Procedure Code and the principles set out in Ahmed Nkonge Abdulfathi Mohamed & Another vs Republic Criminal Appeal Number 135 of 2016, on the position that any sentence is to run from date of arrest provided that applicant has all along been in custody.

Analysis & Determination

9. The issue that arises for determination is whether the plea for resentencing is merited.
10. Re-sentencing is a proceeding undertaken within the court's power to review sentence only. The court in resentencing will check the legality or propriety or appropriateness of the sentence. The relevant considerations in the proceeding inter alia, are the penalty law, mitigating or aggravating factors, and the objects of punishments.
11. On 24th April, 2010, the Appellant was sentenced to death which, according to section 296 (2) of the Penal Code, was the only penalty for such an offence.
12. The Appellant urges this court to review its sentence by applying the principles set out in Francis Karioko Muruatetu (supra).
13. The mandatory death sentence was dealt with by the Supreme Court in the case of Francis Karioko Muruatetu & Another vs Republic (supra). The said court declared the mandatory sentence for murder under Section 204 of the Penal Code to be unconstitutional on grounds that it deprives courts of the inherent discretion to impose a sentence other than the death sentence in an appropriate case.
14. Subsequently, the Court of Appeal in William Okungu Kittiny vs Republic (2018) eKLR applied the Muruatetu case mutandis mutatis to the mandatory sentence for robbery with violence under the



provisions of section 296 (2) of the Penal Code and declared the said section to be unconstitutional on the same reasons stated by the Supreme Court in the Muruatetu case. The court held as follows:

“...The appellant was sentenced to death for robbery with violence under Section 296 (2). The punishment provided for murder under Section 203 as read with Section 204 and for robbery with violence and attempted robbery with violence under Section 296 (2) and 297 (2) is death. By Article 27(1) of *the Constitution*, every person has inter alia, the right to equal protection and equal benefit of the law. Although the Muruatetu's case specifically dealt with the death sentence for murder, the decision broadly considered the constitutionality of the death sentence in general...From the foregoing, we hold that the findings and holding of the Supreme Court Particularly Paragraph 69 applies mutatis mutandis to Section 296 (2) and 297 (2) of the Penal Code. Thus the sentence ... is a discretionary ...”

15. In my view, and this has now been widely accepted to be the position, a court can, in an appropriate case, impose a sentence other than the death sentence in a case of robbery with violence.
16. The Supreme Court in the Francis Karioko Murwatetu case (supra) set out the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:
 - 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.

We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process. This notwithstanding, we are obligated to point out here that paragraph 25 of the 2016 Judiciary Sentencing Policy Guidelines states that:

Guideline Judgments

Where there are guideline judgments, that is, decisions from the superior courts on a sentencing principle, the subordinate courts are bound by it. It is the duty of the court to keep abreast with the guideline judgments pronounced. Equally, it is the duty of the prosecutor and defence counsel to inform the court of existing guideline judgments on an issue before it.”



17. In *Nicholas Mukila Ndetei vs Republic* (2019) eKLR, Odunga J (as he then was) considered what the court has to consider in a re-sentencing hearing and held that: -

“In my view, fairness to the accused where a sentence re-hearing is considered appropriate would require a consideration of the circumstances prior to the commission of the offence, at the time of the trial and subsequent to conviction. The conduct of the accused during the three stages may therefore be a factor to be considered in determining the appropriate sentence. The need to protect the society clearly requires the court to consider the impact of the incarceration of the offender whether beneficial to him and the society or not hence the necessity for considering a pre-sentencing report.”

18. I have considered the above stated principles of sentencing and the seriousness of the offence.

19. In mitigation before the trial court the Appellant stated as follows:

“I ask the court if it has found me guilty to see I am a young man who has not gotten married.”

20. Circumstances under which the offence herein was committed were not so grave to warrant a death penalty. The Appellant prior to the commission of the offence was armed with a dangerous weapon i.e. a panga. In the process of robbery, he grabbed the Complainant’s Apron that had Ksh.6,550/= and ran away with it. He did not seriously injure her as the complainant stated that he slapped her. The P3 report that was produced by PW5 showed the complainant sustained burns and the degree of injury was classified as harm. The prosecution did not tell court whether the Appellant was a first time offender but from the record there is no evidence that the Appellant is a repeat offender.

21. According to the Prison report filed in this court on 12th July, 2022, the Appellant has good records. The report states that the Appellant has behaved well in custody and enrolled in tailoring section where he is currently undergoing training in dress making Grade III. The report also indicates that he is a leader and role model in the prison and that he is remorseful.

22. In *James Kariuki Wagana vs Republic* [2018] eKLR, Prof. Ngugi J observed that while the penalty of death 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. He noted that while force had been used in the case before him, it could not be said that the appellant used excessive force, nor did he “unnecessarily injure the Complainant during the robbery” and was not armed during the robbery. He therefore reduced the appellant’s sentence of death to imprisonment for fifteen years, from the date of conviction.

23. In Nairobi Misc. Cr. Application No. 430 of 2015; *Simon Kimani Maina vs Republic*[2019] eKLR, the Applicant was convicted for the offence of attempted robbery with violence and sentenced to life imprisonment. The court considered that he was 18 years at the time of his arrest and the victims were not injured during the failed robbery attempt. It also considered the fact that he was a first offender, that he was not the one with the AK-47 rifle and that he appeared remorseful. He was resented to the time served of 14 years.

24. In Nairobi Misc. Cr. Application No. 393 of 2018; *Joseph Kaberia Kainga vs Republic* [2019] eKLR the Applicant was convicted for the offence of attempted robbery with violence and sentenced to death. He was 27 years old at the time of his arrest and had been in custody for 16 years. In resentencing him to the time served, the court noted that the victims were not injured during the failed robbery attempt,



that the probation officer's report was positive, that the Appellant appeared to have been rehabilitated during his period of incarceration and that he was remorseful.

25. In Nrb Misc Criminal Appeal Nos. 81 & 82 of 2009; *Martin Bahati Makoha & Another vs Republic* [2018] eKLR, the Appellants were convicted for the offence of robbery with violence and sentenced to death. The victim sustained a cut wound on the left thumb and throat and his injuries were classified as harm. The court was of the view that the circumstances under which the offence was committed were not so grave to warrant a death penalty. The Appellants were resentenced to the time served of 10 years and 2 days.
26. The Appellant herein was a first offender. He is demonstrably remorseful and has demonstrated capacity for reform and rehabilitation through the training he has received while in prison. He was first arraigned in court on 12th October, 2009 and he has been in custody since then which is about 14 years now. I am of the view that he has somewhat atoned for his sins and further incarceration is not appropriate in the circumstances.
27. Section 333 (2) of the Criminal Procedure Code requires a sentencing court to take into account the period spent in custody awaiting trial.
28. In my view, therefore, considering the entirety of the facts, it is appropriate to substitute the death sentence pronounced on the Appellant to the period already served of 13 years 9 months.
29. The applicant shall therefore be set at liberty unless otherwise lawfully held.
30. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 20TH DAY OF JULY, 2023.

HESTON M. NYAGA

JUDGE

In the presence of;

C/A Jeniffer

Ms Murunga for state

Appellant present

