



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 161 OF 2019

SALIM MWACHUNGU MALU

ELVIS M. KIPELENGO.....PETITIONERS

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT ON RESENTENCING

1. The Petitioners herein SALIM MWACHUNGU MALU and ELVIS M. KIPELENGO were jointly charged with the Offence of robbery with violence contrary to 296 (2) of the Penal Code.
2. The particulars of the offence were that *on the 20th day of June, 2009 at around 9:00 p.m at Makuyuni area Taita Taveta County they robbed SILVANO JULIUS of a motorcycle registration number KMCE 217 A make Tvs valued at Kshs. 85,000/=, mobile phone make "Lonke" valued at Kshs. 7,000/= and cash 1,500= all valued at Kshs. 93,000/= and immediately after the time of such robbery wounded the Silvano Julius.* In the alternative they were charged with handling stolen goods contrary to section 322 (2) of the Penal Code. They were convicted and sentenced to death.
3. Their Appeal to the High Court was dismissed and sentence upheld. The death sentence was later commuted to life sentence in 2016.
4. The Petitioners are now in this court pursuant to the Supreme court decision in **Francis Karioko Muruatetu & Another vs. Republic (2017) eKLR** in which the apex court found the mandatory nature of the death sentence to be unconstitutional.
5. When the matter came for resentencing, Ms. Wanjohi, learned counsel appeared for the Prosecution but did not file any submissions. The Petitioners filed their submissions separately, on 2/12/2020.
6. The 1st Petitioner (SALIM MWACHUNGU MALU) on his part submitted that he has reformed; that he regretted the offence and promised not to repeat the crime or any other crime in his lifetime. He is a first offender and submitted that if released, he will lead society in campaign against crime.
7. The 2nd Petitioner (**ELVIS MASINDE KIPELENGE**) on his part submitted that he has reformed; that he regretted the offence and promised not to repeat the crime or any other crime in his lifetime. He pledges to be a good example in the society by sharing with the society the rough experience he has undergone in custody. He has never been charged with any prison misconduct. He prays this court to consider the years he has spent in prison since his arrest and impose an appropriate sentence.
8. I have considered the petition and the submissions. The Petitioners committed robbery with violence and stole property worth Kshs. 93,000/=. In the process they beat the complainant until he lost consciousness. The complainant ended up in hospital. In my view, the offence committed by the Petitioners requires adequate punishment. In **R vs. Scott (2005) NSWCCA 152 Howie, Grove and Barr JJ** stated:

“There is a fundamental and immutable principle of sentencing that the sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed...One of the purposes of punishment is to ensure that an offender is adequately punished...a further purpose of punishment is to denounce the conduct of the offender.”

9. In my considered view, the Petitioners would be adequately punished by a jail term of fourteen (14) years. The Petitioners were tried while in remand. I therefore hereby set aside the life sentence and in place therefore jail the Petitioners for a period of fourteen (14) years from the date of their arrest.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 4TH DAY OF MARCH, 2021.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Petitioner in person

Ms. Wanjohi for the DPP

Ms. Peris Court Assistant