



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 60 OF 2018 CONSOLIDATED WITH 246 OF 2019 & 209 OF 2018

1. EDWARD MUTURI

2. JEREMIAH NYAGA

3. MWANIKI NYAGA.....PETITIONERS

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT ON RESENTENCING

1. The Petitioners herein EDWARD MUTURI, JEREMIAH NYAGA and MWANIKI NYAGA were 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 3rd of August, 2009, at Shonda village in Kilindini District within coast province being armed with dangerous weapons namely pangas and iron bars, robbed Charles Onyango of a mobile phone Nokia 6070, pair of shoes, an identity card and Kshs. 650.**

3. They were sentenced to death. Their appeals to the High Court and to the Court of Appeal were dismissed. Their sentence was later commuted to life imprisonment.

4. The Petitioners are now in this court pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another v 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, **Mr. Fedha** learned counsel for the State submitted that the Petitioners were in a group and that they were armed with dangerous weapons. They used actual violence on the victim who sustained injuries on his neck and was left in a comatose state and was bleeding. Counsel submitted that the offence of robbery with violence is prevalent and he prayed for a definite deterrent sentence of 20 years imprisonment.

6. The Petitioner (EDWARD MUTURI) on his part submitted that he is a first offender and that he was remorseful and reformed. He has been in custody for the over 10 years. He prayed to be sentenced to the term that he has already served.

7. The Petitioner (MWANIKI NYAGA) on his part also stated that he is a first offender, and has been in custody for 10 years. He prayed for the Court to consider time spent in remand. He promised to live well with the society if given an opportunity to rejoin it.

8. The Petitioner (JEREMIAH NYAGA) on his part also stated that he is a first offender, and that he is remorseful and has been living peacefully with fellow inmates and prison authorities. He promises that if given a chance to rejoin the society he will lead as a good example.

9. I have considered the Petition and the submissions. The only issue for determination is the length of the imprisonment. The Court of Appeal in **William Okungu Kittiny v Republic [2018] eKLR** held that: -

“...the sentence of death under Section 296 (2) and Section 297 (2) of the Penal Code is discretionary maximum punishment. To the extent that Section 296 (2) and 297 (2) of the Penal Code provides for mandatory death sentence the Sections are inconsistent with Constitution.”

10. The Court of Appeal in **Thomas Mwambu Wenyi v Republic [2017] eKLR** cited the decision of the Supreme Court of India in **Alister**

Anthony Pereira v State of Maharashtra at paragraph 70-71 where the court held the following on sentencing: -

“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.”

11. In **Matheka Kithome Ngomo v Republic [2020] eKLR** this Court sentenced the Petitioner who was armed with iron bars and pangas to 19 years’ imprisonment.

12. In the instant case the Petitioners used iron bars and pangas and injured the victim on his neck, left him bleeding and in a comatose state. The petitioners have spent 10 years in prison. It is my considered view that 10 years is not sufficient punishment for the offence they committed and the manner in which they committed it. I therefore sentence the Petitioners to 18 years’ imprisonment from the date of arrest.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 12TH DAY OF APRIL, 2021

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Petitioners in person

Ms. Wanjohi for the DPP

Ms. Peris Court Assistant