



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**PETITION NO. 204 OF 2018**

**MAXWELL KIMANI NJUGUNA.....PETITIONER**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT**

**JUDGMENT ON RESENTENCING**

1. The Petitioner herein MAXWELL KIMANI NJUGUNA was 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 7<sup>th</sup> day of January 2001, at around 11:45 am the victim was walking from her hotel along mamba village Mombasa when the petitioner and others while armed with a knife attacked the victim and stabbed him while the accomplices emerged from the side grabbed him by the neck and robbed him off a camera and money”*

3. He was convicted and sentenced to death. His Appeals to the High Court and to the Court of Appeal were dismissed and sentence upheld.

4. The Petitioner is 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, Ms. Wanjohi learned counsel appeared for the State. Counsel submitted that the Petitioner had time to plan and execute the attack directly upon the victim. However, based on the prison progress report and the documents submitted to the prosecution, counsel agreed that the petitioner has reformed and can be released on time served (20) years.

6. The Petitioner on his part submitted that he been in custody for the last 20 years through which he has reformed. He claims to have maintained a good behavior and lived in peace with fellow inmates. He stated that he is a first offender and is remorseful. He prayed this court to consider him for re-integration back to the society.

7. I have considered the Petition and rival submissions. The only issue for determination is the length of the sentence to be imposed. 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.”*

8. 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.”*

9. The Judiciary Sentencing Policy Guidelines lists the objectives of sentencing at page 15 paragraph 4.1 as follows:

*Retribution: To punish the offender for his/her criminal conduct in a just manner.*

*Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.*

*Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.*

*Restorative Justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims, communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.*

*Community protection: To protect the community by incapacitating the offender.*

*Denunciation: To communicate the community's condemnation of the criminal conduct*

10. In this case the Petitioner by the year 2018 he had spent 18 years in prison. I have considered his mitigation; the prosecution counsel's submissions and the petitioner's progress report availed by the prison authorities. I am satisfied that the petitioner is a reformed man now and that he has sufficiently been punished for his offence.

**11. I therefore sentence the Petitioner to the time served. The petitioner is hereby set at liberty, and forthwith released from prison unless he is otherwise lawfully held.**

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 14TH DAY OF APRIL, 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