



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

PETITION NO. 225 OF 2019

1. MUIA ALI

2. KAZUNGU KATANA.....PETITIONERS

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT ON RESENTENCING

1. The Petitioners were charged, tried and convicted for the offence of Robbery with violence contrary to Section 295 as read with 296(2) of the Penal Code. They were sentenced to death in Mombasa Cr. Case No. 1965 of 2007. They appealed in Mombasa HCCRA No. 48 of 2009 and their Appeal was dismissed and sentence upheld.

2. The Petitioners have now petitioned this Court for review of sentence in view of the Supreme Court declaration in **Francis Kariokor Muruatetu & Another v Republic SCK Pet. No. 15 of 2015 [2017] eKLR** in which the apex court found the mandatory nature of the death sentence to be unconstitutional.

Brief Circumstance of the offence

3. The particulars are that on 17/6/2007 at Mikindani Kwa Ngombe village in Mombasa, jointly with others, while armed with crude weapons namely iron bars, broke into the houses of Mwangangi Kilunda and Teresia Mawili and robbed them of one SONY television set, two Nokia and Motorola mobile phones all valued at Kshs. 17,500/=, and immediately, before or immediately after the robbery, they injured the said victims.

4. The Petitioners on mitigation submitted that they have been rehabilitated as a result of the 13 years they have been in prison, and therefore, they have paid their debt owed to society and they have learnt their lesson. They also submitted that they are reformed and they are very remorseful for the incident that occurred. The Petitioners urged this Court to give them a second chance to rejoin the society and be reunited with their families.

5. **Mr. Fedha** for the prosecution submitted that taking into account the circumstances of the case, and the fact that the Petitioners together with their accomplices engaged in a spate of robberies with violence incidences in Mikindani area, a deterrent sentence of 30 years including time served from the time of arrest would be appropriate.

6. I have considered the Petition, the submissions by the Petitioners and the D.P.P. Sentencing is a discretion of the trial court. In **Ambani v Republic [1990] KLR**, Bosire J. (as he then was) stated that a sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and that the court should look at the facts and the circumstances of the case in its entirety before settling for any given sentence.

7. I have now considered the mitigating and aggravating circumstances in the case. In my view, the nature of this robberies do not call for invocation of the death penalty. However, it is noteworthy that actual violence was meted on the Petitioners' victims during the robberies which include one complainant being struck on the head causing him to lose consciousness and another victim was cut on the leg. Therefore, in my view, the aggravating factors outweigh the Petitioners' mitigating factors.

8. The aim of punishment is **community protection**, deterrence, retribution, rehabilitation, restorative Justice and reformation. Further, Section 333 (2) of the Criminal Procedure Code requires a sentencing court to take into account the period spent in custody awaiting trial.

9. This court in sentencing must send out a clear warning that crime does not pay and will be adequately punished once proved.

10. In the upshot I render Judgement as under:

(i) I hereby set aside the death sentence imposed upon the Petitioners by the trial court.

(ii) instead thereof I hereby jail the Petitioners to serve a term of eighteen (18) years in jail from the date of arrest.

That is the Judgment of the Court.

Dated, Signed and Delivered at Mombasa this 14th day April, 2021.

E. K. O. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Petitioner in person

Ms. Wanjohi for DPP

Ms. Peris Court Assistant