



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

PETITION NO. 110 OF 2019

(CONSOLIDATED WITH PETITION NOS. 117 OF 2019, 23 OF 2021 AND 161 OF 2020)

1. VINCENT OKOTH MATINDE

2. MUSTAFA ALI MWAMBEYU

3. DERRICK KARIUKI KAMAU

4. BASILO MICHAEL KIARIE NJUE.....PETITIONERS

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT ON RESENTENCING

1. The Petitioners herein **VINCENT OKOTH MATINDE, MUSTAFA ALI MWAMBEYU, DERRICK KARIUKI KAMAU AND BASILIO MICHAEL KIARIE NJUE** were jointly charged with two (2) counts of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. They were all convicted and sentenced to death. They appealed to the High Court and their appeal was dismissed on 2/8/2018.

2. The Petitioners robbed and attacked their victims. They were armed with dangerous weapons namely a pistol, a panga and a knife when they attacked the victims; they also robbed the victims of mobile phones made Blackberry and Nokia 6290 all valued at Kshs. 42,000/=, Kshs. 20,500/= and another mobile phone make Samsung valued at Kshs. 4,000/= (four thousand). The attacks and robbery were carried out at 11.00 p.m. on 15/10/2013.

3. The particulars of the first count were that on 15/10/2013 at Nyali Estate in Kisauni sub-county within Mombasa County, they jointly while armed with dangerous and crude weapons namely a pistol, panga and a knife robbed Sydney Anthony Mote Kshs. 20,500/= (twenty thousand five hundred) and two (2) mobile phones make Blackberry and Nokia 6290 all valued at Kshs. 42,000/= (forty two thousand) and at or immediately before or after the robbery threatened to use actual violence to the said Sydney Anthony Mbote.

4. The particulars of the second count were that on 15/10/2013 at Nyali Estate in Kisauni sub-county within Mombasa County, they also jointly while armed with dangerous and crude weapons namely a pistol, panga and a knife robbed Ibrahim Malele Salat of one mobile phone make Samsung valued at Kshs. 4,000/= (four thousand) and at or immediately before or after the robbery threatened to use actual violence to the said Ibrahim Malele Salat.

5. The prosecution evidence in summary was that PW 2 who is a business development manager arrived at his house at Nyali Estate on 15/10/2013 at 11.00 p.m. and PW 2 (Ibrahim Salat) opened the gate for him; suddenly PW 1 said he heard PW 2 screaming. PW 1 was shocked, he sensed danger and he checked through the side mirrors. He did not see anything, and decided to park the car and call his neighbour; before he could call the neighbor, a man arrived at the passenger side of the motor vehicle and pointed a gun at him. PW 1 raised his hands and complied with the attackers orders. The man ordered PW 1 to come out of the vehicle. They ordered him to lie at the back seat and two other people entered and sat on his head and they reversed the car; after a short distance the car alarm went off and PW1 showed them where the cut-off was and after that they told him to lie down between the front seats and the passenger seat and they stepped on him; PW 1 said he did not know where they were going. He could sense his life was in danger. At one time he felt they were driving on a rough road. He said the five people took his Blackberry and Nokia mobile phones; at one point they stopped the car and two of them went out and upon returning the car engine failed and they started shouting at him. He told them the lever of the car was at "D" instead of "P" and that was why the car could not start. They put the lever on "P", started the car and drove off; the car cut-out went on again and the complainant showed them what to do. The complainant said the people took his ATM card and they told him to repeat his PIN several times; he said the front tyres of the motor vehicle entered a ditch. They struggled to push it but the vehicle did not move. PW 1 said the people stayed outside the car and talked while he slept at the back of the car. When he woke up the men had left. PW 1 said that he got out of the vehicle and persuaded a watchman to open the gate for him. He called his wife and informed her what had happened. She called the police. The police

arrived at the scene and PW 1 narrated to them the whole episode. He went home and recorded his statement the following day. PW 1 said he was subsequently called to the police station where he identified the appellants at identification parades. His ATM card had been recovered from them.

At conclusion of the hearing the Petitioners were found guilty and were convicted and sentenced to death.

6. The 2nd, 3rd and 4th Petitioners are now in this court for purposes of resentencing pursuant to the Supreme 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.

7. The 1st Petitioner, Mr. Vincent Okoth Matide, however prays for a retrial or acquittal on the basis that he was not given fair trial. He further stated that he was not seeking a retrial. The 1st Petitioner submitted that he was not given the right to mitigate, and that his petition is founded under Article 22 of the constitution.

8. Article 22 of the constitution enforces the bill of rights. It is the 1st Petitioner's submissions that he was not given the right to mitigate, and so therefore, the trial was a mistrial. Apart from this submission the 1st Petitioner provided no evidence of a new evidence or facts which may entitle him to a retrial. I will not delve any further in this issue except to state that there is no evidence whatsoever to support a retrial.

9. As for resentencing, even though the 1st Petitioner stated that he did not want to be resented, this Court has the jurisdiction to resentence him, together with the rest of the Petitioners.

10. The 1st Petitioner Vincent Okoth Matide declined to offer any mitigation stating that he wanted a re-trial.

11. The 2nd Petitioner Mustafa Ali, on his part submitted that he was remorseful and regretted the offence, and that he was misled by friends. However, he submitted that he has since reformed. He is only 28 years old and has been in jail for 8 years. He submitted that he only threatened the victim with a knife but did not cause any injury. However, he is now a barber and would be useful to society upon release. He prayed to be jailed for no more than 10 years.

12. The 3rd Petitioner Derrick Kariuki Kamau also submitted that he was remorseful and that friends led him to crime. At that time he was also taking drugs. However, he has now reformed and has completed his secondary school education and is willing to rejoin the society.

13. The 4th Petitioner Basilo Michael also regretted the offence and stated that he has reformed. He is only 29 years and begged for mercy from this Court.

14. On his part **Mr. Fedha**, learned prosecutor submitted that the Petitioners should be jailed for a term of 25 years. However, counsel added that the 1st Petitioner should not be resented since he specifically stated he did not want to be resented and wanted a retrial.

15. I have carefully considered the mitigation and aggravating factors. The Petitioners committed robbery and stole both money and property worth about Kshs. 70,000/=. The Petitioners are young men. They are around 29 years meaning that at the time they committed the offence they were barely 20 years. I have considered their mitigation and the submission that they have reformed. However, the 1st Petitioner did not show any remorsefulness. He was not apologetic for the crime he committed, and he did not care how long he was jailed. All he wanted was a re-trial.

16. From the circumstances of the commission of the offence it is clear that the Petitioners were determined to carry out the offence. They even had a gun. However, they did not use the gun to harm the victim but as a weapon of threat. This experience was obviously very traumatic on the victim. But still, they did not injure the victim physically.

17. In the upshot, and with a singular aim of re-integrating the young Petitioners into society, and taking into account that they never caused any injury, I herewith lift the death sentence imposed on them, and

resentence them to a lighter sentence as hereunder:

(i) The 1st Petitioner Vincent Okoth Matide shall serve a jail term of 16 years from the date of arrest.

(ii) Petitioners Basilo Michael Kiarie Njue, Ali Mustafa and Derrick Kariuki Kamau, due to their apparent remorsefulness and readiness to abide in a free society, shall all serve a jail term of 12 years from the date of arrest.

Right of appeal in 14 days.

Dated, Signed and Delivered at Mombasa this 7th day of June, 2021.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Petitioner in person

Ms. Wanjohi for DPP

Ms. Peris Court Assistant