



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HIGH COURT CRIMINAL APPEAL NOS. 262 & 267 OF 2008

MICHAEL NJOROGI WAITHERA.....1ST APPELLANT

MICHAEL IRUNGU JOSHUA.....2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

RULING ON SENTENCE

1. The appellants were arraigned before the Chief Magistrate’s Court at Limuru Law Courts, charged vide, Criminal Case No. 2893 of 2007, with the offence of; robbery with violence contrary to; section 296 (2) of the Penal Code (Cap 63) Laws of Kenya. Upon taking a plea of not guilty, the case was heard and determined vide; a judgment delivered on 18th June, 2008. On 23rd July, 2008, each accused was sentenced to suffer death as provided for under the law.

2. However, being dissatisfied with the decision of the trial court, each appellant lodged an appeal to the High Court vide; High Court Criminal Appeal Numbers; 262 and 267 of 2008. The appeals were consolidated and heard by the Learned Honourable Judges, Mbogholi Msagha, J. (as he then was) and L. Achode J. The appeals were subsequently dismissed in their entirety.

3. The appellants were still not satisfied and lodged a second appeal to the Court of Appeal, vide Criminal Appeal Number 146 of 2016. On 8th March 2019, the Learned Honourable Judges JA(s), P. N. Waki (Rtd), S. Gatembu Kairu and M. Warsame held that, the prosecution had proved its case beyond reasonable doubt and that, the evidence against the appellants was overwhelming. They accordingly dismissed the appeal on conviction.

4. However, the court allowed the appeal on sentence and stated as follows: -

“On sentence, we have noted that, both the Trial Court and the High Court did not take into account any mitigating factors, but imposed death sentence to both appellants. On our part, we think it is appropriate that, the appellants should offer mitigation before any sentence is imposed. Consequently, we set aside the death sentence and remit the matter back to the High Court for re-sentencing”.

5. Pursuant thereto, the appellants filed what they term as “mitigating submissions”. In a nutshell, they argue that, they are first offenders, and that, they committed the offence while of tender age and as a result of peer pressure and bad company. Further, each one of them is remorseful for committing the offence.

6. That, during their incarceration period of about thirteen (13) years, they have been rehabilitated, as evidenced by the certificates availed in proof that, they have undertaken several trainings and acquired useful skills. Hence, the plea that, the court do take into consideration their mitigation and release them to serve the society.

7. I have considered the mitigations offered by each appellant, alongside all the other materials before the court. I have also considered the objectives of sentence, as stated under paragraph 4.1 of the Judiciary of Kenya Sentencing Policy Guidelines, as *retribution, deterrence, rehabilitation, restorative justice, community protection, and denunciation*.

8. **Similarly, I have taken into account the guidelines** to be considered in re-sentencing **in the case of; Francis Karioko Muruatetu & another v Republic (2017) eKLR**, by the Supreme Court of Kenya, as follows:

a) Age of the offender;

- b) Being a first offender;
- c) Whether the offender pleaded guilty;
- d) Character and record of the offender;
- e) Commission of the offence in response to gender-based violence;
- f) Remorsefulness of the offender;
- g) The possibility of reform and social re-adaptation of the offender;
- h) Any other factor that the Court considers relevant.

9. Furthermore, I have considered the nature of the offence, and the circumstances under which it was committed. I also note from the court record that, the appellants were arrested on; 5th September and arraigned in court on 10th September, 2007. They were in custody throughout the trial until, 23rd July 2008, when they were sentenced to death. That is a period of one (1) year and two (2) months. That period is considered pursuant to the provisions of section 333(2) of the Criminal Procedure Code (Cap 75) Laws of Kenya.

10. Be that as it were, sentencing is the discretion of the court to be judiciously exercised taking into account all the surrounding circumstances of the case. **In the case of; S vs. Mchunu and Another (AR24/11) [2012] ZAKZPHC 6**, the High Court held following in regards to sentencing;

“It is trite law that, the issue of sentencing is one which vests a discretion in the trial court. The trial court considers what a fair and appropriate sentence should be. The purpose behind a sentence was set out in; S v Scott-Crossley 2008 (1) SACR 223 (SCA) at paragraph 35:

“Plainly any sentence imposed must have deterrent and retributive force. But of course one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the over-riding ones. ‘[i]t is true that it is in the interests of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of society.”

11. However, before I down the tool of trade, it is noteworthy that, following Supreme Court of Kenya’s decision on 6th July, 2021, in the case of Muruatetu, that issue of re-sentence is only applicable to a death sentence in respect of; murder offences only, this being a case of robbery with violence, re-sentence will not be tenable. However, the order of the Court of Appeal herein was made before the subject decision. It is still on record and binds this court and therefore justifies the sentence imposed herein. Similarly, this case is not a subject of re-sentence but imposing a sentence upon conviction.

12. Be that as it were, in exercise of the discretion to pronounce the sentence herein taking into account the aforesaid, and pursuant to the aforesaid order of the Court of Appeal that mitigation be considered before sentence, I sentence each accused person to serve a custodial sentence of; twenty-four (24) years. The sentence shall commence from the date of arrest on 5th September, 2007. Right of appeal in 14 days explained.

DATED, DELIVERED VIRTUALLY AND SIGNED ON THIS 9TH DAY OF NOVEMBER, 2021

GRACE L NZIOKA

JUDGE

In the presence of:

No appearance for the applicant

Ms. Chege for the Respondent

1st Appellant present in person

2nd Appellant present in person

Edwin Ombuna – Court Assistant