

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HIGH COURT CRIMINAL REVISION NO. 5 OF 2019

BERNARD MULWA MUSYOKA.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

(As per the orders of the Court of Appeal (NRB) in Criminal Appeal No. 25 of 2016, dated 8th February 2019.)

RULING ON SENTENCE

1. **Bernard Mulwa Musyoka** the Applicant, was convicted of the offence of robbery with violence contrary to section 296(2) of the Penal Code, and sentenced to death, on 6th December, 2013 vide Kilungu Principal Magistrate’s Court Criminal Case No. 20 of 2013.

2. He appealed against the judgment vide Machakos High court criminal appeal no. 20 of 2016. His appeal was dismissed and both conviction and sentence upheld.

3. He again appealed against the judgment of the High court vide Court of Appeal criminal appeal no. 25 of 2016. In its judgment, the Court of Appeal confirmed the conviction. The said court referred the matter to this court for rehearing on mitigation and sentence in the following words: -

*“As stated by the court **in criminal appeal no. 22 of 2015, Wycliffe Wangusi Nafura –vs- R (2018) eKLR**, this court has jurisdiction to direct a sentence rehearing or pass any appropriate sentence that the trial Magistrate’s court could have lawfully passed. However, given the fact that counsel for the Appellant asked us to remit the matter to the High court for rehearing on mitigation and sentencing, we are inclined to send the matter to the High court as requested Ultimately the appeal on conviction is hereby dismissed and the matter is hereby remitted back to the High court for rehearing on mitigation and sentence.”*

4. It is by virtue of that direction that the matter is before this court. The Applicant was on 14th November 2019 heard on mitigation and resentencing by this court. He told the court that him and the complainant had agreed to forgive each other. He asked the court to forgive him as he has reformed. He mentioned that he was born in 1992 and was 20 years old at the time of conviction.

5. In response, Mrs. Owenga learned counsel for the Respondent submitted that the Applicant had not said anything substantial that would make this court interfere with the sentence. She asked the court to confirm the sentence.

6. The record of the lower court shows that the Applicant was a first offender. In his mitigation he said he assists his family. A perusal of the particulars shows that the Applicant robbed the complainant of Kshs.10,000/= plus a mobile phone make Samsung valued at Kshs.2,500/=. The said particulars are squarely supported by the evidence adduced. The Applicant assaulted the complainant (Pw1) as he robbed him. The stolen Samsung mobile phone was however recovered.

7. He says he was 20 years old at the time of the offence. The details taken at the prison show he was aged 23 years and not 20 years old when he was first received at the prison. He is therefore now aged 29 years. The manner this whole incident was carried out was so brutal. I have however considered all the

circumstances of the case and all the other factors.

8. I find the death sentence imposed to be too harsh. I hereby set it aside and substitute it with a sentence of twenty (20) years imprisonment from 6th December, 2013.

Orders accordingly.

Delivered, signed & dated this 19th day of February, 2020, in open court at Makeni.

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H. I. Ong'udi

Judge