



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**MISC. CRIMINAL APPLICATION NO. 29 OF 2016**

**SULEIMAN MOHAMMED.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING ON RE-SENTENCING**

1. The petitioner was convicted by the lower court of the offence of robbery with violence and sentenced to suffer death. His appeal to the High Court was unsuccessful. He has now filed a petition for re-sentencing following the Supreme Court decision in **Francis Karioko Muruatetu & Another –Vs- Republic, Petition No. 5 of 2015 (2017) eKLR** where the said superior court held that the mandatory death sentence for the offence of murder as provided in Section 204 of the Penal Code is unconstitutional as it deprives courts of their inherent jurisdiction not to impose a death sentence in an appropriate case. In **William Okungu Kittiny –Vs- Republic (2018) eKLR** the Court of Appeal applied *mutatis mutandis* the *Muruatetu case* to the offence of robbery with violence under Section 296 (2) of the Penal Code. The said court accordingly held the provisions of Section 296 (2) of the Penal Code that provide for a mandatory death sentence for the offence of robbery with violence to be unconstitutional for the same reasons given by the Supreme Court in the *Muruatetu case*. The court held that the mandatory death sentence for robbery with violence under Section 296 (2) of the Penal Code is a discretionary maximum sentence. It is on this basis that the petitioner has sought for re-sentencing.

2. The evidence against the petitioner was that he and two other accomplices while armed with a toy pistol they robbed the victim of the offence of cash of Ksh. 500/=. The petitioner was followed by a police tracker dog and arrested.

3. The petitioner was sentenced on 16/12/2004. He was in custody for 20 months while awaiting trial. That means that he has been in incarceration for a period of nearly 17 years.

4. The advocate for the petitioner **Mr. Munyendo** mitigated that the petitioner had a family that he was taking care of before he was sentenced. That he is remorseful. The advocate cited the ruling of this court in **Kakamega Misc. No. 16 of 2018 Javan Khaemba Nyongesa –Vs- Republic** where in a re-sentencing for the offence of robbery with violence the court re-sentenced the convict to 15 years imprisonment even upon considering that the robbers had seriously injured the victim and that the stolen motor vehicle had not been recovered.

5. The court called for a pre-sentencing report which was prepared by **Mr. Achungo Kennedy**, Kakamega County Probation Director. The report noted that the petitioner is aged 41 years. That he has been in prison for 16 years. The report recommended that the petitioner be released on probation sentence.

6. Sentencing is a discretion of the trial court. In **Ambani –Vs- 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. Section 333 (2) of the Criminal Procedure Code requires a sentencing court to take into account the period spent in custody awaiting trial.

8. I have considered the sentences imposed in some other cases where convicts of robbery with violence were re-sentenced after the Supreme Court decision in the *Muruatetu case*. In **Michael Kathewa Laichena –Vs- Republic (2018) eKLR** where the petitioner was in a gang that was armed with a gun and knives, Mabeya J. re-sentenced the petitioner to a prison term of 15 years after considering that he had been in custody for 5 years pending trial.

9. In **Benjamin Kemboi Kipkone –Vs- Republic (2018) eKLR** where 3 robbers armed with an AK 47 rifle robbed the complainant of Ksh. 250,000/= and a mobile phone Chemitei J. substituted the death sentence with 20 years imprisonment.

10. In **Paul Ouma Otieno –Vs- Republic (2018) eKLR** where the accused was armed with an AK 47 rifle and a kitchen knife robbed the complainant of Ksh. 450,000/= and 3 mobile phones, Majanja J. substituted the death sentence with 20 years imprisonment.

11. In **Wycliffe Wangugi Mafura –Vs- Republic Eldoret Criminal Appeal No. 22 of 2016 (2018)** the Court of Appeal imposed a sentence of 20 years imprisonment where the appellant was involved in robbing an Mpesa shop agent with the use of firearm.

12. In **Benson Ochieng & France Kibe –Vs- Republic (2018) eKLR** the petitioner was re-sentenced to 20 years imprisonment upon the court considering that the offence was aggravated by the use of multiple guns by an organized gang to commit armed robbery.

13. I have considered the petition, the submissions by the advocate for the petitioner and the pre-sentencing report. The petitioner has been in incarceration for a period of nearly 17 years. He stole a paltry Ksh. 500/= cash from his victim. There was no bodily harm on the victim. The pre-sentencing report is favourable to the petitioner. I am of the considered view that the period served is sufficient punishment for the crime committed.

14. In the foregoing, the sentence of death imposed on the petitioner by the lower court is set aside and substituted with a sentence of the time already served. The petitioner is set at liberty forthwith unless otherwise lawfully held.

**Delivered, dated and signed in open court at Kakamega this 19<sup>th</sup> day of February, 2020.**

**J. NJAGI**

**JUDGE**

In the presence of:

Mr. Munyendo for Petitioner

Mr. Mutua for State/Respondent

Petitioner - present

Court Assistant - Polycap

14 days right of appeal.