



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. 5 OF 2019

EMMANUEL MUTINDA KISILA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(A revision from resentencing at the Chief Magistrates' Court in Kibera

delivered by Hon. Kitagwa, SRM on 16th January 2019).

RULING

1. The Applicant was charged alongside two others that is Leonard Tonui and Samson Ngala Kimetu with **robbery with violence contrary to Section 296(2) of the Penal Code**. The particulars were that on 16th of October, 2004 along Siaya Road in Kileleshwa Nairobi Area, jointly and while armed with dangerous weapons namely pistols, robbed one Fakar Alam of Kshs. 200 000/- and assorted jewelry, two mobile phones make Nokia 6610 all valued at Kshs. 250 000/- and at, or immediately before or immediately after the time of such Robbery used personal violence to the said Fakar Alam. At the end of the trial, the Applicant and Leonard Tonui were found guilty of the offence and sentenced to suffer death. The Samson Ngala Kimetu was acquitted.

2. The Applicant appealed to the High Court and the Court rejected the same finding that the trial court's evaluation of the evidence was proper. He further appealed to the Court of Appeal arguing that the evidence was not exhaustively analyzed. The Court also rejected his appeal on the ground that there was proper analysis.

3. At the advent of the **Francis Kariokor Muruatetu and Another v Republic [2017]eKLR** jurisprudence he sought to be resentenced. He was sent back to the Chief Magistrates' Court in Kibera. Honorable Kitagwa, SRM, upheld the sentence after hearing the Applicant's mitigation and the circumstances of the offence. The court found that the loss of a life, and the multiple injuries suffered occasioned by the robbers' shooting the complainant informed the aggravated circumstances of the offence. The court upheld the life imprisonment sentence the Applicant has been serving.

4. He was aggrieved and sought a review of the resentencing ruling on the following grounds:

a. That he had been in custody for approximately 15 years;

b. That he was a first offender and arrested at a tender age;

c. That he was remorseful; and

d. That he had acquired various life- support skills.

5. The **Francis Kariokor Muruatetu v Republic [2017]eKLR** laid out guidelines that should inform a court on the suitability of an Applicant to resentencing. The Court set out the following guidelines:

(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.*

6. **Section 362 of the Criminal Procedure Code** directs that a court may call or otherwise receive court records for the purpose of satisfying itself as to the:

- a. Legality;*
- b. Correctness;*
- c. Propriety; and*
- d. Regularity of proceedings.*

7. Further **Section 364(1)(b) of the Criminal Procedure Code** empowers this court to alter, reverse or affirm the decision of the trial court. The matter herein arising from a resentencing decision, this court is merely conferred with the power to determine whether the trial court properly considered the criterion set out in the Muruatetu decision.

8. It then behooves this court to consider the circumstances of the case. They were that the Applicant and his accomplices accessed the compound and thereafter the house of the complainant. They entered the bedroom of the complainant and ordered him and his wife to surrender all that they had. They acceded to this request and gave them money and jewelry all valued at Kshs. 250 000/-. The Applicant and the Leonard Tonui then took the complainant out of the room and told him that they would prove that the gun was not a toy. It is at this point that Leonard Tonui loaded his gun. They shot the complainant at close range. He suffered injuries to his chest and hand. As well, their son who had noticed the commotion and engaged the robbers in a shoot-out succumbed to heart failure.

9. It is clear that the robbers were not simply interested in robbing but much more. Their conduct suggests that they were trigger happy and out to steal, kill and destroy. I am hard-pressed to find that they were intent on doing more harm than just self-aggrandizement.

10. The Applicant as per PW1's testimony was seen wielding both a gun and a bolt cutter. Although it is not clear whether he shot PW1 his role was still damning. I find that the family of the complainant was permanently traumatized. As such, for this sake it must be seen that justice has been done.

11. As regards the issue of remorsefulness, it has become a major ground on which persons seeking resentencing base their claim on. It is evident that the Applicant seeks leniency and asks to be forgiven by the court. However, as analyzed above the circumstances of the case call for a very stringent penalty that is commensurate with the pain the victims suffered. In my view, the aggravating circumstances far outweigh the mitigating ones. A custodial sentence that would serve both deterrent and retributive purposes is deserved. I accordingly set aside the death sentence and order that the Appellant serves 40 years imprisonment commencing from the date of arrest which is 15th September, 2004.

DATED and DELIVERED this 4th day of **March, 2020.**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Applicant in person.
2. Mr. Momanyi for the Respondent.