



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 139 OF 2015

CLEMENT NJOROGE CHEGE.....APPELLANT

VERSUS

REPUBLIC.....STATE

(Being an appeal from the Judgment of Honourable J. Mwaniki – Principal Magistrate,

delivered on 19th May, 2015 in Nakuru Chief Magistrate’s Court

Criminal Case No. 1045 of 2012)

JUDGMENT

1. The Appellant herein, Clement Njoroge Chege, was arraigned before the Nakuru Chief Magistrate’s Court charged with a single count of robbery with violence contrary to section 296(2) of the Penal Code. The particulars were that on 10th July, 2012, the Appellant and others not before the Court were alleged to have robbed Ephraim Macharia while armed with dangerous and offensive weapons namely an axe and a rungu. It was alleged that they robbed the victim of a mobile phone make Motorola C117 and cash, Kshs. 240/- all valued at Kshs. 5,240/-. It was further alleged that at, immediately before or immediately after the time of the said robbery, the Appellant and his colleagues used actual violence against the victim.

2. The Appellant pleaded not guilty and a full hearing ensued. At the conclusion of the case in which the Prosecution called five witnesses and the Appellant gave an unsworn statement, the Learned Trial Magistrate convicted the Appellant of the offence charged. He then sentenced him to death as the law then mandatorily required.

3. The Appellant was dissatisfied with the conviction and sentence and appealed to this Court. He filed a Petition of Appeal with some grounds of appeal which he subsequently amended. However, when the case came up for hearing on 25/02/2020, the Appellant informed the Court that he wished to withdraw his appeal against conviction and urge the Court to review the sentence only in view of the recent jurisprudence on the question of mandatory death sentence.

4. I allowed the Appellant some “cooling off” time to reconsider his decision to confirm that he voluntarily and willingly wished to withdraw his appeal against conviction. In a scheduled mention on 27/02/2020, the Appellant confirmed that he wished to withdraw his appeal against conviction. I therefore set the case for sentence hearing to receive mitigation and consider whether to review the imposed death sentence in view of the Supreme Court decision in *Francis Karioko Muruatetu & Another v Republic [2017] eKLR*. In that case, the Supreme Court held that mandatory death penalty for murder is unconstitutional. The Court of Appeal extended the reasoning to all similar mandatory death penalties in *William Okungu Kittiny v R [2018] eKLR*.

5. The law of the land as it stands today, therefore, is that the maximum penalty for both murder and robbery with violence is the death penalty but the Court has discretion to impose any other penalty that it deems fit and just in the circumstances.

6. So what would be the appropriate sentence in the circumstances of this case?

7. During the re-sentencing hearing phase of the case, the Applicant expressed remorse for his role in the robbery. He said that he is now remorseful. He said that he had gone into deep alcoholism at the time which drove him into bad company and bad choices. He pledged that he has now reformed during the six years in which he has been in custody. Finally, he told the Court to consider that he was a first offender.

8. The Prosecutor, Ms. Verne Odera, told the Court to consider that the sentence meted out was lawful and not excessive. She pointed out that the attack here was done in broad daylight by neighbours and that it instilled fear in the neighbourhood. She said that such an attack

would have the effect of inducing trauma among the neighbours. She asked the Court to consider that there were complaints that the Appellant continued to intimidate witnesses during the trial to the point that even some of them refused to testify.

9. In the present case, the circumstances were that the Appellant and his colleague attacked the victim, a village elder, ostensibly to avenge for the village elder having arrested them earlier on a theft case. They cornered the victim as he walked home in broad daylight. As the victim attempted to flee, the Appellant cut him on the hand with a Somali sword while his colleague cut him on the chest with an axe. They then stole a mobile phone and cash and fled, leaving the victim on the ground. Dr. Justus Ndombi classified the injuries to the victim as harm.

10. From the facts of the case, there are several aggravating factors as pointed out by the Prosecution:

- a. First, the offence involved use of gratuitous force;
- b. Both assailants were armed with offensive weapons; and
- c. The victim was attacked because of his public service as a village elder.

11. Weighed against the mitigating factors which include the fact that the Appellant is remorseful and is demonstrably reforming in Prison, these circumstances here do not lift this case to the scales of the death penalty. Death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder cases. However, the aggravating circumstances here call for a significant incarceration period to reflect all the sentencing objectives which include deterrence and proportionality. Consequently, all considered, I will set aside the death sentence and substitute it with a sentence of imprisonment for twenty (20) years.

12. The upshot, then, is that the appeal against conviction is marked as withdrawn. The appeal against sentence succeeds. The sentence imposed on the Appellant for the conviction for the offence of robbery with violence is set aside. In its place, a prison sentence of twenty (20) years imprisonment is imposed. The sentence will be computed to run from 26/03/2012 when the Appellant was first arraigned before Court since he remained in custody since then.

13. Orders accordingly.

Dated and delivered at Nakuru this 14th day of May, 2020

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by Video-conference facility pursuant to the various Directives by the Honourable Chief Justice asking Courts to consider use of technology to deliver judgments and rulings where expedient due to the Corona Virus Pandemic. This resulted in Administrative Directives dated 01/04/2020 by the Presiding Judge, Nakuru Law Courts authorizing the delivery of judgment by video-conferencing. This avoided the need for the participants to be in the same Court room for the delivery of the judgment. The Appellant attended by video-conference from Prison

while the Prosecutor, Ms. Verne Odero, and the Court Assistant were in attendance by video-conference set up at the Court's Boardroom. Representatives of the media were able to access the proceedings by watching at the Court's Boardroom. Accordingly, the proceedings met the constitutional requirement of public hearing.