



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

PETITION NO. 229 OF 2018

1. EMMANUEL MUTISYA MUTHOKA

2. BONIFACE GITHAKA MUTHEE

3. STEPHEN KIMEU MUTUNGA

4. SAMUEL MUTISO.....PETITIONERS

AND

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT

1. The Petitioners were convicted for the offence of Attempted Robbery with Violence contrary to Section 296 (2) of the Penal Code and an alternative charge of handling stolen property contrary to Section 322(1) of the Penal Code and sentenced to death in Mariakani Cr. Case No. 401 of 2015. The Petitioners appealed to the High Court which upheld the death sentence. A further Appeal at the Court of Appeal is still pending.

Brief Circumstance of the offence

2. The particulars of the offence are that on 16th July, 2015 at about 1.00 a.m. at Mwangutwa Primary School in Rabai Sub County within Kilifi County the Petitioners jointly with others not before court while armed with dangerous weapons namely bars robbed Edward Saha Hassan and Mwero Chirunga Bongo of 11 assorted Computer monitors, a speaker make Sony, Amplifier make Yamaha, Microphone receiver make Yamaha, Bamba TV Decoder, 100m extension cable, two cameras make Sony, one laptop and its two chargers, two thermos flasks and cash Kshs. 350,000 all amounting to Kshs. 770,000/= and immediately before the time of such robbery threatened to use violence to the said Edward Saha and Mwero Chirunga Bongo.

3. The Petitioners have now come to court seeking review of the sentence on the basis of new and compelling evidence that was not available to them throughout the trial and even during the Appeal in the High Court. They aver that there were discrepancies in the OB Report and the Investigation Diary. The Petitioners state that the particulars of the offence at OB NUMBER 4/16/07/2015 states that they committed the offence of Robbery with Violence at Matungwa Primary School, while the Investigation Diary given on the material day was "*Breaking to school and committing felony*". Further that the OB Number states the Complainant as Edward Saha Hashan and others while the Investigation Diary indicates the name of the complainant as Daniel Shaha and Sammy Saha. The Petitioners further aver that the nature of the offences indicated did not tally with the facts.

Submissions

Petitioners Submissions

4. Mr. Wamotsa for the Petitioners submitted that the Petition is brought under Article 50(6) (b) of the Constitution and on the basis of new and compelling evidence that was not available to the Petitioners during trial as it was concealed by police. Counsel submitted that there are two OB entries. The first one is OB No. 4 of 16th July, 2015 and the second one is a similar OB save that the "4" has been crossed and "5" endorsed at the top of the handwriting. Counsel submitted that the cancellation is not countersigned and therefore it can be inferred to be the same and that this is buttressed by the fact that the reporting time was 0837 Hrs. Mr. Wamutsa submitted that the prosecution were given leave to verify the information from the police station which they haven't.

5. Mr. Wamotsa further submitted that the Prosecution in the trial case failed to prove their case beyond reasonable doubt and urged the court to review the Appeal and its decision and the trial court's evidence and make a determination.

6. Mr. Wamotsa further submitted that in the event this Court confirms the conviction then it ought to consider the mitigation and give the Appellants a lenient and fixed term from the date of their arrest and confinement that being 16th July, 2015 in line with the Supreme Court decision in Francis **Muruatetu and Others vs. Republic [2017] eKLR**.

7. The Petitioners filed further submissions dated 12th November, 2019, in which they submitted that the fact of non-disclosure of the two OB entries denied the Petitioners the right to cross-examine the prosecution witnesses and to mount an effective defence based on alibi defences as was held in the case **Nyongesa Makikha Sirengo vs. Republic [2019] eKLR**.

Respondent's Submission

8. M/s. Ogega for the Respondent submitted that the Application by the Petitioners lack merit and that the Petitioners have to demonstrate that there is new and compelling evidence that was not within their knowledge during trial and that the same ought to warrant prayers being sought in the Petition. Counsel submitted that the OB NO. 4/16/07/2015 is the same one that the Investigating Officer used to open Police file number 314/180/2015 which lead to the Petitioners being charged with criminal case number 401 of 2015 on the 17th July, 2015. Counsel submitted that there was only OB NO. 4/16/2015, used to charge the Petitioners. Further Counsel submitted that in the event that there were indeed other OB numbers different from the one that the Petitioners were charged in, then the same did not prejudice them as they fully participated in trial and were later convicted.

9. M/s Ogega submitted that the allegations by the Petitioners that the prosecution failed to call some witnesses during trial are issues that ought to have been canvassed during appeal stage and not through Article 50 (6) of the Constitution. Counsel submitted that this court lacks the jurisdiction to handle this Petition. Further, that the Petitioners have an alternative of praying for re-sentencing in line with the Francis Muruatetu (Supra) decision as they were convicted with the offence of robbery with violence contrary to Section 296(2) and an alternative charge of handling stolen property contrary to Section 322(1) of the Penal Code.

Determination

10. The Petitioners' case is that they have discovered new evidence which was not available to them at the time of trial. That alleged new evidence is alleged availability of two OBs. However, only one OB is provided being OB No. 4/16/07/2015. The other OB is said to be "Investigation Diary". It remains an Investigation Diary. There is nowhere therein where it is referred to as an OB. An Investigator can maintain a diary for the refreshment of his own memory. In fact, the Diary is not made in any chronological order the way an OB is normally made. This is a single, self-standing note, meant to refresh the memory of the author. In fact, it is to be noted that the said diary acknowledges that it is based on OB 4/16/07/2015. To state that this Diary was itself an OB is to overstretch the imagination. There is no evidence in the trial court that the Petitioner were tried on the basis of two OBs. This Diary was kept by the Investigating Officer for the refreshment of his own memory. In fact unlike an OB which merely records an event as it took place, this Diary was explaining what took place. In any case and as submitted by the prosecution, in the event there was another OB number, the same did not prejudice the Petitioners because they were aware of the charges facing them, and they participated in the trial and were found guilty and convicted.

11. I am satisfied that the Petition does not disclose any new and compelling evidence to enable this Court to avoid the trial.

Re-sentencing

12. Pursuant to the Muruatetu Case, the Petitioners are entitled to resentencing. The Petitioners mitigation is that they are first offenders; they are remorseful; and they never benefited from the crime since all the proceeds were recovered. They also aver that they all have families and young children who depend on them. They never injured anyone during the commission of the crime and have undergone rehabilitation programmes, religious teachings and other trainings while in prison which will enable them to re-integrate in society and to earn a living. The Petitioners further aver that they have learnt from their criminal deeds and have sworn not to resort to crime again and that they don't live in the same community with the victims of the crime and therefore there would be no animosity between them and their victims, if released. They further aver that they are in their mid-ages and therefore would be useful to the society if released.

13. The Respondent's response to mitigation is that the Petitioners acted in unison by inflicting fear and pain on the victims and the fact that the Petitioners were in a gang and that the offence was committed at night proves how dangerous they are to the society and as such, prosecution prayed for a deterrent sentence of 18 years imprisonment.

14. According to **The Sentencing Policy Guidelines, 2016** ("*the Guidelines*") published by the Kenya Judiciary, the sentence imposed must meet the following objectives in totality;

- a) **Retribution: To punish the offender for his/her criminal conduct in a just manner.**
- b) **Deterrence: To deter the offender from committing a similar offence subsequently as well as discourage other people from committing similar offences.**
- c) **Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.**
- d) **Restorative justice: To address the needs arising from criminal conduct such as loss and damages.**
- e) **Community protection: To protect the community by incapacitating the offender.**
- f) **Denunciation: To communicate the community's condemnation of the criminal conduct.**

15. In determining a custodial sentence, the guidelines provide the factors to be considered under the applicable statute, the mitigating circumstances and the aggravating circumstances by weighing both. There is also Prisoners' Progress Report filed in court on 30th July, 2019.

16. I have carefully considered the mitigation by Petitioners. I now, in light of the foregoing paragraphs of this Judgment, set aside the death sentence imposed on the Petitioners. In place thereof I sentence the Petitioners to serve a jail term of Thirteen (13) years each from the date of arrest.

That is the Judgment of the Court.

Right of appeal in 14 days.

Dated, Signed and Delivered at Mombasa this 15th day of May, 2020.

E. K. O. OGOLA

JUDGE

Judgment delivered via Zoom in the presence of:

Ms. Ogega for State

Petitioners on line at Shimo La Tewa Prison

Mr. Kaunda Court Assistant