



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT LODWAR

CRIMINAL APPEAL NO. 25 OF 2017

1. JOHN LOBUIN

2. LOTUK EKAMAIS

3. ETABO LOBUINAPPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

RULING ON SENTENCE

1. The Appellants were jointly charged with the offence of attempted robbery with violence in Lodwar PMCR No. 101/2014 and were tried convicted and sentenced to suffer death on the charge of robbery with violence. Being dissatisfied with the said conviction and sentence, they filed this Appeal to this court and by a judgment dated 28/2/2019 Justice Riechi upheld the conviction but set aside the death sentence and made the following order

“I hold a similar view with the trial court that this was not a case of attempted robbery because the actual robbery took place even though the tents were not recovered and as such I uphold the conviction. On sentence I note that the Appellants were sentenced to death. I note that the trial court stated that her hands were tied in sentence. In view of the Supreme Court decision in Muruatetu case: FRANCIS KARIOKO MURUATETU & ANOTHER – V – R [2017]eKLR the hands are no longer ‘not’ tied (sic) I therefore set aside the sentence of death and direct that the Appellants to mitigate and this court met out appropriate sentence”

2. It is by virtue the said Judgment that this matter was placed before me for purpose of mitigation and passing of appropriate sentence. I must say at the onset that this matter should have been referred back to the lower court for re-sentencing, as sentencing is the function of the trial court. However this being a first Appeal, this court has the jurisdiction to substitute the sentence of the trial court with its own

sentencing and therefore the matter is properly before me.

3. In compliance with the Supreme Court decision in the Muruatetu case, the court called for pre-sentencing report and allowed the Appellants to mitigate. The 1st Appellant stated in mitigation that when he was arrested, his family fell apart with his children running away to unknown destination same with his wife. He stated that he had not seen his father since birth and was brought up with his mother who depend upon him. He confirmed that he was a brother of the 3rd Appellant.

4. The 2nd Appellant stated that he was a brother in-law to the 1st and 3rd Appellants and that his wife left upon his arrest leaving his children to move to the streets. He sought to be released so as to go back and look for his children. The 3rd Appellant sought for mercy on the ground that upon his arrest, his family disintegrated and that they lost all their livestock. They all sought for term sentence

PRESENTENCING REPORT

5. On behalf of the 1st Appellant it was noted that the victim could not be traced since he left working for NCKK.

a. **Family attitude: it was stated that the member of his family thought that he had reformed and sought for lenient sentence.**

b. **Community Attitude: the area chief stated that the community members were not willing to accept all of them back noting that since their arrest crime which was rampant in the area had subsided.**

c. **Conclusion/Recommendation: it was stated that the stolen items were never recovered and that the Appellants might have been involved in criminal activities in the area which had since reduced. It was recommended that they serve prison term.**

6. On behalf of the 2nd Appellant LOTUK EKAMAIS it was stated that he was a herdsman and goat/Carmel trader married with six children. It was stated that the NPR In charge of his area expressed fears that his release may pose a threat to peace that had existed since their arrest and should therefore serve prison terms. On behalf of the 3rd Appellant it was also stated that he was a herd's man married with three children, who might have been involved in criminal activities. It was recommended that he serves prison terms.

7. Mr. Mongare for the state submitted that death sentence was now not mandatory and that the court could met out any sentence. He submitted that the pre-sentencing report supported custodial sentence.

8. The sentencing objective in Kenya as per the Judiciary sentencing policy guidelines can be summarized as follows;

a) **Retribution: to punish the offender for his/her criminal conduct in a just manner.**

b) **Deterrence: to deter the offender from committing similar offence subsequently as well as to discourage other people**

from committing similar offences.

c) **Rehabilitation: to enable the offender reform**

d) **Restorative justice: to address the matter arising from the criminal conduct such as loss or damages**

e) **Community protection: To protect the community by incapacitating the offender**

f) **Denunciation: To communicate the community's condemnation of the criminal conduct.**

9. In this matter the item stolen was plastic tents, the weapon used were knife and stick. The injuries sustained by the victim were noted as a deep cut on the head and was classified as harm.

10. I have taken into account the nature of the injuries, the degree of blameworthiness on the part of the Appellants and have come to a conclusion that an imprisonment term of Ten (10) years is appropriate and adequate in the circumstances of this case being guided by the Court of Appeal decision in **WILLIAM OKUNGU KITINY – V – R [2018]eKLR**

11. The Appellants shall therefore serve Ten (10) years imprisonment from the date of the judgment of the lower court and it is so ordered.

12. The Appellants are entitled to right of appeal both on conviction and sentence, while the State is entitled to right of Appeal on sentence to The Court of Appeal as provided for in law and it is so hereby ordered.

Dated, Signed and Delivered at Lodwar through Skype this 12th day of May, 2020

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J WAKIAGA

JUDGE

In the presence of:-

Mr. Mwaura for the State

The Appellants in person

Court Assistant: Maurine/Lotimo