



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APP. NO. 284 OF 2019

JONATHAN MWANZIA KITHUKA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant has approached this court with a request for review of ruling arising from his resentencing. His application by way of a Chamber Summons was filed on 28th May, 2019 and is supported by an affidavit sworn by himself.
2. He was charged alongside another before the Magistrate's Court at Kibera with the offence of robbery with violence contrary to **Section 96(2) of the Penal Code**. It was alleged that 24th day of December, 2002 at Plains View Estate in Nairobi within Nairobi Area jointly with others not before court while armed with dangerous weapons to wit pistols robbed Bhagwandas Soman of his motor vehicle registration No. KAK O45Y Toyota Corolla white in colour, two wrist watches make Seiko 5 all valued at Ksh. 350,000/ and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Bhawandas Soman.
3. The Applicant was convicted and sentenced to suffer death which conviction and sentence were confirmed by both the High Court and Court of Appeal. Following the Supreme Court decision in the case of **Francis Karioko Muruatetu and Another [2017] eKLR**, the Applicant sought re-sentencing before the Magistrate's court. In a very brief ruling by Hon. J. Kamau, SRM, the court delivered itself that based on the evidence presented on record, there was no need to vary the sentence. In so upholding, the learned magistrate stated that she had considered the lengthy mitigation of the Applicant submitted by his counsel. The court also stated that it had had regard to the authorities filed by the counsel for the Applicant.
4. The Applicant was heard vide skype video link. He had earlier filed written submissions on 19th May, 2020. Summarizing his submissions, he noted that the death sentence which has since been commuted to life imprisonment was too harsh for the offence committed. He submitted that he was remorseful both to the court and the entire nation. He added that at the time of arrest, he was only aged 24 years and was both under the influence of drugs and peer pressure. That he had since reformed whilst in prison having undertaken artisan skills which would support him if the court released him. In this regard, he indicated that he had been a member of 'crime sio poa' group in the prison which advocates for peaceful coexistence in the prison community as well as counselling new and young convicts. He stated further that he was a religious man who was tolerant and slow to condemn others. In summary, he stated that the prison life had fully reformed him.
5. As regards his health, he submitted that his health had deteriorated due to the long incarceration in prison. He attached a letter from prison which indicated that as a result of gunshot wounds during the arrest, he had developed complications on his lower limbs which have led to osteomyelitis for which he had been treated at Kenyatta National Hospital but unfortunately to date walks with difficulties. Additionally, he developed asthma which he follows up treatment on in prison. That recently he has had persistent epigastric pains which have led to peptic ulcers disease for which he is undergoing treatment. Finally, that he had developed hypertension for which he is also undergoing treatment.
6. In a further letter by prison dated 9th July, 2019, he is vouched as a well behaved, disciplined and not offending prisoner worth emulating by other fellow inmates. It is showed that he has been in prison for accumulatively 16 years which have reformed him.
7. Ms. Ndobi for the Respondent submitted that the life imprisonment was sufficient and ought not to be varied. She submitted on the same notwithstanding that she had not had the opportunity to look at the record of proceedings.
8. I have accordingly considered the rival submissions. Before the court arrives at the appropriate sentence it must consider the circumstances of the case. On the material date on 24th December, 2002 at about 7.45 pm, the complainant was driving from the shop alongside his wife in motor vehicle reg. No. KAK 045Y. He was accosted by four men at the main gate who ordered him to get out of the car. One of the attackers was holding something like a pistol which was pointed at his chest. He came out of the vehicle and the armed man demanded for money. He only had Kshs. 150/= which he surrendered. He and his wife were then pushed to the back seat. There they found two other attackers inside

the car. They were then driven into Kapiti Road through South B and South C where the complainant was robbed of his Seiko 5 watch valued at Kshs. 5,000/=. As they were being driven around the two estates, the complainant saw a police car and the next thing he heard were gun shots. The man seated next to him and the robber who had taken control of the vehicle were hurt. The co-driver and the one to his left fled. Those who were shot were not able to escape. The 2nd accused who is the Applicant herein was one of those shot by the police and also the one who was driving the vehicle. He sustained an injury on his leg. The motor vehicle was exhibited during trial and it had visible bullet holes. The complainant's wife was also injured but fortunately was treated and discharged.

9. Clearly from the background of the case and in my view, it was not the intention of the robbers to injure their captives. What prompted the injury of the complainant's wife was the shooting by the police. This is not to say that the robbery was by any means not grave as the robbers subdued the victims through threats by a gun. Further, I note that the motor vehicle was not stolen and the injuries that the complainant's wife sustained were not so serious as she was treated and discharged.

10. Taking note that the Applicant has been in custody for the last 16 years and at his age then was likely to be influenced by peer pressure, I find that his plea for remorsefulness is genuine. He appears to me to have reformed and the court ought to give him a second chance in life to rebuild himself.

11. In the circumstances, it is my view that the period served has been sufficient sentence. I accordingly set aside the life imprisonment sentence confirmed by the learned trial magistrate and order that the Applicant be forthwith set free unless otherwise lawfully held.

DATED AND DELIVERED THIS 2ND DAY OF JUNE, 2020.

HON. G. NGENYE MACHARIA

JUDGE

In the presence of:

1. Applicant in person.

2. Miss Akunja for the Respondent.