



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISCELLANEOUS CRIMINAL APPEAL NO. 139 of 2019

ISAAC MWANGI WANJIKU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The applicant Isaac Mwangi Wanjiku was charged and convicted for the **offence of Robbery with Violence Contrary to Section 296 (2) of the Penal Code**. The particulars of the offence were that on the 16/12/2002 at Koinange estate within Nakuru in Rift valley Province, jointly with others, being armed with a dangerous weapon namely a sword robbed Nancy Njoki of her two radio cassettes, two mobile phones, thirteen CD Discs, one camera, one knife and one bag and shs. 500/= all valued at Kshs.62,000/= the property of Grace Wanjiku. He was tried and convicted and sentence to suffer the then mandatory death sentence on the 30/7/2003.

An appeal to the High Court Criminal Appeal No. 281 of 2006 was dismissed. The applicant then approached the court of Appeal in Nakuru **Criminal Appeal No. 76 of 2009**. On the 19/11/2008, the Court of Appeal referred the appellant to the High Court for re sentence hearing upon his withdrawal of the Appeal on conviction.

During the re-sentencing hearing, the applicant was represented by Ms. Nancy Njoroge Advocate while the state was represented by Prosecution Counsel Ms. Vera Odero.

The application was made pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another Vs. Republic** (2017) e KLR which outlawed the mandatory death sentence in capital offences, and opened a chance for mitigation by an application, to facilitate re-consideration of the trial court's death sentence.

Ms.Nancy Njoroge mitigated on behalf of the applicant. He is remorseful, that he committed the offence at a young age of 22 years, and has learnt a lot while serving sentence in prison for the last 18 years. He sought for forgiveness from the victims and the state.

The court further heard that while in prison, the applicant was trained in carpentry and has completed form 4 four certificate, and has been of good character all the period in prison. He is not 40 years, and is ready to be assimilated back to the society and undertakes to be a lawful and useful member of his society. It is stated that his family is ready and willing to accommodate him back to the family and assist him to be self sufficient.

The state though objecting of reduction of the sentence submits that the sentence was lawful, and has urged the court to consider the psychological effects of the victims of the crime who were traumatized by the applicant's actions.

The **sentencing Policy Guidelines, 2016** for the Judiciary stipulate that the sentencing process is one of exercise of Judicial discretion and ought to be in accord with the constitution and the Judiciary's overall mandate of ensuring access to justice for all.

- a) *The guidelines put forth the following for consideration;*
- b) *Age of the offender*
- c) *Being a first offender*
- d) *Whether the offender pleaded guilty*
- e) *Character and record of the offender*

- f) *Commission of the offence in response to gender-based violence*
- g) *Remorsefulness of the offender*
- h) *Possibility of reform and social re-adaptation of the offender*
- i) *Any other factor the court considers relevant.*

The above guidelines are in line to provisions of Section 329 of the Criminal Procedure Code that;

”The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence”

The objectives of sentencing are further stated in the Judiciary’s Sentencing Policy as:

- a) **Retribution** – *to deter the offender from committing a similar offence as well as discourage other people from committing similar offences.*
- b) **Rehabilitation** – *to enable the offender reform from his/her criminal disposition and become a law abiding person.*
- c) **Restorative Justice** – *to address the needs arising from the criminal conduct such as loss and damages.*
- d) **Community protection** – *to protect the community by incapacitating the offender.*
- e) **Denunciation** – *to communicate the community’s condemnation of the criminal conduct.*

I have considered that during the robbery with violence, the victims was deprived of her valuables with violence, but grateful that no life was lost during the commission of the offence. This is however not to state that the crime was not serious.

In his mitigation, the applicant who committed the crime at the age of 22 is now 40 years old. He is strong and may be of use to the society. He has indeed equipped himself with useful skills which he may be able to utilize to fend for himself if a non – custodial sentence is allowed. He has a potential of being a useful member of his community. It is noted that the applicant’s family is ready to accept and rehabilitate the applicant by helping him settle back to the community.

I am of the opinion that the 18 years the applicant has served in prison are sufficient, the rationale being that for the offence of simple robbery, the punishment is fourteen years, and the offence under Section 296 (2) of the penal code being more serious, the bottom line on re-sentencing ought not be below the fourteen years.

This rational has found favour with most judges and I am persuaded to follow suit.

In that regard, I am persuaded by the following decisions;

- a) *Paul Ouma Otieno Vs. Republic (2018) e KLR where death sentence was reduced to 20 years imprisonment.*
- b) *Benjamin Kemboi Kipkone Vs. Republic (2018) e KLR, death sentence was substituted with 20 years imprisonment.*
- c) *Sabastian Okwero Mrefu Vs. Republic (2012) where death sentence was reduced to time of 8 years served.*
- d) *Philip Namuli Kisari Vs. Republic (2018) e KLR where the death sentence was substituted with 17 years imprisonment.*

In the premises, I hereby set aside the death sentence imposed on the applicant and substitute it with the 18 years time served in prison.

The applicant is set at liberty unless otherwise lawfully held.

Delivered, Signed and Dated at Nakuru this 9th Day of July, 2020.

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J.N. MULWA

JUDGE