REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 60 OF 2018

GEOFFREY NJIU NDUNGU ....APPLICANT

VERSUS

REPUBLIC..RESPONDENT

JUDGMENT UPON APPLICATION FOR RE-SENTENCING

1. The Applicant, Geoffrey Njiu Ndungu, and eight others were jointly charged with the offence of Robbery with Violence contrary to Section 296(2) of the Penal Code. The particulars were that on 5/12/2001 at Mutirithia Estate Molo, Nakuru District, they jointly, while armed with dangerous weapons, namely a homemade gun, pistols, simis and panga, robbed JOHN WAMAGANA KUNGU of cash Ksh 28,000/= two leather jackets seven compacts, one small calculator, one eveready torch, 2 radio cassettes, a speaker, electric plug, one intercom set, electric transformer, 3 wall clocks, one set of remote alarm, a camera, a graphic equalizer, a cordless phone, handset, two travelling bags a kaunda shirt, three shirts, a pair of long trousers, two coats and one cloth sack containing 2 rolls of elastic bands, all valued at Ksh 63, 230/= and at the time of such robbery they threatened to use actual violence against him.

2. These particulars were confirmed after a fully-fledged trial. They were affirmed by the High Court and the Court of Appeal on appeal. The two appellate Courts also affirmed the death sentence mandatorily imposed on the Applicant.

3. The Applicant approached this Court for re-sentencing following the window opened up by the Supreme Court in ***Francis Karioko Muruatetu & Another v Republic [2017] eKLR***. He seeks for substitution of the death penalty he received with a prison term. In the ***Muruatetu Case***, the Supreme Court outlawed mandatory death penalty for murder as unconstitutional and struck down section 204 of the Penal Code to the extent that it prescribed mandatory death sentence upon conviction for murder.

4. The reasoning in ***Muruatetu Case*** respecting section 204 of the Penal Code (the penalty section for murder), has been extended by the Court of Appeal to the mandatory death penalty in robbery with violence cases and probably all other similar mandatory death sentences. That was in ***William Okungu Kittiny v R [2018] eKLR***.

5. In ***Benson Ochieng & Another v Republic (Nakuru High Court Misc. Application No. 45 of 2018)***, I reached the conclusion that the High Court can invoke its original jurisdiction bequeathed to it in Article 165(3)(a) of the Constitution to re-sentence persons on death row who were sentenced pursuant to the mandatory death penalty provisions which have been declared unconstitutional. Addressing the advisory by the Supreme Court to those on death row pursuant to the mandatory death penalty provisions the Supreme Court had just declared unconstitutional that they should await a Taskforce ordered by the Supreme Court and not approach the Supreme Court with individual petitions, I had this to say:

> *As I understand it, this Application is pivoted on Article 165(3)(a) of the Constitution. That clause gives the High Court unlimited original jurisdiction in criminal and civil matters. On the other hand, the Supreme Court adviced similarly-positioned would-be Petitioners to await the formation of the Taskforce which will recommend the way forward for the thousands of prisoners presently serving the death sentence. However, the position of the Supreme Court was quite specific: it indicated that it will not consider individual Petitions presented to it by the prisoners after enunciating the constitutionality of the mandatory death sentence.*
>
> *I have taken the position that the Supreme Court neither intended nor achieved the purpose of limiting the jurisdiction of this Court to consider applications for re-sentencing by individuals such as the Applicants who were sentenced to death under the then mandatory provisions of the Penal Code. A progressive and purposive reading of the constitutional provisions relied on by the Supreme Court to reach its outcome in the* ***Muruatetu Case*** *would lead us to this conclusion. The Court, may, of course, determine for prudential reasons, to await the work of the Taskforce or other docket management considerations.*

6. It is for this reason that I take jurisdiction to re-consider the sentence imposed on the Applicant herein following the ***Muruatetu Case***.

7. In support of his Application, the Applicant pleaded that he has now reformed. He attributed his offence to youthful ignorance. After serving 16 years in custody, the Applicant submitted that he has been fully rehabilitated. To demonstrate his reformation, he presented

certificates to show that he has taken courses which will serve him well after prison. He has earned certificates in:

i. Diploma in Theology from Discover Bible Schools

ii. Certificate on detergent making

iii. Certificate in Basic Fire Safety Training

iv. Certificate in First Aid.

8. He prayed pray for a term in prison so that he can go back to his family of a wife and three children as well as an aging mother. He asked for his sentence to be reduced to 15 years in prison.

9. On his part, Mr. Chigiti submitted that there are weighty aggravating factors.

a. First, that the Applicant was in the company of several others.

b. Second, that the assailants were armed with dangerous weapons: Pistols, home made guns and pangas.

c. Third, that there is possibility that if released the Applicant may re-unite with the co-accused and re-start his criminal activities and re-engage in crime.

10. Mr. Chigiti conceded that the Complainant was not injured. He also considered it a mitigating circumstance that the Applicant's family has agreed to re-accept him. All considered, Mr. Chigiti was of the opinion that the appropriate sentence is twenty more years above what the Applicant has served.

11. Looking at the circumstances in which the offence was committed, I would agree with Mr. Chigiti that there are several aggravating circumstances present in this case:

a. First, the robbery was committed by an armed gang which was an organized group;

b. Second, the robbers were armed with dangerous weapons which included several guns;

c. Third, the scale of the robbery was quite large giving indications that it was being done for economic gain.

12. On the other hand, the following extenuating circumstances are present here:

a. The Applicant is demonstrably remorseful;

b. The Applicant was a first offender;

c. The Applicant has demonstrated capacity for reform and rehabilitation through the various courses and trainings he has received while in prison. The Prisons Authorities have demonstrated their trust in him by appointing him a Trustee and highly recommending him as a trusted leader in prison; and

d. The Applicant has a family that is willing to take him back and re-integrate him to the society.

13. In previous cases, I explained the position that the appropriate entry point for sentencing for robbery with violence is fourteen years. This is because "simple" robbery under section 296(1) of the Penal Code attracts a minimum sentence of fourteen years imprisonment. It therefore seems logical that the minimum sentence for robbery with violence should be fourteen years imprisonment. This is because robbery with violence under section 296(2) is, by definition, an aggravated robbery which has been singled out by the Legislature for enhanced penalty due to the impact of the crime on the victim and the society. This position is in accord with other decisions of the High Court on this point. See, for example, decisions by Majanja J. in ***Michael Kathewa Laichena and Another v Attorney General MERU High Court Crim. Pet. No. 19 of 2018 (UR)*** and ***John Kathia M'itobi v Republic [2018] eKLR***. An entry point of fourteen years for robbery with violence, in my view, is also appropriate for reason of uniformity and parity in sentencing.

14. Taking all these factors into consideration, I find that given the weighty aggravating circumstances, it is important for the Court to accentuate the societal denunciation for the heinous and socially damaging crime the Applicant committed: the use of multiple guns by an organized gang to commit armed robbery. A sufficiently stiff sentence will also serve the deterrence function to the extent that a custodial sentence has a signaling effect.

15. **In my view, therefore, considering the entirety of the facts, it is appropriate to substitute the death sentence pronounced on the Applicant in this case. In its place, I re-sentence Applicant to twenty-one (21) years imprisonment commencing the date of sentencing before the Trial Court that is from 27/11/2002**.

16. Orders accordingly.

Dated and delivered at Nakuru this 15th day of January, 2019

JOEL NGUGI

JUDGE