



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC APPLICATION NO. 62 OF 2018

JOHN MULINGE NDUATI ,.....APPLICANT

VERSUS

REPUBLICSTATE

JUDGMENT UPON APPLICATION FOR RE-SENTENCING

1. The Applicant, John Mulinge Nduati, was convicted of two counts of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the charge were that on the 12th day of August, 2003 at Mbaruk area in Nakuru, the Appellant, jointly with others not before the Court while armed with dangerous weapons namely pistols robbed James Kiiru Mwangi of Kshs. 77,400/-, one mobile phone make Siemens A35, 60 satchets of Tiger brand Whisky and, at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said James Kiiru Mwangi.
2. The particulars of the second count were that on the same day and at the same place while similarly armed, the Applicant, jointly with others not before the Court robbed Stephen Ndung'u Thuo of his mobile phone make Motorola T192 and one Khaki jacket and at the time of such robbery threatened to use actual violence to the said Ndung'u Thuo.
3. After a fully-fledged trial, the Applicant was convicted at the trial Court. He was sentenced to death as was then mandatorily provided under the law. Both the High Court and the Court of Appeal affirmed both the conviction and sentence.
4. The Applicant has now 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.
5. 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***.
6. 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 advised 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.

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

8. The Applicant pleaded with the Court to substitute the death sentence imposed with a lenient prison term. He informed the Court that he was remorseful; and that he is a changed man after accepting Jesus while in Prison. He says he has undertaken vocational training while in Prison including upholstery and carpentry. Additionally, he has studied theology. He says this trainings as well as his changed attitude show that he is reformed and capable of living crime-free life.

9. The Applicant also says that he has one son who is 15 years old that he needs to go and take care of.

10. Mr. Motende, the Prosecutor, urged the Court to consider the following factors:

- a. Appellant was armed with a pistol – a dangerous weapon
- b. He was with other people – meaning they were a gang.
- c. The pistol was never recovered. Only the Appellant was arrested meaning that the others are still out there with a pistol. If Appellant goes back, he will gang up with them again.
- d. Appellant has not mentioned whether he plans to look for complainant to ask for forgiveness
- e. Appellant did not show remorse during sentencing. He only asked for proceedings meaning he was not remorseful at the time.

11. Mr. Motende suggested that the Applicant be sentenced to 25 years in prison.

12. I have considered all the mitigating and aggravating factors in this case as well as the circumstances in which the crime was committed. While a heinous and highly socially damaging crime, the circumstances in which the crime was committed do not place it at the highest level of culpability that should attract the death penalty. Death sentence should be reserved for the highest level armed robbery offences.

13. What prison term, then, would fit the crime committed here? I have considered that the Applicant is remorseful and has reformed as mitigating circumstances. On the other hand, I have considered that the aggravating circumstances highlighted by Mr. Motende which include the fact that the Applicant was armed with a gun; was operating in a gang; and actually injured one of the victims.

14. Taking all these into consideration, I have concluded that a prison term of twenty one (21) years will be the appropriate one to fit the crime committed here. The term will be computed to begin on 03/09/2003.

15. Orders accordingly.

Dated and delivered at Nakuru this 17th day of January, 2019

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JOEL NGUGI

JUDGE