



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 142 OF 2010**

**RICHARD KIMINING.....1<sup>ST</sup> APPELLANT**

**FREDRICK KIPRONO CHEPKANGOR ....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC .....STATE**

**JUDGMENT**

1. The two Appellants together with a third one David Korir Kimalel) were all charged jointly with two counts Robbery with Violence contrary to section 296(2) of the Penal Code before the Nakuru Chief Magistrates Court. The particulars were that on the night of 21<sup>st</sup> October, 2008 at Makongeni village, Nakuru District jointly with others not before court robbed Gilbert Owour Manda of Ksh 6,000/= and a mobile phone make WSD valued at Ksh 12,500/= the second count is that on the night of 27<sup>th</sup> October, 2008 at Makongeni village, Nakuru District jointly with others not in court robbed Jacob Kiptoo of cash Ksh 200, two mobile phones, five pairs of ever ready batteries, four tins of Kimbo cooking fat, two kgs of sugar and four packets of salt and used actual violence on both victims.

2. At the conclusion of the trial, the two Appellants were convicted of both counts of robbery with violence. Their Co-Accused was acquitted. The Learned Trial Magistrate proceeded to sentence them to death with respect to Count 1 and held sentence with respect to Count 2. At the time, a conviction for robbery with violence attracted a mandatory sentence of death penalty.

3. The two Appellants filed their appeals before this Court. They initially challenged both conviction and sentence. However, when the matter came up for hearing before me on 05/07/2018, Ms. Chemnetich, Counsel for both Appellants, informed the Court that after due consideration and consultation with their clients, they had decided to abandon their appeal against conviction. Instead, in line with the Supreme Court decision 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 line with these developments, I will now consider the appropriate sentences for the two appellants.

6. The evidence presented at the trial which the Appellants are not challenging show that the Appellants wounded both complainants. The Appellants were working in an enterprise with at least four others. They put sisal cuttings on the road to force motorists to stop to remove them. As as soon as a motorist alighted, they would pounce on him with pangas. This was the modus operandi used for both robberies. In both cases, the Appellants and their colleagues inflicted grievous harm on the victims.

7. In mitigation, the 1<sup>st</sup> Appellant told the Court that he had accepted the mistake he committed and prayed for forgiveness He stated that he was very remorseful. Further, he told the Court that since being imprisoned, he has tried to do many things to improve himself – including joining school. Previously, he told the Court, that he could neither read or write. He told the Court that he has fully reformed. If given another chance, he would never be a criminal again.

8. To demonstrate his reform credentials, the 1<sup>st</sup> Appellant told the Court that in Prison he is now a teacher. He teaches Classes 1-4. Finally, he told the Court that he has two wives and four children. He hopes to get a second chance to go back home and take care of them.

9. The 2<sup>nd</sup> Appellant also told the Court that he accepts they committed the offence; that he is remorseful and begs for forgiveness. He also

said that he joined school in Prison and studied all the way to Standard 8. Saying that he is remorseful, he asked for leniency. If released he would never engage in criminal activities again, he promised.

10. Mr. Chigiti argued that there are serious aggravating factors in this case. He enumerated the following:

- a. The Appellants were members of a gang. There were at least 6 robbers.
- b. They used crude weapons – pangas and a metal pipe
- c. They mercilessly assaulted two victims. One of them sustained a deep cut on the head.
- d. The Appellants were habitual criminals. They faced two counts of robbery with violence. Mr. Chigiti argued that they were determined to continue with their heinous actions. He was convinced that the Appellants have not put in any evidence that they are reformed. He also pointed out to the Court that none of the family members were present in Court hence raising questions about the capacity for re-integration of the two Appellants if released.

11. As for appropriate sentence, Mr. Chigiti recommended that the sentence should be 30 years imprisonment.

12. I have now considered all the aggravating and mitigating circumstances as outlined above. I would agree that the following are mitigating factors:

- a. The expressed remorse by both Appellants;
- b. The efforts they have been making in Prison to educate themselves as a sign of capacity for reform.

13. As Mr. Chigiti observed, however, there are questions about the capacity of the two Appellants to re-integrate into the society. There was no indication that their families and community are ready to accept them and it is unclear that the very rudimentary education they have obtained, without any vocational training in Prison, they would easily re-integrate into a crime-free life. Further, I observed that there was no positive recommendation from Prison authorities about their characters while in Prison.

14. In addition, as Mr. Chigiti correctly pointed out, there are some substantial aggravating factors in this case:

- a. The Appellants were operating as a gang;
- b. They violently attacked and grievously harmed their victims;
- c. They were armed with dangerous weapons; and
- d. The other members of the criminal enterprise have never been arrested.

15. Taking all these factors into consideration, I find that given the weighty aggravating circumstances even when weighed against the listed mitigating circumstances, I find the need to mete out a sufficiently stiff sentence. I have considered that there were two separate counts. While I do not find that the offences should attract the death sentence which should be reserved for the rarest deviant crimes, **In my view, considering the entirety of the facts in this case, I will substitute the death sentences pronounced on the Appellants in this case. In its place, I re-sentence each Appellant to twenty-one (21) years imprisonment commencing on 07/11/2008 when the Appellants were first arraigned since they remained in custody throughout the trial.**

16. Orders accordingly.

**Dated and delivered at Nakuru this 15<sup>th</sup> day of January, 2019**

**JOEL NGUGI**

**JUDGE**