



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL PETITION NO. 3 OF 2016

TIMOTHY KARUIRU NGUGI.....PETITIONER

VERSUS

REPUBLIC.....1ST RESPONDENT

JUDGMENT

1. Timothy Karuiru Ngugi (“Petitioner”) was convicted, together with two other Co-Accused Persons, on 15/05/2006 of two counts of robbery with violence as follows:

a. That on 20/07/2004 along Njoro-Biston Road in Nakuru district within Rift Valley Province, jointly with others and while armed with dangerous weapons namely, pistols, robbed Ruth Wanjiru Muhugu of cash Kshs. 412,000/- and at or immediately before the time of the said robbery threatened to use actual violence to the said Ruth Wanjiru Muhugu.

b. That on the same day, at the same place and around the same time while armed with pistols, they robbed Daniel Chepkonga of cash Kshs. 18,000/- and at or immediately after the time of the said robbery used actual violence against the said Daniel Chepkonga.

2. The account of the violence accepted by the Trial Court and affirmed by both the High Court and the Court of Appeal was as follows. The robbery happened in broad daylight. The Petitioner was Ruth Muhugu’s regular taxi driver. He drove her to the bank where she withdrew part of the money that was robbed. While on the way to the destination, the Petitioner chose to use a different route for un-explained reasons. The Petitioner also refused to carry another passenger at Ruth Muhugu’s request for unexplained reasons. On the way, the Petitioner also kept making many phone calls. In any event, after a while, two people appeared on the road and though Ruth Muhugu told the Petitioner to turn the vehicle around to avoid them, he proceeded and then braked, then suddenly opened the passenger door where Daniel Chepkonga was seated. The two assailants then attacked both Ruth Muhugu and Daniel Chepkonga armed as they were with pistols. They used actual violence on Chepkonga and threatened to use some on Ruth. Further, the Petitioner thwarted any attempts to get the assailants because he gave the Police the wrong registration number.

3. Based on this circumstantial evidence, the Petitioner was found guilty of both counts and was sentenced to death as was mandatorily required at the time. Both the High Court and the Court of Appeal affirmed both the conviction and sentence – with the Court of Appeal holding in abeyance the second death sentence.

4. The Petitioner was given another chance to plead for a different sentence by the Supreme Court in *Francis Karioko Muruatetu & Another v Republic [2017] eKLR*. He seeks for substitution of both death penalties 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. In support of his Application, the Applicant pleaded that he has now fully reformed. In the fourteen years he has been in prison, he has earned Biblical certificates in:
 - i. Biblical Studies from AFCM International Training Centre, Africa;
 - ii. Emmaus Bible School;
 - iii. International School of Ministry.
 - iv. He has also participated in peer education training under the sponsorship of the Kenya Red Cross
9. As part of his efforts to prove his reform credentials, the Petitioner produced a glowing letter from the Officer-in-Charge, Nakuru Main Prison who writes that his character in prison has been “above reproach as evidenced by the fact that he has never committed any offence against the prison discipline.” The Officer-in-Charge also concludes that the Petitioner has “good discipline which has earned him the trust of being assigned the responsibility to be the house leader of his accommodation which holds an average of 200 inmates among other roles.”
10. The Petitioner informed the Court that he has a family and that his daughter sat for his Standard 8 exam in 2018 and that they own a family plot in Kiamunyi which he can put to good use once he is released. A Social Inquiry Report requested for by the Court reported that the Petitioner’s maternal family still resides in the Kiamunyi area and his sister and two brothers are ready to welcome him back and help him settle down in life.
11. I have considered the above mitigating factors against the following substantial aggravating factors:
 - a. First, that the Petitioner was in the company of several others with whom he was acting in cahoots.
 - b. Second, that the assailants were armed with Pistols which were never recovered.
 - c. Third, some violence was used on the second Complainant even though he was not hurt.
 - d. Fourth, the scale of the robbery was quite large giving indications that it was being done for economic gain.
12. In the present case, I have taken into consideration that the level of participation by the Petitioner seems not to have been as great as the other two Co-Accused Person. However, there is no doubt that this was still a joint criminal enterprise.
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 sentences pronounced on the Petitioner in this case. In its place, I re-sentence the Petitioner to eighteen (18) years imprisonment commencing on 19/05/2005 which is the date the charges were consolidated before the Trial Court.**
16. Orders accordingly.

Dated and delivered at Nakuru this 15th January, 2019

JOEL NGUGI

JUDGE