



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**MISC. CRIMINAL APPLICATION NO. 99 OF 2018**

**GEOFFREY KIBET KEMOI.....APPLICANT**

**VERSUS**

**REPUBLIC .....STATE**

**JUDGMENT UPON APPLICATION FOR RE-SENTENCING**

1. The Applicant, Geoffrey Kibet Kemoi, was charged together with one other person with the offence of robbery with Violence contrary to Section 296(2) of the Penal Code. The Co-Accused was acquitted for lack of evidence. The facts stated in the charge sheet are that on the 22<sup>nd</sup> day of August, 2004 at Kericho Township in Kericho District of the Rift Valley province, jointly with others not before court while armed with dangerous weapons namely pistols robbed Anthony Kiprono Mutai of a motor vehicle Registration No. KAS 681J make Toyota Corolla station wagon valued at Ksh 650,000/= and at or immediately before or immediately after the time of such robbery used actual violence thereby causing the death of the said Anthony Kiprono Mutai.

2. Evidence adduced at the trial and confirmed by the High Court and the Court of Appeal connected the Applicant with both the robbery and the brutal death of Anthony Kiprono Mutai (Deceased). The Deceased was an operator of a taxi owned by his father. The Applicant hired the taxi with his partners in crime. The body of the Deceased was later found at Chagaiki Forest. Forensic autopsy showed that the Deceased had experienced a brutal murder through strangulation using a rope. His neck was fractured and his limbs showed signs that he had been tied up. His body was found many days after the attack and was, therefore, badly decomposed.

3. After conviction, the Applicant appealed to the High Court and the Court of Appeal. Both Superior Courts confirmed the convictions and sentences.

4. However, in the wake of Supreme Court decision in *Francis Karioko Muruatetu & Another v Republic [2017] eKLR*, the Applicant has now approached this Court seeking 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. Mr. Maragia argued the Application on behalf of the Applicant. He told the Court that the Applicant is greatly remorseful; that he has spent over 14 years in custody since he has been in custody since he took plea on 8/11/2004. Secondly, Mr. Maragia informed the Court that the Applicant has substantially reformed; that he has been undertaking various courses while in prison; that he has a changed view of his role in the society. Mr. Maragia presented several short course certificates to evidence this.

9. Mr. Maragia informed the Court that the Applicant promises to be of good conduct if released; that he will not be a danger to the society. He insisted that there were no dangerous weapons which were used; that this became a case of robbery with violence because the Applicant was in the company of three others. Mr. Maragia insisted that there is no direct evidence that the Accused harmed anyone.

10. Finally, Mr. Maragia told the Court that the Applicant has physical disability; that he is now on a wheelchair and requires regular checkups. He filed a letter form a doctor on the Applicant's disabilities.

11. On his part, Mr. Chigiti, Prosecuting Counsel, submitted that there are several aggravating circumstances. According to Mr. Chigiti, they included the following three:

- a. That the Applicant was part of a notorious gang.
- b. That the gang robbed the victim of the motor vehicle and subjected him to a lot of cruelty: the victim was strangled and his body dumped in a forest.
- c. That the Applicant and his colleagues dealt with the victim mercilessly.

12. Mr. Chigiti urged imprisonment of 30 years in the case since death occurred as a result of robbery.

13. Mr. Maragia resisted the characterization that the Applicant was a member of a notorious gang. There was no evidence, he insisted, to show that this was a gang. He also insisted that there was no evidence to show that the Applicant in person harmed the victim.

14. A point of convergence between the Applicant and the Prosecution is that the death penalty would be disproportionate in this case. The death penalty is reserved for the most heinous aggravated robberies. This was not one such. The task now is to determine the appropriate prison term for the Applicant in this case.

15. I have taken into consideration the mitigating circumstances: that the Applicant is a first offender; that he is remorseful; that he now suffers from disability; that he has shown signs of reformation while in prison. However, I noted that the Applicant had no reference or recommendation letter from the Prison authorities.

16. On the other hand, I have taken into consideration the aggravating circumstances in this case: The leading and most egregious aggravating circumstance is that the victim's life was lost in the course of this robbery. It is no answer for the Applicant to say that there is no evidence that he did not directly inflict harm on the Deceased victim. Indeed, that is a callous response that detracts from his claim that he is remorseful. The fact of the matter is that the Applicant was in a joint enterprise with the other robbers and as a result of their criminal activity a life was lost. The Applicant is as guilty of the murder of the victim as the colleague who tightened the noose to strangle the victim.

17. Second, despite Mr. Maragia's protestations, there is ample evidence in the trial court record to show that the Applicant was a member of an organized gang and that this was a well-planned criminal activity. These are substantial aggravating circumstances.

**18. In view of these seriously aggravating circumstances, after taking into consideration the mitigating circumstances, I sentence the Applicant to twenty-five (25) years imprisonment. The prison term will be computed commencing on 08/11/2004 when the Applicant was first arraigned in Court.**

19. Orders accordingly.

**Dated and delivered at Nakuru this 7<sup>th</sup> day of March, 2019**

.....

**JOEL NGUGI**

**JUDGE**