



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. CRIMINAL APPL. NO. 56 OF 2018

GEOFFREY KIPKEMOI TUIYA.....1ST APPLICANT

BENARD TANUI.....2ND APPLICANT

HILLARY KIPNGENO.....3RD APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT UPON APPLICATION FOR RE-SENTENCING

1. The Applicants are Geoffrey Kipkemoi Tuiya; Benard Tanui; and Hillary Kipngeno. They were jointly charged and convicted at the Nakuru Chief Magistrate's Court of a single count of the offence of robbery with violence contrary to section 296(2) of the Penal Code. The conviction came after a fully-fledged trial.
2. The Applicants were each sentenced to suffer death as was compulsorily stipulated by the law at the time.
3. The convictions and death sentence were confirmed by both the High Court and the Court of Appeal.
4. The Applicants have 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**. They seek for substitution of the death penalty they 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. During the hearing, Mr. Maragai appeared for the three Applicants. He submitted that the Court should consider that at the time of the conviction, each of the three Applicants were first offenders. Further that they are remorseful for their actions. He submitted that they have been in custody since 2006 since they were not granted bond.
9. Mr. Maragia further submitted that the Applicants were young men when they committed the offence; that they are now fully reformed; that they have taken advantage of opportunities in Prison to develop their technical capacity and knowledge. Mr. Maragia thought that a prison term of 12 years would be sufficient to punish the offence here.
10. Each of the Applicants also addressed the Court. Each pleaded to be given a chance to go back to the society and live a crime-free life now that they are reformed. They each expressed remorse for their actions.
11. Mr. Chigiti, the Prosecutor, thought this is one case that lies “somewhere between rare and rarest.” He submitted that there are weighty aggravating circumstances in the case including the following:
 - a. That the Applicants were a gang;
 - b. That they were armed with dangerous weapons;
 - c. That they mercilessly inflicted injuries on the complainant and then left him for the dead.
12. Mr. Chigiti submitted that based on the facts of this case, the Applicants should be imprisoned for no less than thirty years.
13. I have considered the circumstances in which the offence was committed. They are rehashed in each of the three judgments by the various tiers of Courts. There is no dispute about the facts. The three Applicants waylaid one Peter Waweru Mbutia as he went home from his shop. He was carrying his 6-years old daughter on the bicycle. His wife, Josephine Wanjiku, walked behind them. The 1st Applicant had been an employee of the Complainant. He had previously stolen money from him but they had resolved to settle it out of court. Instead of the resolution, the 1st Appellant responded by organizing the revenge heist on 10/10/2006. The attack took place near the Complainant’s house. The assailants had hidden rungs in their jackets. They unleashed them as the 6-year old daughter and wife of the Complainant fled for dear life. The Complainant attempted to flee as well. He was not as lucky. After the initial attack, he ran off but as he attempted to open the gate to his landlord’s house, he was cornered by the assailants. They continued to clobber him with rungs until he lay prostrate on the ground, lifeless and unconscious.
14. The Complainant was admitted to War Memorial Hospital for three days before he was transferred to Kijabe Hospital. The Assailants had also made off with the money he had and his phone.
15. There is no question that the attack on the Complainant was brutal and blood-chilling. The attackers showed a savage appetite to inflicting harm on the Complainant. The attack was committed in an especially heinous, cruel and depraved manner: it went beyond robbery; the Applicants were intent on either killing the Complainant or inflicting grievous harm.
16. There are other seriously aggravating factors in this case. First, the offence was committed in the presence of a young child of only six years old. This child had to endure the trauma of seeing her father clobbered to what might have seemed to her to death. There is no question that the event will haunt her for a long time. Additionally, the Applicants acted in concert, as a group, to further the criminal objectives of the gang. Lastly, I have treated as an aggravating circumstance that the Applicants laid in wait for their victim, having carefully planned the attack.
17. I have considered the extenuating circumstances raised by the Applicants. In particular, I have considered their expressed remorse which I felt were genuine and sincere. I have also taken into account that they are first offenders. Finally, I have given them credit for their efforts to reform and rehabilitate themselves. I have looked at the various certificates presented which demonstrate that each of the three has now attained certification in vocational training in welding.
18. However, as outlined above, the aggravating circumstances in this case far outweigh the extenuating circumstances. The savagery of the attack; the depravity of it; the exposure of such violence to a young child; the careful planning and orchestration by the Applicants – all point to an aggravated robbery. Consequently, a stiff custodial sentence is merited in this case.
19. **In view of all the above, while I have formed the view that the death penalty would be a disproportionate sentence in the circumstances, and I hereby substitute it with a prison term, I find that the prison term which balances the mitigating and aggravating circumstances and takes into account the essential nature of the charged crime – robbery with violence – is a prison term of twenty five (25) years. Consequently, I sentence each of the three Applicants to twenty-five years imprisonment. The prison term shall be computed beginning on 07/12/2006 when the Applicants were first arraigned in Court.**
20. Orders accordingly.

Dated and delivered at Nakuru this 7th day of March, 2019

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JOEL NGUGI

JUDGE