REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

MISC. CRIMINAL APPLICATION NO. 63 OF 2018

ROBERT KARIUKI WACHIURI.....1ST APPLICANT

TIMOTHY GACHICHIO THIKA.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT UPON APPLICATION FOR RE-SENTENCING

1. The two Applicants, Robert Kariuki Wachiuri (1st Applicant), and Timothy Gachichio Thiga (2nd Applicant), were jointly charged with two counts of robbery with violence contrary to section 296(2) of the Penal Code and two counts of being in possession of a firearm without a firearm certificate contrary to section 4(1) as read together with section 4(3) of the Firearm Act (Chapter 14 of the Laws of Kenya).

2. The Applicants were arraigned before the Narok Senior Principal Magistrate's Court on 09/07/2007 and pleaded not guilty to all the charges. A fully-fledged trial ensued. The Magistrate's Court found them guilty of all the offences. They appealed to the High Court which affirmed the convictions in the counts of robbery with violence but acquitted them of the two counts of being in possession of a firearm illegally. The Court of Appeal affirmed the decision of the High Court.

3. 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.

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 ***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 adviced 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.*

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

7. Evidence from the trial and confirmed on appeal revealed as follows. The two Applicants, together with others, attacked Abdi Yusuf's wholesale town in Narok town on 24/06/2007. They were armed with an AK47 and two pistols. They threatened to shoot Yusuf and his

workers as they robbed. The stole at least Kshs. 250,000/-.

8. Shortly after robbing Yusuf, the two Applicants and their gang, attacked Kennedy Momanyi Mose and stole his motor vehicle, a taxi, Registration No. KAQ 166K. They did this after threatening to shoot him. They blindfolded him and threw him to the back to the vehicle.

9. The two Applicants were arrested by the Police after the Police pursued the robbers after noticing Kennedy Momanyi Mose in an abandoned vehicle and noticing the Applicants and others leaving the motor vehicle in suspicious circumstances. The Police ordered the Applicants and their colleagues to stop. Instead, they drew their arms and a shoot-out ensued. The robbers managed to escape in a gate-away vehicle. Unfortunately for them, the get-away motor vehicle got a puncture after a short chase forcing them to abandon it and flee on foot. Eventually, the two Applicants were arrested and charged: The 1st Applicant was arrested immediately after he boarded a matatu which was intercepted by the Police. He then led the Police to the 2nd Applicant. The guns used for the robberies were also recovered.

10. Both Applicants requested the Court to set aside the two death sentences imposed on them and, instead, give them a term-sentence.

11. The 1st Applicant told the Court that he regretted his actions. He conceded that they had hired a care and got weapons with the plan to commit robberies in Narok. He admitted to both robberies. He said he was remorseful. He told the Court that if released, he will use his life as a cautionary tale to warn young people against life of crime.

12. The 1st Applicant told the Court that while in prison he has had plenty of opportunity to reflect on his life. He said he is now a changed person. He presented a certificate to show that he has done bead work and bead design vocational training in prison. He will rely on these skills, he said, to support himself if and when he is released from prison.

13. In similar vein, the 2nd Applicant sought the Court's mercy. He said that he has now fully reformed; that he is a "saved" Christian. He is remorseful for his actions which, he said, were caused by greed. He had been given a pick-up by his brother to use for business – but greed led him to a scheme to get money quicker.

14. The 2nd Applicant says that he has had time to reflect on his life. He accepted Christ and was baptized in 2010. He has also done Diploma in Theology. He joined SDA Church in Prison and became an Elder. He produced a letter of reference from the Naivasha maximum prison SDA Chaplaincy. He also produced certificate for "celebrate recovery training." He said he is remorseful; that he has accepted his mistakes and repented.

15. Finally, he asked the Court to consider that they were first offenders and that he has a family: a wife and two young children.

16.The Prosecution Counsel, Mr. Kemo, was of the view that the case was not fit for re-sentencing. The circumstances are aggravated, he argued. The 1st complainant was attacked by 6 armed men. One had an AK-47 and two had 2 pistols. That the 1st Complainant had employed 7 people who because of the fear lay down as they emptied the cash box and the robbers stole Ksh 250,000/= and made off with vehicle they had stolen from PW3. Mr. Kemo argued that the robber exchanged fire with the Police as they escaped endangering the lives of the public. Although no one was injured, lives could have been injured, he argued.

17. Mr. Kemo argued that while it is true that the two Applicants are on the correct path in prison, they stand to benefit from rehabilitative services in prison. That system works, he said. He recommended that the Applicants should remain in Prison and await for power of Mercy committee when they are fully reformed.

18. I have now carefully considered the Application, the mitigation by the Applicants and the State's response. I have accepted that the Applicants are remorseful. I have also accepted that they are reformed and possibly on their path to full reformation. They are also first offenders. Finally, I have considered that they did not gratuitously use violence during the committal of the offences.

19. On the other hand, I have considered the following aggravating circumstances:

a. The robberies were committed by an organized gang;

b. The assailants were armed with dangerous weapons: multiple guns – an AK 47 rifle and two pistols;

c. One of the guns used is an assault weapon with a capacity to cause multiple fatalities;

d. The robbers engaged the Police in a shoot-out in a public area where many innocent members of the public could have been killed or injured; and

e. The robbers involved intricate planning.

20. Considering all these factors and circumstances, I am persuaded that the crimes committed were very serious and aggravated. However, I do not accept, as Mr. Kemo suggested, that the crimes committed here are in the rare category of heinous crimes for which the death sentence is reserved. It is especially important to point out that the Applicants resisted using force on their victims despite the fact that they were heavily armed. As a result, no one was physically injured during both attacks.

21. In the circumstances, I do not think the death sentence is warranted in the specific circumstances of this case. At the same time, I think a stiff custodial sentence is indicated in the circumstances. Imprisonment for twenty one (21) years would, in my view, meet all the sentencing

objectives in the circumstances of this case. This is the sentence the Court will impose.

22. The upshot is the following:

a. The death sentences imposed on each of the two Applicants is hereby set aside.

b. In its place, each of the Applicants is hereby sentenced to imprisonment for a term of twenty-one (21) years for each of the two counts of robbery with violence. The sentences will run concurrently and will be computed to commence on 09/07/2007 when the Applicants were first arraigned.

23. Orders accordingly.

Dated and delivered at Nakuru this 13th day of March, 2019

……

JOEL NGUGI

JUDGE