



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

PETITION NO. 5 OF 2018

SAMSON ETYENG.....1ST PETITIONER

DAVID MBUGUA.....2ND PETITIONER

JEREMIAH MACHARIA MUNGAL...3RD PETITIONER

VERSUS

REPUBLIC..... STATE

JUDGEMENT

1. The three Applicants were arraigned before the Nakuru Chief Magistrate's Court charged with the following offences:

Count I: Robbery with Violence contrary to Section 296(2) of the Penal Code

That on the 9th day of June 2001 at Kinoru Farm Bahati, in Nakuru District of the Rift Valley province, jointly with others not before court being armed with dangerous or offensive weapons namely pangas, runigus and iron bars robbed HASSAN FAR 30 litres stamp chemical, Hussar chemical 30 litres, captrace chemical 18 litres, 2/4D chemical 10 litres, Buchtril chemical 4 – litres, 20 litres Engine oil all valued at Ksh 63,200/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said HASSAN FAR.

Count II: Burglary and stealing contrary to Section 304(2) and 27(b) of the Penal Code

That on the 9th day of June 2001 at Kinoru Farm Bahati, In Nakuru District of the Rift Valley province, jointly with others not before court broke and entered the dwelling house of ABOI KUNU HASSAN with intent to steal therein and did steal therein cash 9,665/=, 4-Trousers, brief case, a radio cassette all valued at Ksh 20,000/= the property of the said ABOI KUNU HASSAN.

2. The 2nd and 3rd Applicant also faced an alternative charge of handling stolen goods contrary to section 322(2) of the Penal Code.
3. After a full trial, the Trial Court found all the Applicants guilty of Count I. The Learned Trial Magistrate proceeded to sentence them to death as mandatorily prescribed at that time. The Trial Court also found all the three Applicants guilty of Count II and sentenced them to three years imprisonment. He also ordered that each of them to receive two strokes of the cane on each count and that imprisonment was to run concurrently.
4. On appeal to the High Court, the convictions were affirmed. However, the High Court held in abeyance the imprisonment and strokes of the cane upon confirming the death sentence. The Court of Appeal affirmed the decision of the High Court.
5. Having climbed the appeals ladder to its end, the Applicants resigned to their death sentence. In 2003, however, President Kibaki commuted the death sentence to life imprisonment. Then, in December, 2017, a ray of sunshine shone on the Applicants: **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** was decided by the Supreme Court. 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.
6. 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**.

7. 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.*

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

9. The Applicants have now approached this Court seeking for substitution of the death penalty they received with a prison term.

10. The circumstances of the robbery and burglary are detailed in the three judgments of the three levels of the Court. Essentially, the three Applicants set out to steal from Kinoru Farm. In the course of doing so, they confronted the watchman to the farm and threatened to harm him. The watchman ran away and entered into a neighbour's house. The Applicants went there and threatened to harm the watchman and the owner of the house he had sought refuge in if they dared come out. They proceeded to loot goods from the farm and from the house of the complainant in the burglary count.

11. In mitigation, the 1st Applicant told the Court that he now "humbly" accepts responsibility for his actions. He conceded that he participated in the robbery. He told the Court that he is now a changed man; that he became a Christian in prison. He produced letters from his church to demonstrate this. He also has Certificates and Diplomas in theology.

12. The 1st Applicant has also done welding up to Grade 1. He told the Court that he participated in making seats for parliament. He has done so well in terms of rehabilitation that he is now a "trustee" in prison – at Naivasha Prison. Lastly he said he wished to say that it was true he committed the offence. He said he now accepts responsibility; but that he is now fully reformed with his training and skills. As such, he will never have to go back to a life of crime. He therefore asked for a lenient sentence.

13. The 2nd Applicant also told the Court that he was grateful for the opportunity to plead for a term prison. He said that he had now realized that he was a "foolish man" to have participated in this crime.; that he now fully reformed. He said that he learned new skills in prison. He produced certificates in Grades III, II and I in Carpentry and joinery. He produced certificates from NITA to prove this.

14. The 2nd Applicant stated that he has also sought refuge in church. He produced letters from the church attesting to his commitment. He said that he has prayed to God for forgiveness; that he has accepted responsibility for his actions; and that he has had a chance to reflect on his actions while in Prison. He pleaded with the Court to give him a change to and be a father again to the two children he left when they were seven and eight years old respectively.

15. In the same vein, the 3rd Applicant expressed gratitude for the opportunity to mitigate. He also admitted to committing the offence. He too, he said, has fully reformed while in Prison. He said he has taken the opportunity in Prison to learn new skills which he hopes to use when he comes out. He has undertaken skills training in upholstery and he produced a certificate to demonstrate it. He also said that he has just started skills training in electrical mechanics. He begged for an opportunity to go back and rejoin the family to take care of them and be a father again.

16. Mr. Omutelema, Learned State Counsel, said that he left it to the Court to make a determination in the matter.

17. According to the *Judiciary Sentencing Policy and Guidelines* (See para. 4.1), a Court imposes a sentence on an offender for one or more of the following purposes:

- a. To ensure that the offender is adequately punished for the offence;
- b. To deter the offender or other people from committing the same or similar offences;
- c. To protect the community from the offender;
- d. To rehabilitate the offender;
- e. To denounce, condemn or censure the conduct of the offender;

f. To restore justice and relations by making the offender accountable for his or her actions and to recognize the harm done to the victim of the crime and to the community.

18. Arising from these purposes, a number of principles underpin the sentencing process and must be borne in mind in crafting an appropriate sentence in a given case. They include the following three:

- a. *Proportionality*: that the overall punishment must be proportionate to the gravity of the offending behaviour;
- b. *Parsimony*: that the sentence must be no more severe than is necessary to meet the purposes of sentencing;
- c. *Parity*: the principle that similar sentences should be imposed for similar offences committed by offenders in similar circumstances

19. Ultimately, as many courts have pointed out, the fundamental and immutable principle of sentencing is that the sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed and the circumstances of the crime committed.

20. Looking at the circumstances of this case, I am persuaded that:

- a. The Applicants were first offenders;
- b. The offence, while heinous, did not involve any use of force and the Applicants did not hurt any of the victims. In the course of the robbery, the Applicants threatened but did not use violence on the victims. I therefore believe that the three Applicants have been adequately punished for the offence they committed;
- c. The more than eighteen years the Applicants have been in custody readily serves the deterrence function as well as the parity function;
- d. The glowing recommendation letters from Prison authorities, the demeanour of the Applicants and their representations before me have persuaded me that the Applicants are no longer a danger to the society and that they have reformed;
- e. Each of the Applicants have undertaken a number of vocational and skills training which will serve them well after life in custody;
- f. The Applicants are remorseful for their actions and their remorse seemed genuine;
- g. The society has already has already sufficiently denounced the offence through the seventeen years of the Applicants being in custody;
- h. Each of the Applicants' families have shown a willingness to accept them back and re-integrate them into the society; and
- i. The only aggravating circumstance in this case is that the Applicants acted in concert with each other hence forming an organized gang.

21. I am therefore persuaded that no useful purpose will be served by the continued incarceration of the three Applicants. The Applicants are sufficiently rehabilitated. It is time for them to go home. I therefore substitute the death sentence imposed on the two Applicants with a prison sentence equal to the time they have been in custody.

22. Consequently, the three Applicants shall be released from prison forthwith unless otherwise lawfully held.

23. Orders accordingly.

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

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JOEL NGUGI

JUDGE