



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**CRIMINAL APPEAL NO. 6 OF 2019**

**1. KENNEDY OTIENO DALMAS**

**2. DAN OLUOCH OTIENO.....APPELLANTS**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

***(Being an appeal on sentence arising from the conviction and sentence by Hon. R. Odenyo, Senior Principal Magistrate in Migori Chief Magistrate's Criminal Cases No. 670 of 2019 delivered on 22/01/2019)***

**JUDGMENT**

1. The Appellants herein were charged with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. They denied the offence and a trial was held where they were found guilty as charged, convicted and sentenced to suffer death. Their appeals to the High Court and the Court of Appeal were both unsuccessful.

2. Following the decision of the Supreme Court in **Francis Karioko Muruatetu & Another v. Republic (2017) eKLR** the Appellants petitioned this Court for sentence re-hearing and the Petition was allowed. They were referred to the trial court for re-sentencing which was undertaken by **Hon. Odenyo, SPM** on 22/01/2019. The trial court received submissions and a Pre-Sentence Report and eventually sentenced each of the Appellants to 20 years' imprisonment from the said 22/01/2019.

3. The Appellants were aggrieved by the sentences and appealed against the sentences claiming that the sentences were very harsh and did not take into account the period from 13/10/2010 where the Appellants have been on death row. They prayed that the sentences be reviewed accordingly. **Mr. Kimanthi**, Senior Principal Prosecution Counsel conceded that indeed the period from the time the Appellants were convicted ought to have been taken into account in the re-sentencing.

4. The Court in the case of **Wanjema v. Republic (1971) EA 493** laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

5. I have considered all the issues in this matter and noted that the sentencing court took into account all the relevant issues including calling for a Pre-Sentence Report. I however find that the court, with tremendous respect, erred in not taking into account the period the Appellants were held on death row. To that end, the appeal succeeds and the order that the sentences of 20 years' imprisonment shall start running from 22/01/2019 is hereby set-aside. It is hereby ordered that the sentences of 20 years' imprisonment shall instead run from 13/10/2010 when the Appellants were first sentenced before the trial court.

6. Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 14<sup>th</sup> day of May 2019.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open Court and in the presence of: -**

**Kennedy Otieno Dalmas and Dan Oluoch Otieno the Appellants in person.**

**Mr. Kimanthi Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.**

**Evelyne Nyauke – Court Assistant**