



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL PETITION NO. 53 OF 2018

GEORGE MUKOLO KHALWALE.....1ST PETITIONER

GEORGE MUKABANA INJAKHA.....2ND PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The petitioners herein were convicted of two counts of robbery with violence contrary to Section 296 (2) of the Penal Code and sentenced to death. Their appeals to the High Court and the Court of Appeal were unsuccessful.
2. The petitioners have now filed the instant application seeking for re-sentencing which has been necessitated by the Supreme Court decision in **Francis Karioko Muruatetu & Another –Vs- Republic Petition No. 15 of 2015 (2017) eKLR** whereby the mandatory death sentence for the offence of murder was declared unconstitutional. As a corollary, in the case of **William Okungu Kittiny –Vs- Republic Kisumu Criminal Appeal No. 56 of 2013 (2018) eKLR**, the Court of Appeal applied the Muruatetu decision *mutatis mutandis* to the provisions of Section 296 (2) of the Penal Code which imposes a mandatory death penalty for the offence of robbery with violence. The petitioners are seeking that the death sentences imposed on them be set aside and for the court to impose an appropriate sentence.
3. The facts of the case against the appellants were that on the 11th April, 2004 the appellants attacked the two complainants in the case and robbed them of three radio cassettes, cash of Ksh. 5,000/=, one turkey, a leather jacket, several trousers and shirts and a mobile phone. They cut the first complainant with a panga severally on the head and all over the body. He was hospitalized at Kakamega Provincial General Hospital for 6 days. The second complainant sustained several injuries on the head and back after being hit with a club.
4. The petitioners were represented by **Mr. Malala** advocate. He mitigated on behalf of the petitioners that they were arrested in the year 2004 and convicted in 2005. That they have been in prison for 14 years. He asked the court when re-sentencing the petitioners to consider the period that the petitioners have been in custody.
5. The court called for pre-sentence reports. They were prepared by a Probation Officer, Bernard Wangatia. The reports indicate that the 1st petitioner is aged 46 years and that he has a terminal illness. His wife left after the appellant was imprisoned. The 2nd petitioner is reported to be 47 years old and suffers from ulcers.
6. The reports indicate that the appellants do not have a bad record during the incarceration in prison and that they are remorseful for committing the offence. That their family members are supportive to their release and are ready to help them settle in life. That the complainant feels that the period served in prison has served the cause of justice. That she does not fear for their return as she has reconciled with their families.
7. Sentencing is a discretion of the trial court. In **Ambani Vs Republic**, the High Court stated that a sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and that the court should look at the facts and the circumstances of the case in its entirety before settling for any given sentence.
8. The Court of Appeal **Thomas Mwambu Wenyi Vs Republic (2017) eKLR** cited the decision of the Supreme Court of India in **Alister Anthony Pereira Vs State of Maharashtra** at paragraph 70-71 where the court held the following on sentencing:-

“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for

the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.

9. In **Francis Karioko Muruatetu & Another –Vs- Republic (Supra)** the Supreme Court stated the following guidelines as mitigating factors in a re-hearing sentence for the conviction of a murder charge:-

(a) age of the offender;

(b) being a first offender;

(c) whether the offender pleaded guilty;

(d) character and record of the offender;

(e) commission of the offence in response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender and

(h) any other factor that the court considers relevant.

These factors are also applicable in a re-sentencing for the offence of robbery with violence.

10. Mr. Malala cited the case of **Douglas Muthaura Ntoribi –Vs- Republic, Meru High Court Misc. Criminal Appeal No. 4 of 2015** where Chitembwe J. considered that the robbers were armed with a panga and stole a paltry Ksh. 500/= and that the victim sustained minor injuries as a result of which the death sentence was substituted with a prison term of 15 years.

11. The advocate also referred to the case of **Benjamin Kemboi Kipkone –Vs- Republic (2018) eKLR** where 3 robbers armed with an AK 47 rifle robbed the complainant of Ksh. 250,000/= and a mobile phone and Chemitei J. substituted the death sentence with 20 years imprisonment.

12. He further cited the case of **Paul Ouma Otieno –Vs- Republic (2018) eKLR** where the accused being armed with an AK 47 rifle and a kitchen knife robbed the complainant of Ksh. 450,000/= and 3 mobile phones. Majanja J. substituted the death sentence with 20 years imprisonment.

13. In **Wycliffe Wangugi Mafura –Vs- Republic Eldoret Criminal Appeal No. 22 of 2016 (2018)** the Court of Appeal imposed a sentence of 20 years imprisonment where the appellant was involved in robbing an Mpesa shop agent with the use of firearm.

14. Section 333 (2) of the Criminal Procedure Code requires a sentencing court to consider the period spent in custody awaiting trial.

15. I have considered the principles of sentencing set out above. I have considered that the petitioners have been in custody for 15 years since the time of their arrest. They were young men when they were arrested but they are now approaching middle age. They are reported to be remorseful for committing the offence. The complainant has reconciled with their families. In view of the favourable pre-sentence reports and the fact that the petitioners have served nearly 14 years in prison, I am of the view that the time served is sufficient punishment. The sentence of death is therefore set aside and substituted with the time already served. The petitioners are to be released from prison custody forthwith unless lawfully held.

Delivered, dated and signed in open court at Kakamega this 13th day of June, 2019.

J. NJAGI

JUDGE

In the presence of:

Mr. Malala for petitioners

Mr. Ngetich for respondent

Petitioners - present

Court Assistant - George

14 days right of appeal.