



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISC. CRIMINAL APPLICATION NO. 1 OF 2018 AND NO. 18 OF 2018 (CONSOLIDATED)

GEOFFREY NAKHAMI WESONGA.....1ST PETITIONER

MICHAEL ODHIAMBO AJUOGA.....2ND PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The petitioners herein were convicted in Count 1 of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code and sentenced to suffer death. In Count 2 the 1st appellant was convicted of the offence of simple robbery contrary to Section 296 (1) of the Penal Code whose sentence was left in abeyance. The appeals by the petitioners 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 CA 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 sentence imposed on them be set aside as the same has been declared unconstitutional and for the court to impose an appropriate sentence.

3. The facts of the case against the appellants were that on the 7th December, 2004 while armed with two pistols they robbed one Rasiklal Kantilal Haria of Ksh. 30,000/=, a motorolla mobile phone, a golden necklace and two finger rings all valued at Ksh. 74,000/=.

4. The 1st petitioner was represented in this petition by **Mr. Malala**, advocate. The 2nd petitioner was unrepresented.

5. Mr. Malala mitigated that the 1st appellant was arrested on 7th December, 2004 and convicted in the year 2009 after a lengthy and delayed trial. That he has been in custody for 14 years. That the appellant was a first offender when he committed the offence. That he has a wife and children. That two of the children are at university while the third one is at high school. That his wife is not employed. That the appellant was a teacher and the breadwinner of the family. That locking up the appellant is effectively imprisonment to his wife and children who all depended on him. That he lost two brothers and a sister while in prison who left behind 4 children who would benefit from his care as there is nobody else to take care of them. Further that he has been an exemplary prisoner who has used his skills as a teacher to assist other prisoners in numerous ways. The advocate pleaded with the court to make a finding that the period that the petitioner has been in custody of 14 years is sufficient punishment.

6. The 2nd petitioner mitigated that he had a young family with two children at the time that he was sentenced. That one child died when he was in prison. His wife got married. The other child was left under the care of his elderly parents. That he has had a terminal illness in prison. He produced documents to show his illness.

7. The court called for pre-sentence reports that were prepared by Bernard Wangatia, Probation Officer Kakamega Central. The report in respect of the 1st appellant gave some further information to what was stated by his advocate in mitigation. The 1st appellant was reported to be aged 52 years and that his wife is a teacher. The report adds that the first born son works in Qatar while the second born is at Jaramogi Oginga University and the third born has completed form 4 and is waiting to join college though fees is the challenge.

8. The report for the 2nd appellant indicates that he is aged 41 years. That he has been in prison for 15 years since the time of his arrest. He does not have a bad record in prison. That he suffers from a condition called hypogilacimia (a sugar deficiency condition) that is controlled by continuous intake of glucose. That he has a grown up son who has finished form 4 and is waiting to join college. That the offender is remorseful for the offence that he committed. That his family is ready to facilitate his rehabilitation and resettlement.

9. Both reports indicate that the petitioners' community is not opposed to their release since the offence in question was committed far away from home. The reports recommend leniency in sentencing.

10. 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.

11. 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.

12. 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 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.

13. 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.

14. 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.

15. 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.

16. 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.

17. I have considered the mitigating and the aggravating factors in this petition. The appellants have been in custody for a period of 14 ½ years from the time of their arrest. The appellants committed a serious offence which was aggravated by the fact that they were armed with pistols with which they threatened the complainant with. I am however of the considered view that the circumstances of the case does not warrant a death sentence. The death sentence imposed on the appellants is set aside.

18. I have considered all the circumstances of this case and the sentences imposed in the above cited authorities where the convicts were armed with guns during robbery. Though the pre-sentence reports are favourable for the release of the petitioners I am of the considered

view that they should all the same pay in full for the offence that they committed. I sentence each of the petitioners to a prison term of 15 years commencing from the date of sentence by the lower court.

For clarity, the sentence on the 1st Petitioner for the offence of simple robbery is deemed to have been served.

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 1st petitioner

Mr. Ng'etich for respondent

Petitioners - present

Court Assistant – George