REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. CRIMINAL NO. 14 OF 2018

SAMUEL KIRATO MBECHE.....1ST APPLLICANT

ROBERT KIMOTAI RONO .....2ND APPLLICANT

VERSUS

REPUBLIC .....STATE

JUDGMENT UPON AN APPLICATION FOR RE-SENTENCING

1. The two Petitioners, Samuel Kiratu Mbeche and Robert Kimutai Rono (hereinafter "1st Petitioner" and "2nd Petitioner" respectively) have approached the Court with a Petition containing two prayers as follows:

> *1) That the sentence of death meted upon and commuted to life imprisonment under the charges of Robbery with violence under the outlaw section of 296(2) of the penal code is in consistent with articles 50 (1) (2) (b) (p) s(a)(b) 25(a) 26(1) 27 (1) 28, 29(a) (d) (f) and articles 19(a) (2) (3) of the Constitution of Kenya and the outlaw Section 296(2) of the Penal Code have grossly subjected the Petitioners into parches and inexpressible condition and undesirable state of life.*
>
> *2) That the sentence of death meted upon and now life imprisonment charged under the outlawed section of 296(2) of the Penal Code is utterly arbitrary inhuman, cruel and extremely excessive given that the order of the president of commuting the death sentence to life imprisonment was not guided by the court of law considering to the fact that there is no indefinite sentence or natural sentence in the Constitution of Kenya hence the sentence is consistent with the principles of the Constitution that the sentence of death imposed upon the petitioner under the outlaw Section of 296(2) of the Penal Code if will be gross injustice and contravention of the order of the Supreme Court to continue confining or held the petitioner in custody serving the sentence which it's been declared null and void to continue with the confinement of the petitioner in imprisonment is gross violation of articles 47 (1) (2) of the Constitution.*

2. The two Petitioners were charged together with two others at Kericho Principal Magistrate's Court with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The Petitioners' two Co-Accused Persons were acquitted at the conclusion of the trial but the two Petitioners were convicted and were each sentenced to suffer death in the manner authorized by law. Their respective consolidated appeals against conviction and sentence to the High Court and the Court of Appeal were dismissed.

3. The Petitioners have now approached this Court to exercise its original jurisdiction to re-sentence them following the recent decision in ***Francis Karioko Muruatetu & Another v Republic [2017] eKLR***. 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. In essence, the Petitioners seek the substitution of the death penalty they received with a prison term. They both hope that after due analysis the Court will conclude that the time served in custody is sufficient punishment for the offence committed given the circumstances in which it was committed.

8. To determine whether the Application is meritorious and to what extent, the Court must look at the circumstances surrounding the commission of the offence, the circumstances related to the victims of the offence as well as the circumstances related to the Applicant himself.

9. The Petitioners were convicted of violently robbing Mrs. Jane Rono. The circumstances were as follows. Mrs. Rono is a Children's Officer. She is currently the Country Director of Children Services in Kericho County. Mrs. Rono had just lost her husband around May, 1995. She had organized for a function at which some money was raised. Apparently, the rumour spread that she had money in the house following the function. On the night of 9th and 10th May, 1995, while Mrs. Rono and her family was in her house with her family and two relatives who had come to console her. At about midnight, a group of people broke into the house using a large rock. The assailants were armed with pangas. They ordered Mrs. Rono's brother-in-law who had woken up following the commotion to go back to his room. One of the Assailants went to Mrs. Rono's room and demanded for money. She gave them the Kshs. 8,000/- which she had. They later escorted her to the children's room where they covered her and her children with blankets.

10. The assailants proceeded to ransack the house as they went on a robbery spree. In the end, they made off with the Kshs. 8,000/-; two blankets; four men suits; two bed covers; two curtains; one shirt; two bed sheets; twenty eight tale clothes; three pillow cases; four pairs of shoes; one pair of rubber shoes; one hurricane lamp; one sweater; one blouse; two pressure lamps; 28 spoons; 7 sufurias; six plates; one Samsung TV; one handbag; twn mugs; one radio cassette; one Seiko watch; and two thermos flasks.

11. Evidence adduced at the trial and confirmed on appeal at the High Court and the Court of Appeal established that the two Petitioners were among the assailants. Indeed, Mrs. Rono identified the 2nd Petitioner.

12. During the hearing of the Petition for re-sentencing, both Petitioners orally submitted. They also called two witnesses on their behalf. The second witness was an unusual one: the victim of their crime. The self-same Mrs. Rono who the Petitioners terrorized about twenty-four years ago agreed to come to Court to testify on their behalf. Her message was simple: she and her family had whole-heartedly forgiven the two Petitioners. The family wanted the Court to consider releasing the Petitioners so that they can go back to their families. Mrs. Rono reported that the family of the 2nd Petitioner had undertaken two visits to her family home to seek reconciliation on behalf of the 2nd Petitioner. She reported that the 2nd Petitioner has been in touch with her and has promised to go for a third reconciliation visit if he is ever released from Prison. Mrs. Rono pleaded with the Court to determine that the time served was sufficient punishment for the two Petitioners.

13. That, too, was the plea by Rev. Joseph Birgen. Rev. Birgen is a pastor in Mr. Zion 7th Day Church of God. He is also the 2nd Petitioner's first cousin. He testified that he is the one who "mediated" the reconciliation between the Petitioners and Mrs. Rono. He told the Court that he chose to do this after he realized that the two Petitioners were fully reformed. They each had repented and asked for forgiveness. Rev. Birgen also informed the Court that the family of the 2nd Petitioner had fully embraced him and was ready and willing to support him if and when he is released from Prison. Indeed, he confirmed that the family had demarcated some land with coffee bushes for him. He informed the Court that his wife and his now adult three children were eagerly awaiting his return.

14. On his part, the 1st Petitioner told the Court that he was fully reformed. He told the Court that he had now learnt that crime does not pay; that he was barely 26 years old when he committed the offence. He will never commit crime again if released; that he had learnt his lesson in the 24 years he has been in Prison. He said that he was very remorseful. The 1st Petitioner informed the Court that in Prison he has been a model inmate: he has done trainings in carpentry, tailoring, and dressmaking. He begged forgiveness from Mrs. Rono (who was present in Court), the Court and the Society. He said he was ready for civilian life.

15. Similarly, the 2nd Petitioner begged for forgiveness and conveyed his remorse for the robbery. He readily admitted that he committed the offence. He told the Court that he has now fully reformed. He produced a certificate to show that he is now certified in carpentry. He begged for an opportunity to re-join his family.

16. Both Petitioners begged the Court to consider the twenty-four years they have been in Prison sufficient time for the crime committed.

17. Mr. Chigiti, the Prosecutor, agreed that the circumstances of the offence did not warrant the death penalty. However, he did not think the twenty-four years the Petitioners were in Prison was enough. He told the Court that given the aggravating circumstances, the Court should impose a prison sentence of no less than thirty (30) years. The aggravating circumstances mentioned by Mr. Chigiti were that the Petitioners were in a large group; and that they terrorized the Complainant for a long time.

18. I would start by agreeing that the circumstances in which the crime was committed here do not point to the need to invoke the death penalty. The death penalty should be reserved only for the worst form and most vicious of robberies. There was no evidence here that the robbery was committed in a particularly heinous, cruel or depraved manner. For these reasons, I am not persuaded that the death penalty is merited in this case.

19. 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.

20. 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

21. 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.

22. Looking at the circumstances of this case, I am persuaded that both Petitioners are remorseful; they amply demonstrated this. They are both first offenders. They were both relatively youthful when they committed the offence. Both of them presented recommendation letters from Prison Authorities which describe in glowing terms the efforts the Petitioners have undertaken to be fully rehabilitated. They each have taken advantage of their time in Prison to undertake vocational training in carpentry; dressmaking and tailoring. I am persuaded that they are fully reformed. Their capacity for reform is supplemented by the fact that their families are ready and willing to embrace them and help them re-integrate into civilian life.

23. Finally, the one unusual but astoundingly significant mitigating factor is the plea by the Complainant in this case for the Court to consider the time served as sufficient. The Complainant spoke of the efforts made by the Petitioners – especially the 2nd Petitioner and his family – to seek reconciliation and make right what had been breached by the Petitioners' conduct. In spite of her hurt, the Complainant traveled from Kericho seek mercy for her tormentors. Her heart is free; her hurt has dissipated. Her bitterness is no more; her forgiveness the key to the Petitioners' reformed life outside Prison. This is therapeutic jurisprudence in action: it is justice and healing for both the victim and the perpetrator.

24. The Complainant told the Court that twenty-four years in Prison is enough punishment for the two Petitioners. That is a powerful voice and most valid of perspectives. The Court heeds it. In the specific circumstances of this case, the twenty-four (24) years in custody has met all the sentencing objectives to be met here.

25. Consequently, taking all these factors into consideration, I have determined:

a. That the crime committed here does not proportionately call for the imposition of the death sentence. Consequently, the death sentence imposed in this case is hereby set aside.

b. In its place, there shall be a sentence of imprisonment equal to the time served.

c. Consequently, the two Petitioners shall be released from Prison unless otherwise lawfully held.

26. Orders accordingly.

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

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JOEL NGUGI

JUDGE