



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL REVISION CASE NO. 15 OF 2019

MULINGE MASWILI.....APPLICANT/OFFENDER

AND

REPUBLIC.....RESPONDENT

R U L I N G

1. This file was placed before me for Revision following a letter authored by the Officer in Charge of Prison, Kitui who sought interpretation of the order granted by **Hon. J. Munguti, PM** following re-sentencing orders.

2. **Mulinge Maswili** whom I shall hereinafter refer to as “offender” was charged with three Counts as follows:

Count 1 – Attempted Robbery with Violence contrary to **Section 297(20)** of the **Penal Code**. Particulars of the offence were that on the **15th day of August, 2004** at around **1.00 p.m.** along **Kasayani Kitui Murram Road, Mbitini Location** in **Kitui District** of the **Eastern Province**, jointly with another not before Court, while armed with a dangerous or offensive weapon namely a homemade gun, attempted to rob **Shadrack Isika Makau Kshs. 20,000/=**.

Count 2 – Being in Possession of Imitation Firearm contrary to **Section 34(1)(2)** of the **Firearm Act (Cap 114 Laws of Kenya)**. Particulars of the offence were that on the **15th day of August, 2004** at around **1.00 p.m.** along **Kasayani/Kitui Murram Road, Mbitini Location** in **Kitui District** of the **Eastern Province**, was found in possession of an imitation firearm to wit a homemade gun without a Firearm Certificate.

Count 3 – Being in Possession of Ammunitions without a Firearm Certificate contrary to **Section 4(1)** as read with **Section 4(3)** of the **Firearms Act (Cap 114 Laws of Kenya)**. Particulars of the offence were that on the **15th day of August, 2004** at around **1.00 p.m.** along **Kasayani/Kitui Murram Road, Mbitini Location** in **Kitui District** of the **Eastern Province**, was found in possession of two (2) rounds of **7.62mm** caliber ammunitions without a Firearm Certificate.

3. After being taken through full trial, he was found guilty on all Counts, convicted and sentenced thus:

Count 1 – Sentenced to hang.

Count 2 – To serve **10 years imprisonment**.

Count 3 – To serve **10 years imprisonment**.

4. Aggrieved, he appealed to the High Court which upheld the conviction and sentence save that sentences in respect of Counts 2 and 3 were ordered to run concurrently and to remain suspended in light of the capital punishment awarded for the 1st Count.

5. Dissatisfied with the decision of the High Court, he appealed, an Appeal that was dismissed by the Court of Appeal.

6. In **2017** the Supreme Court came up with the decision of **Francis Kairoko Muruatetu and Another vs. Republic, Petition No. 15 and 16 of 2015** (consolidated) where the mandatory death sentence was found to be unconstitutional.

7. Pursuant to the decision of the Supreme Court this matter was remitted to the Chief Magistrate’s Court for re-hearing of mitigation and re-sentencing.

8. Having considered the case, the trial Court presided over by **J. Munguti, PM** was of the view that the offender had been adequately punished. It rendered itself thus:

“... The accused has been adequately punished and in view of this I review the death sentence to the period already served and in addition CSO for 3 years ...”

9. He did not make any pronouncement on the sentence that was held in abeyance in respect of Counts 2 and 3.

10. I have been called upon to enquire into the correctness, legality or propriety of the order recorded by the trial Court and especially so taking into regard the Judgment pronounced by **Ojwang J. B., J.** (As he then was) and **Sitati R. N., J** on the **11th May, 2007.**

11. The concern of the Prison Authority is the term of ten (10) years that has not been served. The State through learned Counsel, **Mr. Mamba** asked the Court to consider evidence on record in reaching the decision.

12. The offender was granted the opportunity to address the Court pursuant to the provisions of **Section 364(2)** of the **Criminal Procedure Code**. He urged that the attempted robbery committed was done by use of a firearm and ammunition therefore the three offences were interdependent.

13. Facts of the case as presented were that **Shadrack Isika Makau**, a driver employed by one **Musya Syuki**, to drive motor vehicle **Registration No. KAP 439Z**, was driving the said vehicle along **Yongela Mbitini Road**, when two people emerged from bushes by the roadside and mounted a road block using a log of wood. One of the two men was armed with a homemade gun, and the two ordered **Shadrack** to produce **Kshs. 20,000/=**. He did not have the money and pleaded with the attackers to accept a lesser sum of **Kshs. 10,000/=**. **Shadrack** who was accompanied by **Evan Ngusyi Syuki** (Evan) and a loader, decided to confront their attackers. He caught hold of the man who was armed with a gun following which a struggle ensued. As they struggled he screamed for help. Members of the public responded to his screams and assisted him to subdue the armed man. When the second man saw people gathering he escaped. **Maswili** was the individual with the gun. The homemade gun was later sent to a firearm examiner, who, following his examination of it came to the conclusion that it was capable of firing, and was therefore a firearm within the meaning of the Firearms Act.

14. It is important to note that the Supreme Court addressed itself to the death penalty. The maximum penalty for the offence of Murder or Robbery with Violence contrary to **Section 296(2)** of the **Penal Code** is death but the trial Court is seized of jurisdiction to impose any other penalty.

15. In the instant case the trial Court was of the view that the Appellant serves a sentence under the Community Service Order considering the length he has been in custody. However, there were other sentences that had been suspended.

16. A Court is seized of the discretion to impose concurrent or consecutive sentences but in doing so it is guided by the law.

17. **Section 14** of the **Criminal Procedure Code** provides thus:

“(1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.

(2) In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.

(3) Except in cases to which section 7(1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences—

(a) of imprisonment which amount in the aggregate to more than fourteen years, or twice the amount of imprisonment which the court, in the exercise of its ordinary jurisdiction, is competent to impose, whichever is the less; or

(b) of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose.

(4) For the purposes of appeal, the aggregate of consecutive sentences imposed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence.”

18. In the case of **Peter Mbugua Kabui vs. Republic (2016) eKLR** the Court of Appeal stated as follows:

“As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment. It is our considered view that the exception in Section 14 (3) of the Criminal Procedure Code is inapplicable to this case in light of the provisions of Section 7 (1) of the Criminal Procedure Code. We further observe that Section 14 of the Criminal Procedure Code stipulates that for purposes of an appeal, the aggregate of consecutive sentences imposed in case of convictions for several offences at one trial, shall be deemed to be a single sentence. We take the view that given the circumstances of this case, the consecutive sentences totaling 20 years imposed on the appellant, cannot said to be excessive. In any event, as we have pointed out earlier, severity of sentence is a question of fact and this Court has no jurisdiction to consider issues of fact in a second appeal. Is the sentence illegal or unlawful” We find that the sentence was legal and lawful,

and we have no legal basis for interfering with the same.”

19. At the point of arrest, the Appellant did commit a series of offences as captured in the charge sheet. It was therefore erroneous on the part of the trial Court to make an order for the Appellant/Applicant to serve a sentence under the Community Service Orders on the 1st Count while other sentences were held in abeyance.

20. In mitigation the offender pleaded for leniency. He called upon the Court to consider the fact that he was a first offender, and has reformed such that he even offers spiritual services to other inmates.

21. I have noted the mitigation factors, and circumstances that surrounded the commission of the offence. The offender was armed with a homemade gun that was capable of firing and ammunition as he attempted to rob the Complainant while in company of another. However, he has demonstrated the ability to offer spiritual services to other people.

22. In the premises, I find it appropriate to substitute the death sentence imposed. Therefore, I quash and set aside the order of the trial Court on re-sentencing and consequently the death sentence imposed, and substitute it with a sentence of **Eighteen (18) years imprisonment**.

23. Sentences imposed on Count 2 and 3 will run concurrently with the sentence imposed on Count 1. This will be with effect from the date of sentencing by the trial Court on the 6th day of **December, 2005**.

24. For avoidance of doubt, the term of **ten (10) years imprisonment** on both Counts 1 and 2 shall be deemed to have been served.

25. It is so ordered.

Dated, Signed and Delivered at Kitui this 16th day of July, 2019.

L. N. MUTENDE

JUDGE