



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. CRIMINAL APPL. NO. 103 OF 2018

PAUL THIONGO KIMANI1ST APPLICANT

SAMUEL KAMAU KARANJA.....2ND APPLICANT

VERSUS

REPUBLIC.....STATE

JUDGEMENT UPON APPLICATION FOR RESENTENCING

1. The two Applicants herein are Paul Thiong'o Kimani ("1st Applicant") and Samuel Kamau Karanja ("2nd Applicant"). They were both convicted, together one other Co-Accused Person, on 15/05/2006 of two counts of robbery with violence as follows:

a. That on 20/07/2004 along Njoro-Biston Road in Nakuru district within Rift Valley Province, jointly with others and while armed with dangerous weapons namely, pistols, robbed Ruth Wanjiru Muhugu of cash Kshs. 412,000/- and at or immediately before the time of the said robbery threatened to use actual violence to the said Ruth Wanjiru Muhugu.

b. That on the same day, at the same place and around the same time while armed with pistols, they robbed Daniel Chepkonga of cash Kshs. 18,000/- and at or immediately after the time of the said robbery used actual violence against the said Daniel Chepkonga.

2. The account of the violence accepted by the Trial Court and affirmed by both the High Court and the Court of Appeal was as follows. The robbery happened in broad daylight. The Applicant's Co-Accused was Ruth Muhugu's regular taxi driver. He drove her to the bank where she withdrew part of the money that was robbed. While on the way to the destination, the Petitioner chose to use a different route for unexplained reasons. The Co-Accused also refused to carry another passenger at Ruth Muhugu's request for unexplained reasons. On the way, the Co-Accused also kept making many phone calls. In any event, after a while, two people appeared on the road and though Ruth Muhugu told the Co-Accused to turn the vehicle around to avoid them, he proceeded and then braked, then suddenly opened the passenger door where Daniel Chepkonga was seated. The two people are the Applicants herein.

3. They attacked both Ruth Muhugu and Daniel Chepkonga armed as they were with pistols. They used actual violence on Chepkonga and threatened to use some on Ruth. They then fled in the vehicle.

4. The Applicants were found guilty of both counts and were sentenced to death as was mandatorily required at the time. Both the High Court and the Court of Appeal affirmed both the conviction and sentence – with the Court of Appeal holding in abeyance the second death sentence.

5. The Applicants got another chance to plead for a different sentence when the Supreme Court decided *Francis Karioko Muruatetu & Another v Republic [2017] eKLR*. They seek for substitution of both death penalties they received with prison terms. 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.

6. 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*.

7. 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 advised 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.*

8. It is for this reason that I take jurisdiction to re-consider the sentence imposed on the Applicants herein following the **Muruatetu Case**.

9. In an earlier Petition (**No. 3 of 2018: Timothy Karuiru Ngugi v Republic**), I considered an Application for re-sentencing by the Applicants' Co-Accused. In that Petition, I considered the following substantial aggravating factors in the robbery here:

- a. First, that this was a criminal enterprise carried out by a gang of robbers;
- b. Second, that the Applicants were armed with Pistols which were never recovered;
- c. Third, some violence was used on the second Complainant even though he was not hurt; and
- d. Fourth, the scale of the robbery was quite large giving indications that it was being done for economic gain.

10. I will balance these aggravating circumstances against the mitigating circumstances suggested in this case. On the part of the 1st Applicant, he is now deeply remorseful for his part in the robbery. He also submitted that he has become fully rehabilitated while in Prison. He produced a recommendation letter from the Prison Authorities which is glowing in its recommendations. He also produced many certificates from various groups engaged in the training of prisoners. They include theological training, first aid; life coaching and the like. In addition, he has done training in carpentry and joinery.

11. The 1st Applicant had an unusual submission to make: he insisted that the robbery was planned between him, the Co-Accused (Timothy Karuiru Ngugi) and a third person who was never arrested. He insisted that the 2nd Applicant was never involved. Indeed, he said that he met the 2nd Applicant for the first time in remand. He had no idea how the 2nd Applicant came to be saddled with the criminal case.

12. This submission tallied with those of the 2nd Applicant. The 2nd Applicant told the Court that his was a case of mistaken identity but that he had accepted his fate. He was grateful that, at last, the 1st Applicant had agreed to tell the truth about what actually happened. He pleaded with the Court to let the years he has been in custody be enough for a crime he insists he did not commit but one he says he is no longer bitter about. The 2nd Applicant, too, has taken his time in Prison to better himself. He brought several certificates to show this. In addition, he brought a recommendation letter from a Prison Chaplain.

13. All in all, I formed the opinion that the two Applicants were truthful; and that the version they told about the events was the candid one. I also was persuaded about the remorse of the 1st Applicant and the reformation of both.

14. In previous cases, I explained the position that the appropriate entry point for sentencing for robbery with violence is fourteen years. This is because "simple" robbery under section 296(1) of the Penal Code attracts a minimum sentence of fourteen years imprisonment. It therefore seems logical that the minimum sentence for robbery with violence should be fourteen years imprisonment. This is because robbery with violence under section 296(2) is, by definition, an aggravated robbery which has been singled out by the Legislature for enhanced penalty due to the impact of the crime on the victim and the society. This position is in accord with other decisions of the High Court on this point. See, for example, decisions by Majanja J. in **Michael Kathewa Laichena and Another v Attorney General MERU High Court Crim. Pet. No. 19 of 2018 (UR)** and **John Kathia M'itobi v Republic [2018] eKLR**. An entry point of fourteen years for robbery with violence, in my view, is also appropriate for reason of uniformity and parity in sentencing.

15. Taking all these factors into consideration, I find that given the weighty aggravating circumstances, it is important for the Court to accentuate the societal denunciation for the heinous and socially damaging crime the Applicant committed: the use of multiple guns by an organized gang to commit armed robbery. A sufficiently stiff sentence will also serve the deterrence function to the extent that a custodial sentence has a signaling effect.

16. **In my view, therefore, considering the entirety of the facts, it is appropriate to substitute the death sentences pronounced on the Applicants in this case. In its place, I will impose the following sentences:**

- a. **For the 1st Applicant (Paul Thiong'o Kimani), to imprisonment of eighteen (18) years commencing on 19/05/2005 which is the date the charges were consolidated before the Trial Court.**

b. For the 2nd Applicant (Samuel Kamau Karanja), to imprisonment equal to the term already served. Consequently, the 2nd Applicant shall be released from custody forthwith unless otherwise lawfully held.

17. Orders accordingly.

Delivered at Nakuru this 11th day of July, 2019

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JOEL NGUGI

JUDGE