



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NANYUKI

CRIMINAL APPEAL NO 166 OF 2000

(Appeal from Conviction and Sentence dated 13/04/2000 in Nanyuki SRM

Criminal Case No.882 of 1999 – S.M. Kibunja, SRM)

SIMON LOKWACHARIA NAKOR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RE-SENTENCING

(Upon application in – Nanyuki HC Criminal Petition No 1 of 2018 Simon Lokwacharia Nakor – VS – A-G and DPP)

1. The Appellant herein, **SIMON LOKWACHARIA NAKOR**, was convicted by the trial court of five counts of **robbery with violence** contrary to **section 296(2)** of the *Penal Code*. He was also convicted of **braking out of a building having committed a felony therein** contrary to **section 306(b)** of the Penal Code. He was sentenced to death on each of the robbery with violence convictions. For the breaking out of a building conviction he was sentenced to one year imprisonment.
2. His first appeal to this court against the convictions and sentences was dismissed in a judgment herein dated 31/03/2006 (*Khamoni & Okwengu, JJ*).
3. The Appellant's second appeal to the *Court of Appeal* at Nyeri (*Criminal Appeal No 180 of 2006*) was dismissed by a judgment dated and delivered on 14/12/2007 (*Bosire, Waku & Onyango-Otieno, JJA*).
4. In the meantime, the Appellant informed this court, his sentences of death had been commuted to life imprisonment by executive clemency in the year 2009.
5. The Appellant then petitioned this court vide *Criminal Petition No 1 of 2018* upon strength of the decision of the *Supreme Court of Kenya* in *Petition No 15 of 2015 (Consolidated with Petition No 16 of 2015), Francis Karioho Muruatetu & Another – VS - Republic & Others, [2017] eKLR*. In its judgment dated and delivered on 14/12/2017 that apex court declared as unconstitutional the mandatory nature of the death sentence as provided for under **section 204** of the Penal Code and remitted the matter to the High Court for re-hearing on sentence only. For avoidance of doubt the court also stated that the declaration did not disturb the validity of the death sentence as contemplated under **Article 26(3)** of the *Constitution of Kenya, 2010*.
6. By parity of reasoning, the above stated declaration of the *Supreme Court of Kenya* in regard to the mandatory nature of the death sentence under section 204 of the Penal Code would no doubt apply in equal measure to the mandatory nature of the death sentence under **section 296(2)** of the Penal Code.
7. The *High Court* in its criminal appellate jurisdiction has the same sentencing powers as the trial court. See **section 354** of the *Criminal Procedure Code, Cap 75*. This court having heard the Appellant's first appeal, I consider it more expedient that this court re-sentences the Appellant, rather than remit the matter to the trial court.
8. Regarding the sentences for the five convictions for robbery with violence under section 296(2) of the Penal Code, I have considered the submissions of the learned prosecution counsel and those of the Appellant. I have also perused the trial court's record in order to understand the circumstances surrounding the commission of the offences.
9. I note that the Appellant was a member of a large gang of robbers who committed a series of robberies. There were firearms involved

although no victim was shot in the course of the robberies. However, one woman was raped. Other complainants were assaulted and seriously injured.

10. The Appellant stated to this court that he was 24 years old when he was convicted. He was single. But he was not a first offender. He admitted to a previous conviction of simple robbery under **section 296(1)** of the Penal Code for which he served a sentence of three (3) years imprisonment.

11. The Appellant also informed this court of a rather tragic personal history. He said that his single mother died only days after giving birth to him, her only child. He was brought up by his maternal grandmother and aunts. He came to know his father when he grew up. The father never took any part in raising him.

12. The trial court, when sentencing the Appellant, noted his and his colleagues' beastly conduct while they committed the robberies. I have myself noted the violence visited upon the victims during the robberies including the rape of one of them. That notwithstanding, I am not satisfied that the sentences of death were merited in this case. This is not affected by the fact that those sentences were later commuted to life imprisonment by executive clemency. Fairly long prison sentences would have served the ends of justice in this case.

13. I will therefore set aside the five (5) sentences of death imposed upon the Appellant and substitute therefor a term of imprisonment of thirty-five (35) years for each of the five convictions for robbery with violence under section 296(2) of the Penal Code. Those sentences shall run concurrently from the date of sentencing by the trial court – that is, 13th April, 2000. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 17TH DAY OF JULY 2019

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 18TH DAY OF JULY 2019