REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. CRIMINAL APPL. NO. 287 OF 2018

SIMON MAINA KARANJA.....1ST APPLICANT

WILLIAM MUGO KINUTHIA.....2ND APPLICANT

VERSUS

REPUBLIC.....STATE

JUDGMENT

1. The two Applicants, Simon Maina Karanja and William Mugo Kinuthia, were jointly charged with one another with the offence of Robbery with Violence contrary to Section 296(2) of the Penal Code. The particulars were that on the 27th day of December, 2006 at 9.00pm at Kwa Amos Trading Centre Bahati in Nakuru District of the Rift Valley Province they jointly with others not before court, being armed with dangerous weapons namely pangas, robbed Peter Kinuthia Mugo of cash money Ksh. 63,000/= and at or immediately after the time of such robbery used actual violence to the said Peter Kinuthia Mugo.

2. The Complainant in the criminal case was Peter Kinuthia Mugo. He is the father of the 2nd Applicant (William). He owned a shop in Bahati, Nakuru. Just as he was about to close it on 27/12/2006, he was accosted by a group of robbers. Among them were the two Applicants. He was able to identify the two well – since, of course, the 2nd Applicant is his own son. The gang attacked him. They injured him with a sharp object and gagged him so that he could not scream. Then, they robbed the cash and fled.

3. The initial trial at the Magistrate's Court resulted in a conviction on the charge of robbery with violence and a sentence of death. It was confirmed by the High Court and the Court of Appeal. A ray of hope was lit by the Supreme Court in ***Francis Karioko Muruatetu & Another v Republic [2017] eKLR***. He seeks for substitution of the death penalty he received with a prison term. 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.*
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> *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***. In essence, the Applicants 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.

7. 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.

8. In urging his application for review of his sentence in view of ***Muruatetu Case*** and the factors which the Supreme Court listed as important, the 1st Applicant (Simon Maina) apologized to the Complainant (who was present in Court) and to the Court and the Kenyan people. He expressed deep remorse for his actions. He told the Court that he was youthful and stupid when the crime happened; that he had learnt a lot in Prison; and that he had taken seriously the Olive Branch of forgiveness extended by the Complainant who had severally visited him and his Co-Applicant in Prison and forgiven them for their actions. He hoped that he can be given a second chance to re-join civilian life.

9. That, too, was the plea of the 2nd Applicant (William Mugo Kinuthia). It was his father, the Complainant, who showed up in Court to plead for a lenient sentence. The 2nd Applicant expressed appreciation for the forgiveness. He expressed remorse for his actions and stated that he really loved his parents and was sorry that he had deeply betrayed them. He told the Court that he was youthful and drunk when he committed the offence but he has learnt enough skills in Prison to prevent a recurrence. He was thankful to his parents for the forgiveness they had extended to him.

10. The 2nd Applicant told the Court that he is now fully rehabilitated. He completed KCPE while in Prison and has done vocational training in Prison attaining NITA Grade 1 status as a welder.

11. He begged the Court to deem the time he has spent in Prison as as sufficient stating that his family is willing to embrace him back and support him after he comes from Prison

12. The Complainant, Peter Kinuthia Mugo, also requested to address the Court. He told the Court that he has fully forgiven the two Applicants. He told the Court that he had followed their paths by visiting them in Prison occasionally and that he was persuaded that they had changed. He told the Court that a big group had come from home to show their support for the two Appllicants and indicate that they were willing to help the two as they regained a foothold in society.

13. On his part, Mr. Chigit told the Court to consider the aggravating circumstances in the case. They included, in his view, the fact that the duo prepared to commit the offence "at all costs"; they armed themselves with pangas; they attacked the complainant; and they used the panga to inflict injury to the head and the hand of the Complainant. Mr. Chigiti emphasized on the need to strike a balance between punishment and rehabilitation. And suggested 20 years as sufficient punishment.

14. 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.

15. 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.

16. 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

17. 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.

18. 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. I am also persuaded on the basis of the evidence before me that the two Applicants have reformed and are fully rehabilitated. I am also buoyed by the fact that their families are very supportive and willing to embrace and assist them as they begin post-prison life.

19. Finally, I have given due weight to the fact that the Complainant took his time to appear before the Court and urge leniency. This is, to my mind, is a great extenuating factor.

20. However, as Mr. Chigiti suggested, it is important that the Court balances the severity of the sentence and the seriousness of the offence. In this case, the offence calls for a minimum sentence of fifteen (15) 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.

21. **Taking all these factors into consideration, I find that it is appropriate to substitute the death sentences pronounced on the Applicants in this case. In its place, I will impose a sentence of fifteen (15) years imprisonment. The Prison term will be computed from 12/01/2007 when the Applicants were first arraigned in Court.**

22. Orders accordingly.

Delivered at Nakuru this 11th day of July, 2019

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JOEL NGUGI

JUDGE