IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. CRIMINAL APPLICATION NO. 72 OF 2018

LAWRENCE NKONGE MWIANDI ..... APPLICANT

VERSUS

REPUBLIC ..... STATE

JUDGMENT UPON APPLICATION FOR RE-SENTENCING

1. Lawrence Nkonge Mwiandi, the Applicant, was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code in Nakuru Chief Magistrate's Criminal Case No. 866 of 2003. The particulars of the offence were that it was alleged that on 10/11/2002, at Kenya Seed Company while armed with dangerous weapons namely electrical wires robbed Julius Kipchumba Cherono of one mobile phone – make Erickson – valued at Kshs. 12,900/-, one spectacle case valued at Kshs. 500/- and Kshs. 149,102/-in cash all valued at Kshs. 167,502/- and that he used actual violence on the Complainant during the robbery.

2. Evidence adduced at the trial showed that the Applicant was a guard at Kenya Seed Company, deployed there by Securicor Guards. On the day of the robbery, the Complainant, a Senior Manager at Kenya Seed Company, went to the Company premises to pick up a company vehicle to go to a company-sponsored event. He found the Applicant at the gate. The Complainant went to his office. He smelt some burning and went to investigate. Unbeknownst to him, that was a ruse: he was immediately accosted by robbers who bounded him and covered his face immediately. When he eventually sought assistance and reported the matter to the Police, he did not find the Applicant at the gate; but only his uniform. The Applicant was arrested three months later in Eldama Ravine.

3. On the basis of this evidence, the Applicant was convicted of the charged offence. His appeals were dismissed. The death sentence imposed on him by the Trial Court was confirmed on appeal.

4. Having exhausted his appeals options and having been given a new option by the Supreme Court in ***Francis Karioko Muruatetu & Another v Republic [2017] eKLR***, the Applicant has approached this Court with the prayer that it substitutes 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.

5. 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***.

6. 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.*

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

8. In support of his Application and prayers, the Applicant told the Court that he has now realized his mistake. In his words, when he committed the offence, he was a "fool". In Court he asked for forgiveness before God, his family and the country. He stated that the period he has been in Prison has been useful for him to get his right back on track; that he has undergone a lot of training especially on Theology to help him "overcome the spiritual foolishness [he] was suffering from." The Applicant begged the Court to allow him to go home after having served more than fifteen years in Prison and being 58 years old at present.

9. To attest to his reform, the Applicant told the Court that Naivasha Prisons Authorities have accorded him the highest level of trust by naming him a Trustee.

10. The Applicant presented no less than eight certificates on various theological and catechism courses he has completed while in prison. He also presented at least two certificates attesting to trade skills – one in tailoring and another in making household chemicals like disinfectants and liquid detergents.

11. Mr. Chigiti, the Prosecuting Counsel, conceded that there were no aggravating circumstances in the case. He also conceded that the Applicant had shown remorse and had clearly demonstrated that he was fully rehabilitated. However, Mr. Chigiti felt that the Court should substitute the death penalty with an order that the Applicant serves ten more years in prison.

12. Looking at the circumstances in which the offence was committed, I would agree with Mr. Chigiti that there are no aggravating circumstances to take this case out of the realm of the minimum sentence allowable for armed robbery. While it is true that some violence was used to bound the Complainant, the violence used was minimum and was not excessive or sadistic. There was no use of firearm. Finally, even though there was more than one robber, the manner in which the robbery was committed does not give one any sense that this was an organized gang.

13. On the other hand, the following extenuating circumstances are present here:

a. The Applicant is demonstrably remorseful – and has been consistent in that remorse;

b. The Applicant was a first offender;

c. The Applicant has demonstrated capacity for reform and rehabilitation through the various courses and trainings he has received while in prison. The Prisons Authorities have demonstrated their trust in him by appointing him a Trustee and highly recommending him as a trusted leader in prison; and

d. The Applicant has a family that is willing to take him back and re-integrate him to the society.

14. In the ***Benson Ochieng' Case***, 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 no reason to impose a sentence higher than the minimal sentence for armed robbery. I believe that the minimal sentence for robbery with violence (which is fourteen years imprisonment) would, in this particular case, serve all the sentencing objectives considering the nature of the offence; the circumstances in which it was committed; the circumstances of the Applicant; and the societal interests in denouncing the crime of robbery with violence.

16. **Since the Applicant was sentenced on 16/04/2004, I will proceed to substitute the death sentence imposed on him with a sentence equal to the time already served. Consequently, the Applicant shall be released from prison unless otherwise lawfully held**.

17. Orders accordingly.

Dated and delivered in Nakuru this 4th day of October, 2018

…….……

JOEL NGUGI

JUDGE