



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

PETITION NO. 6 OF 2018

PHILIP NZAMULI KISAVIPETITIONER

V E R S U S

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

R U L I N G

1. The petitioner was convicted by a subordinate court of the offence of robbery with violence contrary to section 296(2) of the penal code and sentenced to suffer death. His appeals to the High Court and the Court of Appeal were unsuccessful. The sentence of death has since been commuted by the president of Kenya to life imprisonment. The petitioner has filed this petition seeking a re-sentencing following the ruling of the Supreme Court in **Francis Karioko Muruatetu & another Vs Republic, petition No. 15 of 2015** where the court held that:

“(69) consequently, we find that section 204 of the Penal Code is inconsistent with the constitution and invalid to the extent that it provides for the mandatory death sentence for murder”

as a consequence of which the court remitted the said case to the High Court for re-sentencing. The case opened a widow for other persons serving sentences for capital offences to approach the High Court for re-sentencing. In **William Okungu Kittiny Vs Republic , Kisumu Criminal Appeal No. 56 of 2013**, the Court of Appeal held the following in relation to the Muruatetu case:-

“... We hold that the findings and the holding of the Supreme Court particularly in paragraph 69 applies Mutatis Mutandis to section 292(2) and 297(2) of the Penal Code. Thus the sentence of death under section 296(2) and 297(2) of the Penal Code is a discretionary maximum sentence.”

It is on this basis that the petitioner has filed the application dated 30/4/2018 seeking for re-sentencing.

2. The petitioner referred the court to several authorities where courts have re-sentenced capital offenders to reduced prison terms. In the case of **Boniface Juma Khisa Vs Republic ,Eldoret Criminal Appeal No. 268 of 2009** where the appellant had been sentenced to death for the offence of attempted robbery with violence contrary to section 297(2) of the Penal Code, the court of Appeal substituted the sentence to 5 years imprisonment .

3. In **Protus Buliba Shikuku, Kisumu High Court Constitutional Reference No. 3 of 2011 (CA)** where the appellant had been convicted of the offence of attempted robbery with violence the court substituted the sentence of death with the period served of 8 years.

4. The court was also referred to some other sentences related to robbery with violence contrary to section 296(2) of the Penal Code where courts replaced death sentences with prison terms. In **Douglas Muthaura Ntoribi Vs Republic Meru High Court Misc. Criminal Appeal No. 4 of 2015 Chitebwe J** in a ruling delivered on 18/1/2018 replaced the death sentence with a prison term of 15 years imprisonment upon considering the circumstances of the case that the robbers were armed with a panga , that only Kshs. 500/- was stolen and that the victim sustained minor injuries. The judge held that such circumstances did not call for the death sentence.

5.The court was also referred to another judgment of Chitebwe J in **Sabastian Okwero Mrefu Vs Republic, High Court Kakamega petition No. 151 of 2012** where the petitioner had been sentenced to death for robbery with violence contrary to **section 296(2) of the penal code**. The facts of the case were that the petitioner was a member of a gang that was armed with an AK47 rifle and robbed the complainant of a motor vehicle lorry. They also robbed another complainant of a matatu motor vehicle as they escaped and fired in the air as they escaped. Both motor vehicles were recovered shortly after the robbery. The learned judge considered the circumstances of the case and was of the view that the death sentence was not appropriate. He substituted the death sentence with the period already served of 8 years.

6. I have considered other sentences that were imposed by courts after the Muruatetu case. In **Benjamin Kemboi Kipkone Vs Republic (2018) eKLR** where 3 robbers armed with an Ak 47 rifle robbed the complainants of Kshs. 250,000/= and a mobile phone, **Chimitei J** substituted the death sentence with 20 years imprisonment with effect from the date of judgment.

7. In **Paul Ouma Otieno Vs Republic (2018) eKLR** where the convict was armed with an AK 47 rifle and a kitchen knife and robbed the complainant of cash Kshs. 450,000/= and 3 mobile phones , **Majanja J** substituted the death sentence with 20 years imprisonment commencing on the date of the sentence by the trial court.

6. When exercising its duty of sentencing an accused person the court is called upon to consider the set down principles of sentencing and the circumstances of the case.

In **Ambani Vs Republic**, the High Court stated that a sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and that the court should look at the facts and the circumstances of the case in its entirety before settling for any given sentence.

8. The Court of Appeal **Thomas Mwambu Wenyi Vs Republic (2017) eKLR** cited the decision of the Supreme Court of India in **Alister Anthony Pereira Vs State of Maharashtra** at paragraph 70-71 where the court held the following on sentencing:-

“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.

9. The Judiciary Sentencing Policy Guidelines lists the objectives of sentencing at page 15 paragraph 4.1 as follows:

1. **Retribution:** To punish the offender for his/her criminal conduct in a just manner.
2. **Deterrence:** To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
3. **Rehabilitation:** To enable the offender reform from his criminal disposition and become a law abiding person.
4. **Restorative Justice:** To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims, communities’ and offenders’ needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender’s contribution towards meeting the victims’ needs.
5. **Community protection:** To protect the community by incapacitating the offender.
6. **Denunciation:** To communicate the community’s condemnation of the criminal conduct.

10. The petitioner was armed with a rifle when he and other people robbed the complainant of a motor vehicle. The petitioner was arrested on 3rd October, 2003 and stayed in remand custody upto 5th October, 2005 when he was sentenced to death. He has thereby been incarcerated for a period of 15 years and has served 13 years of his sentence.

11. In mitigation the petitioner says that he was a first offender when he committed the offence. That the period of 15 years that he has been in custody is enough punishment. That he suffers from peptic ulcers and hypertension and that he is in dire need of medical attention. That he has a wife and three children. The children are in high school and university. His wife is not in salaried employment. That he lost a brother while in prison who left behind a wife and 4 children all who require his care. That while in prison he has undergone several mentorship programmes and training that has equipped him with skills and knowledge to face life outside prison.

12. Section 333(2) of the Criminal Procedure Code requires a sentencing court to take into account the period that a convicted person has spent in custody prior to the sentence.

13. I have considered the principles of sentencing stated above. I have considered that the petitioner was 26 years of age when he was sentenced and that he has served 13 years of the sentence. I have also considered that the petitioner had stayed in custody for 3 years before he was sentenced. I have also considered the seriousness of the offence in that the robbers were armed with a rifle and robbed the complainant of a motor vehicle. I have considered precedents of other judges in re-sentencing cases involving robbery with violence as indicated above. I re-sentence the petitioner to 17 years imprisonment commencing from the date of his sentence on 5/5/2005.

Delivered, dated and signed at Kakamega this 11th day of October, 2018

J.NJAGI

JUDGE

In the presence of:

.....for petitioner

Miss Tarusfor respondent

Georgecourt assistant

14 days Right of Appeal