IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL PETITION NO. 1 OF 2017

REPUBLIC.....STATE

VERSUS

SIMON NDUNG'U KINUTHIA.....PETITIONER

JUDGMENT UPON PETITION FOR RE-SENTENCING

1. The Petitioner, Simon Ndung'u Kinuthia, was charged at Molo Chief Magistrate's Court with a single count of robbery with violence contrary to section 296(2) of the Penal Code. The Petitioner pleaded not guilty and a fully-fledged trial ensued. At the end of the trial, the Petitioner was convicted of the offence of attempted robbery with violence.

2. When sentencing the Petitioner, the Learned Trial Magistrate interpreted case law to permit him to impose a sentence lower than the death sentence for a conviction under section 297(2). He, thus, imposed a custodial sentence of seven years imprisonment.

3. Perhaps not realizing his luck, the Petitioner appealed to the High Court. His appeal failed. Then it got worse. The High Court found that on the facts, the Learned Magistrate ought to have convicted the Petitioner of the offence of robbery with violence as originally charged. It therefore proceeded to quash the conviction on the offence of attempted robbery with violence and set aside the conviction. In its stead, the High Court found the Petitioner guilty of the offence of robbery with violence contrary to section 296(2) of the Penal Code and convicted him accordingly. The High Court, then, proceeded to sentence him to suffer death as the statute mandatorily required.

4. The Petitioner's appeal to the Court of Appeal was found to be unmeritorious and was dismissed – leaving the Petitioner in the death row and out of legal options.

5. Then, on 17/12/2017, a ray of hope appeared on the horizon for the Petitioner. On that day, the Supreme Court of Kenya decided ***Francis Karioko Muruatetu & Another v Republic [2017] eKLR***. In that case, the Supreme Court held that mandatory death penalty for murder is unconstitutional and struck down section 204 of the Penal Code to the extent that it prescribed mandatory death sentence upon conviction for murder.

6. While the Muruatetu Case focused on section 204 of the Penal Code (the penalty section for murder), the Court of Appeal extended the reasoning 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. Consequently, the law of the land as it stands today, therefore, is that the maximum penalty for both murder (under section 204 of the Penal Code) and robbery with violence (under section 296(2) of the Penal Code) is the death penalty but the Sentencing Court has discretion to impose any other penalty that it deems fit and just in the circumstances.

8. Based on these new developments, the Petitioner has approached this Court seeking re-sentencing. 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. 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.*

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

10. The facts of the armed robbery are crisply summarized in the Court of Appeal judgment thus:

The Complainant, Samuel Kamanjara Macharia was at the material time residing at Kenyatta Phase II in Molo town. He left his house in the morning of 6th June, 2011 to attend to personal issues and upon his return at about 11:00am, he noticed two people standing at his gate. He became suspicious of the two as there had been thefts in the area. One of the two, identified as the Appellant, pretended to be talking to somebody on the phone. PW1 passed his gate and no sooner had he done so than the two entered his compound and they struggled with the door to his house. He came back quickly and confronted them. He grabbed the Appellant and struggled with him. The two had already picked a pair of slippers and a shoe belonging to PW1's grandchild and had already placed them in a paper bag. He had left these items outside his house to dry. The Appellant's companion joined in the struggle trying to free the Appellant from the Complainant's grip and in the process, snatched the Complainant's wrist watch.

The Complainant raised alarm attracting the attention of Joseph Nthiga Mugambi (PW2) and Yabesh Ogega (PW3) who responded to the distress call. As the two approached the scene of the struggle, the Appellant's companion fled. They helped PW1 to subdue the Appellant, tied him up and then called the Police.

11. Mr. Obutu urged the Petition on behalf of the Petitioner. He submitted that the circumstances under which the offence was committed call for a lenient sentence. He submitted that the Petitioner's aim was to steal and not to commit a robbery; that he tried to escape because he feared he would be lynched by a mob. Mr. Obutu further submitted that the Petitioner was only carrying tools to facilitate his burglary and not weapons.

12. Mr. Obutu also submitted that the Petitioner was a first offender and that he has been in custody for more than six years. He is also, he submitted, fully rehabilitated having done Grade 3 course in welding. He produced the Certificate as evidence of this. Finally, Mr. Obutu submitted that the Petitioner is a family man with three children who were nine, six and two at the time of his arrest.

13. Mr. Chigiti, the Prosecution Counsel, thought that the Petitioner deserved a very stiff sentence of no less than twenty years imprisonment. He submitted that there were aggravating circumstances in the case. First, the Petitioner was not alone. Second, he was armed with dangerous weapons – namely pliers and a metal rod. Third, Mr. Chigiti submitted that the Petitioner was violent and that he ended up hurting the Complainant.

14. In reply Mr. Obutu pointed out that the injury to the Complainant was characterized by the doctor as "harm" and that it was inflicted not intentionally but in the Petitioner's bid to escape what he thought would be "mob justice."

15. In the Benson Ochieng' Case, I explained the position that the correct 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 reasons of uniformity and parity in sentencing.

16. Having established the entry point, I will, next consider the mitigating and aggravating circumstances. In the present case, the following extenuating circumstances stand out:

a. The Petitioner was a first offender;

b. The Petitioner demonstrated remorse at the time of conviction – and the Trial Court record demonstrates this;

c. The Petitioner has demonstrated capacity for reform through his skills training in electric welding;

d. The crime was not committed in a particularly violent or sadistic way and there was no gratuitous use of force;

e. The Petitioner was not armed with dangerous weapons. Given the circumstances of this case, I am not persuaded that the pliers and iron rod the Petitioner had were meant to inflict violence but rather to assist in the breaking and entering. This is because it seems clear from the facts that the Petitioner targeted houses where he thought residents were away.

17. On the other hand, I cannot find any truly aggravating factor here. The facts show that the Petitioner did not set out to harm or injure the Complainant and that the harm the Complainant suffered was in his struggle to escape. I believe the punishment for that harm is already factored in the minimum sentence for aggravated robbery since it is what raises the robbery from the realms of simple robbery.

18. **When all the factors are considered, therefore, I am persuaded that a sentence of fourteen years serves the denunciation; rehabilitative and deterrence functions of sentencing in this specific case. I therefore hereby re-sentence the Petitioner to fourteen (14) years imprisonment commencing the date of sentencing before the Trial Court that is from 26/07/2012.**

19. Orders accordingly.

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

JOEL NGUGI

JUDGE