REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

PETITION NO. 3 OF 2018

SAMWEL MUCHERU KARIUKI.....1ST PETITIONER

GEOFFREY MUGO KINUTHIA.....2ND PETITIONER

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT UPON APPLICATION FOR RE-SENTENCING

1. The two Petitioners herein were charged with and convicted by the principal Magistrate of the offence of robbery with violence contrary to section 296(2) of the Penal Code in Nakuru Chief Magistrate's Criminal Case No. 1294 of 2001. The particulars of the offence were that it was alleged that on the night of 15th June 2001 at Kampi ya Moto Scheme in Nakuru District, the Appellants jointly with others not before the Court being armed with dangerous weapons namely a somali sword, metal bars and a panga, robbed Jacinta Wairimu Njoroge (Complainant) of a video camera, Kodak Camera, an Ericsson T10S Mobile Telephone, and a sum of Kshs. 7,000/- and at or immediately after the time of such robbery used personal violence to the said Jacinta Wairimu Njoroge.

2. Evidence accepted by the Trial Court, the High Court on first appeal; and Court of Appeal on second appeal showed that the Petitioners, in the company of at least three others, invaded the home of the Complainant in the night and forced their way in as the Complainant's workers went for a short call. The 1st Petitioner was armed with a panga while the 2nd Petitioner was armed with a sword. The 1st Petitioner pushed the Complainant to the ground and forced her to lie down. He placed a panga on her neck and demanded money. Later, the assailants pushed her into her bedroom where they forced her to produce the other goods. The assailants, then, took her into the sitting room where they took two boxes of clothes. They then fled into the night.

3. Unfortunately for the Petitioners, they were apprehended later that morning leading to the trial, convictions and appeals. At the trial Court, they were each sentenced to suffer death. The death sentence imposed on them by the Trial Court were confirmed on appeal.

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

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. The 1st Petitioner (Samuel Mucheru) told the Court that he now seeks forgiveness and that he is remorseful. He has been in custody since 2001. During his time in prison, he said, he had fully reformed. Among other things, the 1st Petitioner submitted, he is now certified by NITA as Grade I in shoe-making and Grade III in tailoring. In addition, he has done other trainings in prison – including a training in First Aid from St. John's Ambulance and various theological courses from Emmaus Bible School. He told the Court that he was very young when he committed the offence and that he is now ready to rejoin his family who are also happy to welcome him back to responsible citizenship and family membership. The amily were in Court.

9. On the other hand, the 2nd Petitioner (Geoffrey Mugo) told the Court that he had also fully reformed. He wishes to be permitted to go utilize the life skills he has learnt in Prison to benefit himself and the society. Among other skills, the 2nd Petitioner is certified in upholstery (Grade III); Intensive Training by RODI-Kenya in making household chemical and various Bible correspondence courses.

10. Mr. Motende, Learned State Counsel, conceded that the circumstances of this case did not warrant the death sentence under our emerging jurisprudence. However, he enumerated several factors he considered aggravating which he wanted the Court to consider. He pointed out the following:

a) That the Applicants were armed with offensive weapons namely Somali sword, panga and metal bars during the robbery.

b) In the course of the robbery, they slapped the complainant with the side of the panga.

c) There were more than three attackers. Three were arrested and charged but 2 were convicted.

d) The items robbed were worth more than Ksh 120,000/=

e) The Applicants have not told the court that they have plans to go and ask for forgiveness from the complainant.

11. Mr. Motende submitted that looking at the circumstances, he would recommend 20 years imprisonment would be appropriate sentence.

12. I have now considered both the mitigating and aggravating factors. The aggravating factors are that:

a. The Petitioners were armed with crude weapons;

b. They were many in number; and

c. They used actual violence on the Complainant.

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

a. Both Petitioners are demonstrably remorseful;

b. The Petitioners were first offenders;

c. The Petitioners have demonstrated capacity for reform and rehabilitation through the various courses and trainings they have received while in prison.

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 do not find the robbery committed by the Petitioners to be particularly heinous as to attract the ultimate penalty of death. Indeed, while there is evidence that actual violence was used, the violence used was minimal. There was no gratuitous use of violence or any sadistic infliction of harm. The Complainant did not get injured during the admittedly traumatic event.

16. I believe that in this particular case, the time served in prison by the Petitioners (seventeen years since they were each arrested on 16/06/2001 and have been in custody since then) would, given the circumstances here, 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.

17. **I will, therefore, proceed to substitute the death sentence imposed on the Petitioners with a sentence equal to the time already served. Consequently, the Applicant shall be released from prison unless otherwise lawfully held**.

18. Orders accordingly.

Dated and delivered in Nakuru this 18th day of October, 2018

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JOEL NGUGI

JUDGE