



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

PETITION NO. 41 OF 2016

RAJAB MALIK WANJALA.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

1. The petitioner was on the 15/6/2005 convicted 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. He has now filed this petition seeking for a re – sentencing. This is in pursuance of the judgment of the Supreme Court in **Francis Karioko Muruatetu & Another VS Republic, petition No. 15 of 2015** where the court declared section 204 of the penal code to be inconsistent with the constitution and invalid to the extent that it provides for mandatory death sentence for murder. Following that decision, the Court of Appeal held in **William Okungu Kittiny Vs Republic , Kisumu Criminal Appeal No. 50 of 2013** that :-

“ ... We hold that the findings and the holding of the Supreme Court particularly in paragraph 69 applies Mutatis Mutandis to section 296(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 the basis of the above holding that the petitioner has brought up this case for re- sentencing.

2. The brief facts of the case are that on the 5/8/2003 the petitioner and some other people while armed with an Ak 47 rifle robbed the complainant of a canter motor vehicle, two mobile phones and two bosch handsets all to the total value of kshs. 1,335,200/=. The robbers put the complainant and a colleague at the back of the stolen vehicle and drove away with them. On the way there was a shootout between the robbers and the police. The petitioner was arrested. He was charged with the offence.

3. The petitioner was in custody for a period of nearly 2 years before he was sentenced. He has now served a period of 13 ½ years.

4. In mitigation the petitioner says that he was a first offender. That he has been incarcerated for a period of 15 years which he deems to be sufficient punishment.

5. 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.

6. 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.

7. The Court of Appeal in **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.

8. 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.

9. 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. I will be guided by the above principles to determine the most suitable sentence to impose upon the petitioner herein.

10. I have considered some other cases where High Court judges have re-sentenced convicted persons after the Supreme Court ruling in the **Muruatetu** case(supra).

11. In **Michael Kathewa Laichena Vs Republic (2018) eKLR** where the petitioner was in a gang that was armed with a gun and knives, Mabeya J re-sentenced the petitioner to a prison term of 15 years upon considering that the petitioner had been in custody for 5 years pending trial .

12. 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 re-sentenced the petitioner to 20 years imprisonment commencing on the date of the sentence by the trial court.

13. In **Wycliffe Wangusi Mafura Vs Republic (2016) eKLR**, the Court of Appeal imposed a sentence of 20 years where the appellant was involved in robbing an mpesa agent shop with use of a firearm.

14. In the instant case the petitioner was armed with a gun during the robbery. I have considered that he was a first offender. He was in custody for a period of close to 2 years before being sentenced. He has served 13 ½ years. I re-sentence the petitioner to a period of 17 years imprisonment commencing from the date of the sentence by the trial court.

Delivered, dated and signed in open court at Kakamega this 20th day of November, 2018.

J. NJAGI

JUDGE

In the presence of:

Miss Oduor H/B Kundu.....for petitioner

Juma.....for state

George.....court assistant

Petitionerpresent

14 days R/A.