



**Lekai v Republic (Criminal Appeal 51 of 2016)
[2024] KECA 461 (KLR) (12 April 2024) (Judgment)**

Neutral citation: [2024] KECA 461 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 51 OF 2016
PO KIAGE, FA OCHIENG & WK KORIR, JJA
APRIL 12, 2024**

BETWEEN

DAVID LETIRA LEKAI APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at Naivasha
(Meoli, J.) dated 17th November, 2016 in HCCRA No. 2 of 2014)*

JUDGMENT

1. This is an appeal against sentence only by the appellant, who is held under a sentence of death following a judgment of the High Court at Naivasha (Meoli, J.) delivered on 17th November 2016 in a first appeal by the appellant from a decision of the Chief Magistrates Court at Naivasha. He had been tried and convicted on nine (9) counts of robbery with violence contrary to section 296(2) of the [Penal Code](#) and sentenced to life in prison. On appeal, the learned judge quashed the convictions and set aside the sentences in respect of five of the counts charged. She, however, upheld the convictions on the remaining four counts. Holding that the offence attracted a mandatory death sentence, she set aside the sentence of life imprisonment and in substitution sentenced the appellant to death in respect of count one, while ordering that sentencing in respect of the other counts be held in abeyance.
2. Initially, the appellant signified grievance at both conviction and sentence but thereafter changed his mind, twice. The first time, he filed a notice dated 28th October 2022 indicating his intention to withdraw the appeal under Rule 68(1) of the [Court of Appeal Rules](#). When the matter was listed before us, however, he indicated that he no longer wished to withdraw the appeal. We accordingly ignored the notice of withdrawal and proceeded to hear the appeal.



3. Ms. Kabalika, learned counsel holding brief for Mr. Orege represented the appellant at the hearing and she stated expressly that the appeal was against sentence only, and the hearing proceeded on that basis.
4. Counsel argued, in the main, that the imposition of the death sentence was improper and unconstitutional, citing *Paul Njoroge Ndungu vs. Republic* [2021]eKLR a decision of the High Court. She urged that the court has jurisdiction and discretion to substitute a sentence of death with a term sentence.
5. She thus urged us to reduce the sentence herein to a determinate term sentence, noting that the injuries sustained by the victims of the robberies were ‘harm’ that was not grievous and no excessive force was used.
5. Mr. Omutelema, the learned Deputy Director of Public Prosecutions, was of a different view. He contended that the sentence of death was still available for robbery with violence cases and that in this case it was justified. The appellant was part of armed gangsters who not only brandished, but actually fired, lethal weapons in the form of sub-machine guns which left several victims injured. The case was therefore deserving of the death sentence but, if the Court should be minded to interfere, it should impose a severe sentence.
6. We asked the learned prosecutor whether it was permissible for the learned judge to have enhanced the sentence from one of life imprisonment to death without any notice of enhancement by the Republic and/or a warning to the appellant of the possibility of enhancement if he proceeded with the appeal. Mr. Omutelema’s proper and candid answer was in the negative. This amply speaks to the fact that the sentence of death pronounced upon the appellant cannot stand, and we hereby set it aside.
7. As to the proper sentence to be imposed, the jurisprudence of the superior courts of this country since the precedent setting decision of the Supreme Court in *Muruatetu & Anor vs. Republic* [2017]eKLR is that sentencing is a judicial function that lies within the discretion of the court and sentences must be imposed on a case by case basis depending on the circumstances of each such case. In particular, courts in sentencing must engage in a careful consideration and balancing of all relevant factors, to the end that aggravating factors must lead to enhanced sentences while mitigating ones should be reflected in lower sentences.
8. Having borne those considerations in mind in arriving at an appropriate sentence herein, we think that the case calls for a severe sentence. The appellant was part of a heavily armed gang of robbers that burst into Oliver’s Guest House in Naivasha and unleashed terror and violence upon four helpless guests before going to the house of the owners at Olerai Home where they engaged in yet more violence. They injured their victims as they ransacked the premises and also threatened to rape the woman among them as they demanded money while relieving them of jewellery, phones, cameras and many other valuables. They injured their victims and executed their terrifying ordeal with great impunity and traumatized the innocent diners. All of these factors paint a picture of the appellant and his robbing associates as terrible characters with scant regard to the dignity and property rights of others. We do not see anything on the record that would persuade us to impose a lenient sentence in the circumstances.
9. In the result, we allow the appeal on sentence by setting aside the death sentence and substituting therefor a term of thirty-five (35)years imprisonment to run from the date the appellant was first sentenced.
10. Order accordingly.



DATED AND DELIVERED AT NAKURU THIS 12TH DAY OF APRIL, 2024.

P. O. KIAGE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

