



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MUSINGA & KIAGE, J.J.A.)

CRIMINAL APPEAL NO. 127 OF 2015

BETWEEN

CHARLES MWINZI MUKUNGU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Garissa (Muchemi & Mutuku, JJ.) dated 11th September, 2014

in

HC. CR.A. NO. 5 OF 2014)

JUDGMENT OF THE COURT

1. The appellant was convicted of robbery with violence and sentenced to death by the trial court at Mwingi. His first appeal against both conviction and sentence to the High Court was unsuccessful, hence this second appeal. However, when the second appeal came up for hearing, the appellant, through Mr. Dome, chose to withdraw his appeal against conviction and instead pursue the appeal in respect of the death sentence only.
2. **Mr. Dome** told the Court that the Supreme Court of Kenya in **FRANCIS KARIOKO MURUATETU & OTHERS v REPUBLIC [2017] eKLR** held that the mandatory death sentence was unconstitutional. He submitted that the appellant had already served (8) years in custody and urged us to reduce the sentence to the period already served.
3. On the other hand, **Mr. Hassan Abdi**, learned counsel for the respondent, urged the Court to refer the matter to the trial court so that the prosecution will have an opportunity to file a pre-sentencing report for the court's consideration before passing an appropriate sentence.
4. The appellant, jointly with others who were not arrested, while armed with a knife, robbed one Faith Wambui of a cellphone and an ATM card, all valued at Kshs.5,000. In the process of the robbery the appellant and his accomplices inflicted an injury on the victim's left cheek, which was classified as harm.
5. Upon his conviction, the appellant, who was said to be a first offender, told the trial court in mitigation that he was not married; was aged 30 years; his father was deceased; and was staying with his old grandmother who was depending on him. Though remorseful, the trial magistrate rightly remarked that the death sentence was mandatory for any one convicted of robbery with violence and proceeded to pass the same.
6. In **JUMA ANTHONY KAKAI v REPUBLIC [2018] eKLR** this Court remarked as follows:

“In its recent decision in FRANCIS KARIOKO MURUATETU & ANOTHER v REPUBLIC [2017] eKLR the Supreme Court of Kenya pronounced that the mandatory aspect of the death sentence as the only lawful sentence was unconstitutional. The Court therefore effectively removed the fetters placed on the Court's discretion when passing sentence in cases which hitherto carried the death penalty as the only lawful sentence upon conviction.”

6. The Court proceeded to allow the appeal against the death sentence, set it aside and substituted it with a jail term of twenty (20) years

from the date of conviction. In the above cited appeal the appellant and his accomplices had robbed a man of a motor vehicle, assorted household goods, Kshs.46,000 and also assaulted several people.

7. In the appeal before us, considering all the relevant factors, we are inclined to interfere with the sentence that was passed by the trial court and affirmed by the High Court. We have taken into consideration the appellant's mitigation; the circumstances under which the offence was committed; the value of the items stolen and the nature of injury that was inflicted on the victim of the robbery. We are fully cognizant that sentencing is a trial court function but, given that mitigation was taken and is on record it would not conduce to the doing of justice to remit the matter back to the trial court as urged by Mr. Abdi for the Republic.

We hereby allow the appeal; set aside the death sentence and substitute it with a jail term of ten (10) years from 29th January, 2013 when the appellant was convicted and sentenced.

Dated and delivered at Nairobi this 22nd day of March, 2019.

R.N. NAMBUYE

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR