



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, J.J.A)**

**CRIMINAL APPEAL NO. 165 OF 2014**

**BETWEEN**

**IBRAHIM OTIENO NGONGA.....1<sup>ST</sup> APPELLANT**

**STEPHEN OTIENO OTIN.....2<sup>ND</sup> APPELLANT**

**FREDRICK ONYANGO OYUGA.....3<sup>RD</sup> APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal against the judgment of the High Court of Kenya At Kisumu (Mwera &*

*Warsame, J.J.A) delivered on 20<sup>th</sup> February, 2007 in HC Cr. Appeal No. 271, 272 & 273 of 2004)*

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**JUDGMENT OF THE COURT**

[1] The three appellants and one John Otieno Adero were jointly tried and convicted by the Principle Magistrate's Court at Siaya for the offence of robbery with violence contrary to **section 296 (2)** of the **Penal Code**. They were each sentenced to death. Being aggrieved the three appellants appealed to the High Court against their conviction and sentence.

[2] Upon hearing the appeals the learned judges of the High Court (Mwera & Warsame, JJ) as they then were dismissed the appeals finding that the evidence adduced against the appellants was consistent and cogent, and that each of appellants was properly identified as having taken part in the robbery. The three appellants were dissatisfied by the dismissal of the appeal. They therefore each filed a second appeal to this Court.

[3] When the appeals which were consolidated came up for hearing **Ms Namusubo Pamela Janet** who appeared for all the appellants abandoned all the previous grounds of appeal that had been filed and relied on an amended memorandum of appeal dated 29<sup>th</sup> January, 2019 in which only one ground was raised. Counsel also clarified that the appellants were abandoning their appeal against conviction and only pursuing the appeal against sentence. The sole ground of appeal was that the trial judges erred in failing to set aside the sentence of death since the mandatory nature of the death sentence had been declared unconstitutional.

[3] Ms Namusubo submitted that the mandatory nature of the death sentence was outlawed by the Supreme Court in ***Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR***. Counsel referred us to paragraph 112 of the judgment in which the Supreme Court declared the mandatory nature of the death sentence as provided under **section 204** of the Penal Code as unconstitutional. Counsel argued that the appellants having been first offenders, and having been in custody from 2004; and being remorseful, the court should have exercised its discretion and considered a sentence other than the death penalty.

[4] Mr. Sirituy Learned Principal Prosecuting Counsel concurred with Ms Namusubo, and urged the Court to consider a sentence other than the death penalty.

[5] We have considered this appeal, and do note from the record that although the appellants were given an opportunity to mitigate, they did not say anything in mitigation. However, in sentencing the appellants the trial magistrate simply applied the sentence provided under **section 296(2)** of the **Penal Code**. He does not appear to have considered the circumstances of the case or exercised any discretion in sentencing.

[6] In Francis Karioko Muruatetu (supra) the Supreme Court stated *inter alia* as follows:

*“[48] Section 204 of the Penal Code deprives the court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the court of their legitimate jurisdiction to exercise discretion not to impose the death sentence in the appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right.*

....

*[58] To our minds any law or procedure which when executed culminates in termination of life ought to be just, fair and reasonable. As a result, due process is made possible by a procedure which allows the court to assess the appropriateness of the death penalty in relation to the circumstances of the offender and the offence. We are of the view that the mandatory nature of this penalty runs counter to constitutional guarantees enshrining respect for the rule of law.*

*[59] We now lay to rest the quagmire that has played the court with regard to the mandatory nature of section 204 of the Penal Code. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial with a resulting sentence under section 204 of the Penal Code, unfair thereby conflicting with Article 25(c), 28, 48, 50(1) & (2)q.”*

[7] The appellants herein were sentenced to death in accordance with **section 296(2)** of the Penal Code which provides that a person convicted of the offence of robbery with violence “shall be sentenced to death.” The sentence provided is in identical words as that provided under section 204 of the Penal Code which is “that a person convicted of murder shall be sentenced to death.” It follows therefore as ruled by this Court in William Okungu Kittiny Kisumu Criminal Appeal No. 56 of 2013. That the reasoning of the Supreme Court in regard to the death sentence under section 204 of the Penal code applies with equal force to the death sentence provided under section 296(2) of the Penal Code.

[8] We concur with Ms Namusubo, that had the trial magistrate considered the circumstances in which the offence was committed, and properly exercised his discretion, he would not have imposed the death penalty as provided under **section 296(2)** of the **Penal Code**. In our view a term of imprisonment would have sufficed.

[9] For the above reasons, the appeals against conviction having been abandoned are dismissed. However, we allow the appellants’ appeal against sentence, set aside the death penalty imposed upon each appellant, and substitute thereto a term of fifteen (15) years imprisonment effective from 30<sup>th</sup> November, 2004 which is the date the appellants were sentenced.

Those shall be the orders of the Court.

**Dated and delivered at Kisumu this 7<sup>th</sup> day of October, 2019.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**