REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. CRIM. APPLICATION NO. 167 OF 2018

JOEL KABARI KIMANI...1ST APPLICANT

JOHN NDUNGU MUTURI..2ND APPLICANT

VERSUS

REPUBLIC...RESPONDENT

JUDGMENT

1. The two Applicants were convicted of the offence of robbery with violence contrary to section 296(2) of the Penal Code. They were found guilty of jointly robbing David Kahiga Githui on the 13th December, 1998 at Dana General Merchants, Nakuru Township within Nakuru District of the Rift Valley Province while armed with dangerous weapons namely pistol and swords. The Trial Court also found that immediately before or immediately after the time of the robbery, the two Applicants used personal violence to David Kahiga Githui.

2. The Applicants had pleaded not guilty to the charges compelling a full trial. After conviction, the two Applicants were sentenced to death as the law then provided. Their appeals to the High Court and the Court of Appeal against both conviction and sentence failed.

3. The Applicants, then, found refuge in the Supreme Court decision in ***Francis Karioko Muruatetu & Another v Republic [2017] eKLR***. They seek for substitution of the death penalty he 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.

4. 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***.

5. 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.

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.*

6. It is for this reason that I take jurisdiction to re-consider the sentence imposed on the Applicants herein following the ***Muruatetu Case***. In essence, the Applicants seek the substitution of the death penalty they received with a prison term. They both hope that after due analysis the Court will conclude that the time served in custody is sufficient punishment for the offence committed given the circumstances in which it was committed.

7. To determine whether the Applications by the Applicants are meritorious and to what extent, the Court must look at the circumstances surrounding the commission of the offence, the circumstances related to the victims of the offence as well as the circumstances related to the Applicants themselves.

8. The 1st Applicant told the Court that he is genuinely remorseful for his role in the robbery. He asked the Court, and the Complainant (who was in Court) for forgiveness. He told the Court that he had sent his family members to the Complainant to ask for forgiveness. He told the Court that he has been in Prison for 21 years during which period he has both reflected on his actions and learnt a lot. He submitted that he was now fully reformed. He produced a letter of recommendation from the Prison authorities to attest to this. He also produced several vocational and other certificates to demonstrate that he is rehabilitated. Among his certificates included one by NITA for Upholsterer Grade I Trade Test. There are also a number of certificates for catechism and Bible studies.

9. On his part, the 2nd Applicant equally submitted that he was remorseful for his actions and that he asked for forgiveness from the Court and the Complainant. He also submitted a letter of recommendation from the Prison authorities saying that the Applicant has been of good conduct in Prison and that he is a model Prisoner and is fully rehabilitated. He also produced NITA certificate for Upholsterer Grade I Trade Test.

10. The Complainant, David Kahiga, also came to the Sentence hearing. He told the Court that the families of the Applicants had visited him at the instance of the Applicants and that the Applicants had sought his forgiveness for the robbery. He told the Court that he considered the time served by the Applicants sufficient. He had come to Court to beg it to let the Applicants resume their lives. He thought twenty-one years was enough punishment for the robbery. He told the Court that he accepted the apologies of the Applicants and that he had given them.

11. On her part, Ms. Nyakera, the Prosecution Counsel, told the Court to consider the aggravating circumstances in the case. They included, in her view, the fact that the crime was violent in nature: that the Applicants kicked and knocked down the Complainant and that they robbed more than Kshs. 1 Million which was a lot of money in 1998. She suggested that the death penalty might be appropriate in the case.

12. According to the Judiciary *Sentencing Policy and Guidelines* (See para. 4.1), a Court imposes a sentence on an offender for one or more of the following purposes:

a. To ensure that the offender is adequately punished for the offence;

b. To deter the offender or other people from committing the same or similar offences;

c. To protect the community from the offender;

d. To rehabilitate the offender;

e. To denounce, condemn or censure the conduct of the offender;

f. To restore justice and relations by making the offender accountable for his or her actions and to recognize the harm done to the victim of the crime and to the community.

13. Arising from these purposes, a number of principles underpin the sentencing process and must be borne in mind in crafting an appropriate sentence in a given case. They include the following three:

a. *Proportionality*: that the overall punishment must be proportionate to the gravity of the offending behaviour;

b. *Parsimony*: that the sentence must be no more severe than is necessary to meet the purposes of sentencing;

c. *Parity*: the principle that similar sentences should be imposed for similar offences committed by offenders in similar circumstances

14. Ultimately, as many courts have pointed out, the fundamental and immutable principle of sentencing is that the sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed and the circumstances of the crime committed.

15. Looking at the circumstances of this case, I am not persuaded that there is a need to invoke the death penalty here. The death penalty should be reserved only for the worst form and most vicious of robberies. There was no evidence here that the robbery was committed in a particularly heinous, cruel or depraved manner. For these reasons, I am not persuaded that the death penalty is merited in this case.

16. I am persuaded that both Petitioners are remorseful; they amply demonstrated this. They are both first offenders. I am also persuaded on the basis of the evidence before me that the two Applicants have reformed and are fully rehabilitated. According to the two

17. I am also encouraged by the fact that their families are very supportive and willing to embrace and assist them as they begin post-prison life. The Probation Reports filed for both Applicants are quite favourable.

18. Finally, I have given due weight to the fact that the Complainant took his time to appear before the Court and urge leniency. He told the Court that he has forgiven the Applicants and that he considered the time served to be sufficient for the offence committed. This is, to my mind, is a great extenuating factor.

19. **The two Applicants have been in custody for more than twenty-one (21) years. In my view, that is sufficient time served for the crime committed. I therefore substitute the death sentence imposed in the case for both Applicants with a prison term equal to the term already served. Consequently, the Applicants shall be released from Prison forthwith unless otherwise lawfully held.**

20. Orders accordingly.

Dated and Delivered at Nakuru this 19th day of December, 2019

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JOEL NGUGI

JUDGE

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