Case Number:	Miscellaneous Criminal Application 158 of 2018
Date Delivered:	07 Mar 2019
Case Class:	Criminal
Court:	High Court at Nakuru
Case Action:	Judgment
Judge:	Joel Mwaura Ngugi
Citation:	Lenyesio Lekupe & another v Republic [2019] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Nakuru
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

MISC. CRIMINAL APPLICATION 158 OF 2018

LENYESIO LEKUPE…….....…1S APPLICANT

BENARD LECHERONO……...2ND APPLICANT

VERSUS

REPUBLIC……...……RESPONDENT

JUDGMENT UPON APPLICATION FOR RE-SENTENCING

1. Lenyesio Lekupe (1st Applicant) and Benard Lecherono (2nd Applicant) were charged with Robbery with Violence, contrary to Section 296(2) of the Penal Code. It was alleged that on the night of 16/12/2002 at Bondeni Estate, Nakuru jointly with another before court while armed with Somali swords and *rungus* robbed Abdalla Azubedi of Cash Ksh 600, one mobile phone or immediately after the time of such robbery wounded the said Abdalla Azubedi.

2. The 2nd Applicant also faced a further charge of assault causing actual bodily harm, contrary to Section 251 of the Penal Code. The particulars were that on the same date and place, the 2nd accused unlawfully assaulted Rasmus Noah Etyang thereby occasioning him actual bodily harm.

3. The two Applicants were convicted on Count 1 (robbery with violence) and were sentenced to death. The 2nd Applicant was, however, acquitted of the second count (assault causing actual bodily harm).

4. The circumstances in which the offence occurred are chronicled in the three Court judgments on the matter. The two Applicants were employed by the Complainant. They had worked for him for about two weeks. On the night of 16/12/2002, in a brazen, perhaps daft move, timed the Complainant as he made his way home at around 11:15pm. They demanded for money from him. The 1st Applicant hit him with a simi. The 2nd Applicant then brought the 2nd Complainant, a Mr. Etyang to the 1st Complainant's house. Mr. Etyang was a fellow guard employed by the 1st Complainant. The 2nd Appellant, then, beat up Mr. Etyang before both the 1st and 2nd Applicants made off with the cash they had robbed off the 1st Complainant and the other goods.

5. After entering a plea of not guilty, a fully-fledged hearing ensued. At its conclusion, as aforesaid, the Court convicted both the Applicants of the offence of robbery with violence. The Learned Trial Magistrate proceeded to sentence them to death as was mandated by the law at the time. Their two appeals to the High Court and the Court of Appeal ended up with affirmation of the convictions and sentence.

6. However, in the wake of Supreme Court decision in ***Francis Karioko Muruatetu & Another v Republic [2017] eKLR***, the Applicant has now approached this Court seeking 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.

7. 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***.

8. 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.*

9. It is for this reason that I take jurisdiction to re-consider the sentence imposed on the Applicant herein following the ***Muruatetu Case***.

10. In mitigation, the both Applicants readily admitted that they committed the offence. They sought forgiveness. They said they were remorseful. Both said that they have reformed greatly. Both filed glowing letters of recommendation from Prison Authorities attesting to their reformed characters. Both Applicants also filed certificates demonstrating that they are now accredited by NITA in tailoring and upholstery – a demonstration that they used their time in prison to learn useful skills they can utilize to sustain themselves in life if released.

11. In addition to the two Applicants, two witnesses gave sworn statements on their behalf. Ms. Beatrice Nantei is a sister to the 2nd Applicant. She is a teacher by profession. He informed the Court that the 2nd Applicant had just finished secondary school when the incident happened. He had married a young girl and they had just been blessed with a son who is now in Standard 8. He pleaded with the Court to give her brother a second chance to bring up his family.

12. Mr. William Lekatap is a first cousin to the 1st Applicant. He told the Court that as a family they were shocked when they learnt that the 1st Applicant was involved in the heinous act but that they are now completely satisfied that he is fully reformed. He said that the family will help him get on his feet in order to support his three children.

13. As regards the circumstances of the robbery, Mr. Kemo, the Prosecutor informed the Court that the evidence shows that the complainant got a head injury. It is not clear how serious the injury was. The items were not very high value. He pointed out that the Applicants have been in custody for 15 and 17 years. Given the recommendations of the prison authorities and given that they are now active Christians in the Catholic Church and that the families are willing to receive then, Mr. Kemo indicated that the State would allow the Court to give them a second chance.

14. 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.

15. 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

16. 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.

17. Looking at the circumstances of this case, I am persuaded that:

a. As the State Prosecutor submitted, the two Applicants have been adequately punished for the offence they committed. The offence, while heinous, did not involve excessive use of force and no major injuries were caused;

b. The more than seventeen years the Applicants have been in custody readily serves the deterrence function as well as the parity function;

c. The glowing recommendation letters from Prison authorities, the demeanour of the Applicants and their representations before me have persuaded me that the Applicants are no longer a danger to the society and that they have reformed;

d. The Applicants are remorseful for their actions and their remorse seemed genuine;

e. The Applicants were first offenders;

f. The society has already has already sufficiently denounced the offence through the seventeen years of the Applicants being in custody; and

g. As the State conceded there are no aggravating circumstances in this case.

18. I am therefore persuaded that no useful purpose will be served by the continued imprisonment of the two Applicants. They made a dreadful mistake. They have paid the price for it. They have learnt for it. The society has sent a strong message that such conduct will not be tolerated. The Applicants are sufficiently rehabilitated. It is time for them to go home. I therefore substitute the death sentence imposed on the two Applicants with a prison sentence equal to the time they have been in custody.

19. **Consequently, the two Applicants shall be released from prison forthwith unless otherwise lawfully held**.

20. Orders accordingly.

Dated and delivered at Nakuru this 7th day of March, 2019

JOEL NGUGI

JUDGE