



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL PETITION NO. 23 OF 2018

DAVID ELOKITA.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. **The Petitioner herein** was convicted and sentenced to death for the offence of robbery with violence contrary to Section 296(2) of the Penal Code in the *Senior Resident Magistrates's court at Lodwar*. Both his first and second appeal were dismissed.

2. **The Petitioner has filed this Petition pursuant to** the Supreme Court decision in *Francis Karioko Muruateru & Another v Republic SCK Pet. No. 15 OF 2015 [2017] eKLR* declaring the mandatory death sentence for the offence of murder unconstitutional. In the case of *William Okungu Kittiny v Republic KSM CA Criminal Appeal No. 56 of 2013 [2018] eKLR*, the Court of Appeal applied the *Muruatetu* decision *mutatis mutandis* to the provisions of section 296(2) of the *Penal Code (Chapter 63 of the Laws of Kenya)* which imposes the mandatory death penalty for the offence of robbery with violence.

3. He attached certificates to demonstrate that he has reformed and has undergone various rehabilitative programmes including studying biblical studies and had trained as a carpenter.

4. In response to the Petition, Mr Omooria, learned counsel for the state opposed the said petition on grounds that it lacked merit hence urged this court to dismiss the same.

5. The Supreme Court decision in *Francis Karioki Muruatetu & Another v Republic & 5 others* declared the mandatory death sentence unconstitutional and therefore I am called upon to resentence the Petitioner.

6. I have considered the *Sentencing Policy Guidelines, 2016* which provided for a four tier methodology for determination of a custodial sentence. The first point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances.

7. Considering the fact that the aforementioned guidelines did not take into account the fact that the death penalty would be declared unconstitutional, the Court in the *Muruatetu Case (Supra, para. 71)*, considered that in re-sentencing in a case of murder, the following mitigating factors would be applicable;

- (a) age of the offender;
- (b) being a first offender;
- (c) whether the offender pleaded guilty;
- (d) character and record of the offender;
- (e) commission of the offence in response to gender-based violence;
- (f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender;

(h) any other factor that the Court considers relevant.

8. A look at other sentences that were imposed by courts after the Muruatetu case in cases of this nature implies that courts have considered a minimum of 20 years as sentence for offences of this nature. This Court in **Benjamin Kemboi Kipkone Vs Republic (2018) eKLR**, substituted the death sentence with 20 years imprisonment with effect from the date of judgment where 3 robbers armed with an Ak 47 rifle robbed the complainants of Kshs. 250,000/= and a mobile phone.

9. In **Paul Ouma Otieno Vs Republic (2018) eKLR** where the convict was armed with an AK 47 rifle and a kitchen knife and robbed the complainant of cash Kshs. 450,000/= and 3 mobile phones, **Majanja J** substituted the death sentence with 20 years imprisonment commencing on the date of the sentence by the trial court

10. I have considered the above stated principles of sentencing and that the petitioner has been incarcerated for a period of 15 years pre and post-trial. I have also considered that he has an exemplary record from prison authorities. I have considered the circumstances in which the offence was committed and the seriousness of the offence committed in that a life was lost. I do not think that the period served in prison is sufficient for the serious offence committed by the petitioner.

11. I am of the view that the petitioner deserves a sentence of at least 25 years imprisonment. The sentence of death imposed on the petitioner is hereby set aside. I re-sentence the Petitioner to serve **Twenty five (25) years** imprisonment commencing from the date of sentence by the trial court that, is 29/9/2005.

Signed, Dated and Delivered at Kitale on this 5th day of March, 2020.

H.K. CHEMITEI

JUDGE

5/3/2020

In the presence of:-

Ms Kagali for the Respondent

Applicant - present

Court Assistant – Kirong

Ruling read in open court