



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

MISC. APPLICATION NO. 67 OF 2018

ELIJAH MWANGI MACHARIA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant was charged, 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' court at Kitale* on 1/10/2013.

2. **He has now filed the instant application seeking for resentencing pursuant to** the Supreme Court decision in *Francis Karioko Muruatetu & 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. The Petitioner attached certificates to demonstrate that he has reformed and has underwent various rehabilitative programmes. From the certificates, he has attained a diploma in psychological counseling, diploma in biblical studies and higher diploma in biblical and theology.

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

5. 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.

6. 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.

7. 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.

8. 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.

9. Turning to the instant case, I note from the record that the applicant was a first offender. 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. I do not think that the period served in prison is sufficient for the serious offence committed by the Applicant.

10. I am of the view that the applicant deserves a sentence of at least 20 years imprisonment. The sentence of death imposed on the Petitioner is hereby set aside. I re-sentence the Petitioner to serve **Twenty (20) years'** imprisonment commencing from the date of sentence by the trial court that is, **1/10/2013**.

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

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H. K. CHEMITEI

JUDGE

5/3/2020