



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**PETITION NO. 8 OF 2019**

**CONSOLIDATED WITH PETITION NOS. 35 OF 2019 & 40 OF 2020**

**BENJAMIN MUGENDI KINYUA.....1<sup>ST</sup> PETITIONER**

**ALFRED MUSIRA MUTHANJE.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

**A. Introduction**

1. Three petitions were filed on different dates herein. Petitions No. 8 of 2019 and 35 of 2019 are both filed by the 1<sup>st</sup> petitioner while petition 40 of 2020 was filed by the 2<sup>nd</sup> petitioner. Both petitions sought orders for resentencing pursuant to the Supreme Court's decision in **Francis Karioko Muruatetu & another v Republic [2017] eKLR**. Vide the orders of 18/05/2020 the three petitions were consolidated.

2. The background is that the 1<sup>st</sup> petitioner was convicted of the offence of robbery with violence contrary to Section 296(2) of the Penal Code in Embu Criminal Case No. 429 of 2005 after consolidation of two criminal cases one for each accused. The petitioners appealed in the High Court Embu HCCRA. No. 47 of 2007 was dismissed for lack of merit.

3. The petitioners sought orders for resentencing based on the **Francis Muruatetu Petition No. 15 of 2015** where the Supreme Court developed new law to the effect that the mandatory nature of death sentence was unconstitutional for it took away the discretion of courts in sentencing offenders.

4. The petitioners elected to argue their petitions by way of written submissions.

5. Ms. Mati submitted that they were not opposed to the petitions but asked the court to consider the seriousness of the offence as they were armed with crude weapons at the time of commission of the offence and further that their appeals to the High Court were dismissed. In a rejoinder, the 1<sup>st</sup> petitioner invited the trial court to consider the time spent in custody claiming that he was arrested on 28/01/2005 and convicted in July 2007 and thus spent one and a half years in custody. The 2<sup>nd</sup> petitioner submitted in a rejoinder that he was remorseful and that he had taken bible studies while in prison and as such he was able to control his anger. He further invited the court to consider the 1½ years spent in custody.

**B. Analysis of the law**

6. I have considered the petitions herein, and the respective submissions by the parties. As I have stated above, the petitions herein is premised on the Supreme Court's decision in **Francis Karioko Muruatetu & another v Republic [2017] eKLR**. As such the main issue for determination is whether the petitions are merited.

7. The petitioners herein were convicted of the offence of robbery with violence contrary to section 296(2) of the Penal Code. In **Francis Karioko Muruatetu & Another –Vs- Republic Petition No. 15 of 2015 (2017) eKLR** the Supreme Court held that the mandatory death sentence for the offence of murder is unconstitutional. The ratio in **Muruatetu's decision** was applied *mutatis mutandis* to the provisions of section 296 (2) of the Penal Code which imposes a mandatory death penalty for the offence of robbery with violence by the Court of Appeal in the case of **William Okungu Kittiny –Vs- Republic Kisumu Criminal Appeal No. 56 of 2013 (2018) eKLR**.

8. The trial magistrate in meting out the sentence held that: -

**“the accused are sentenced to death as by law provided.....”** As such the petitioners herein having been sentenced to death under section 296 (2) of the Penal Code, are entitled to seek for orders for resentencing so that their mitigation may be considered in line with the binding holdings in the mentioned Supreme Court and Court of Appeal decisions.

9. Despite the **Muruatetu’s decision** having mandated courts to exercise discretion when considering and passing sentence this discretion however should only be exercised in the deserving cases as was held in the case of **Republic v Ruth Wanjiku Kamande [2018] eKLR**. The courts in exercising the said discretion must further have in mind the objectives of sentencing as laid down in the Judiciary’s Sentencing Policy Guidelines, 2016 which include: - *retribution, deterrence, rehabilitation, restorative justice, community protection and denunciation*. The aggravating and mitigating circumstances are key in determining the most suitable sentence. I determining what sentence would meet the ends of justice, the facts and circumstances of each case, the gravity of the crime, motive, nature of the offence and all other attendant circumstance must be taken into account as was held in the case of **Charles Ndirangu Kibue v Republic [2016] eKLR**.

10. From the trial court records, the petitioners committed the offence at night while armed with axes and pangas and made blasts akin to gunshots. When given a chance to mitigate, the petitioners just said that they were not aware of the charges. As such they offered no mitigation before the trial court.

11. The **Judiciary’s Sentencing Policy Guidelines, 2016** obligates this court to take into account the aggravating and mitigating circumstances in determining the most suitable sentence. I note that the petitioners committed the offence while armed with dangerous weapons including pangas, rungas and probably toy guns. The Sentencing Guidelines includes the use of weapons to frighten or injure a victim and commission of the offence in a gang or group are some of the aggravating factors. The effect of aggravating circumstances/factors as per the said guidelines is to increase the term of the custodial sentence.

12. The complainant, a female was terrorized together with her children in the house by the gang that included the petitioners who forced their way into the house around 1.30am in the night. The gang who flashed powerful torches were sounding gunshots outside her souse to scare the complainant to open the door for them. She was saved by her neighbours who called police and on arrival, the thugs ran away having robbed her of Kshs. 6,000/=.

13. I am of the considered opinion that the circumstances of the offence were aggravated and quite traumatizing to the complainant and her family. Despite the foregoing circumstances, I am convinced that the sentence of death meted out on the petitioners requires to be revised under the principles laid down by the Supreme Court in the **Muruatetu case**.

14. Having considered all the relevant factors, I hereby allow the petition. The death sentence is hereby set aside and it is hereby substituted with twenty-five (25) years imprisonment to run from the date of arrest 28/01/2005.

15. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 30<sup>TH</sup> DAY OF JUNE 2020.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Mati for the Respondent**

**Petitioners through Video Link**