

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

PETITION NO. 48 OF 2019

PAUL KIMATHI M'ITONGAPETITIONER

VERSUS

REPUBLIC..... RESPONDENT

R U L I N G

1. **PAUL KIMATHI M'ITONGA (the petitioner)** was jointly charged with others with the offence of robbery with violence contrary to *section 296 (2) of the Penal Code*.
2. The particulars of the offence were that, on 23/11/1993 at about 3:00 am, a gang of robbers descended on the house of **Justus Kirunja** armed with axes, simis and rungs, broke into it and robbed him Kshs 1,200/= and in the course of the robbery fatally wounded **him**.
3. The trial court found him culpable of the offence and sentenced him to death. He appealed against the decision in the High Court **Criminal Appeal No. 202 of 1996** and in the Court of Appeal in **Criminal Appeal No. 07 of 2001** but in both instances his appeal was dismissed.
4. In his petition, the petitioner urges the court to resentence him considering the facts, mitigation and sentence pursuant to the Supreme Court's judgment in **Francis Karioko Muruatetu & another v Republic [2017] Eklr.**
5. In that case, the Supreme Court of Kenya held that the mandatory nature of the death sentence was unconstitutional as it denied the Court its discretion in sentencing. The Court proceeded to set out the criteria or the principles that should guide a Court in sentencing. Some of the considerations are *age of the offender, being a first offender, whether the offender pleaded guilty, the character and record of the offender, commission of the offence in response to gender-based violence, remorsefulness of the offender, the possibility of reform and social re-adaptation of the offender and any other factor that the Court considers relevant*.
6. Though the Supreme Court was dealing with the offence of murder, the view I take is that the same principle applies in other cases where the law provides for a mandatory death sentence including the instant case of robbery with violence. See the Court of Appeal decision in **William Okungu Kittiny vs. Republic [2018] eKLR.**
7. I have considered the circumstances under which the offence was committed. In **Criminal Case No. 3723 of 1993**, the petitioner participated in a planned action. **Pw1** who positively identified the attackers who included the petitioner, narrated how a simi was placed on the waist band of her skirt and with one stroke it was ripped open to the hem and she was left naked. She defecated and urinated as a result of the trauma she underwent.
8. The petitioner presented a favourable report from the Prisons Department. He has been in custody for 26 years now. The period that the petitioner has served is reasonably long. However, a life was lost in the cause of the robbery. There are many ways of earning a living than to dispatch others to the next world in the process of earning such a living. People must be discouraged from earning a living through such dubious means.
9. In this regard, taking into consideration the circumstances of the offence, the positive Prisons Department's report on the petitioner's rehabilitation. The petitioner was a first time offender and considering the provisions of **Section 333 (1)** of the CPC. I set aside the death sentence and substitute therefor with a sentence of 30 years imprisonment. The sentence will run from the date of the time he was first sentenced.

Orders accordingly.

DATED and DELIVERED at Meru this 12th day of August, 2020.

A. MABEYA

JUDGE