



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 27 OF 2018**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010**

**(SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL**

**RIGHTS AND FREEDOM OF AN INDIVIDUAL) HIGH COURT**

**PRACTICE AND PROCEDURE RULES 2013**

**AND**

**IN THE MATTER OF: ARTICLE 22(1) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF: ARTICLE 23(1) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF: ARTICLES 19, 20, 21, 22, 23, 24, 25,**

**27, 28, 48, 50, 258 AND 259 OF THE CONSTITUTION**

**BETWEEN**

**1. DAVID GICHURE KANYORO**

**2. SIMON MUCHIRI WAITITU.....PETITIONERS**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT**

**JUDGMENT**

1. The Petitioners – **David Gichure Kanyoro** and **Simon Muchiri Waititu** were convicted on the main count of robbery with violence contrary to Section 296(2) of the Penal Code and sentenced to a mandatory death sentence. They exhausted their appellate channels when the Court of Appeal dismissed their appeal on 28<sup>th</sup> July, 2006.
2. The Petitioners are now before this Court for purposes of resentencing pursuant to the Supreme Court decision in the case of **Francis Karioko Muruatetu vs. Republic [2017] eKLR**. As at now the Petitioners are serving life sentence after their sentence to death was commuted to life by His Excellency President Mwai Kibaki.
3. In urging for an earlier release to freedom, the Petitioners submitted that they have served a jail term of 18 years. They state that they have children and grandchildren who need their care. They aver that the robbery with violence for which they were convicted did not harm

anybody. They robbed a car in a highway. The Petitioners state that they have now reformed and detest crime. Both of them now serve as Elders in the Seventh Day Adventist Church in Shimo La Tewa Prison. They have also learnt trade and industry while in prison.

4. The prison progress report speaks well of both Petitioners who seem to have embraced the Lord Jesus Christ, and are leaders of the Church in prison. In addition, the 1<sup>st</sup> Petitioner David Gichure Kanyoro is suffering diabetic and pleads for an early release to enable him get proper treatment while a free man. In the prison, he is a “Trustee” and is said to be highly disciplined. The same goes for the 2<sup>nd</sup> Petitioner Simon Muchiri Waititu.

5. On his part Mr. Fedha, the learned counsel for the prosecution submitted that the sentence should be that which deters the commission of the said offence. Counsel submitted that a sentence of 20 years be given two (2) of which should be suspended.

6. I have carefully considered the submissions. The two Petitioners have appeared before me severally. I have had the opportunity to consider their demeanor and their attitude to life. I got the impression that they are genuinely remorseful and regret their action, which, unfortunately, they cannot recall back. They have risen to the highest position in the prison as “trustees”, counsellors and coaches. I think this Court should give them a chance. The purpose of punishment is to enable an offender to reform and to shun crime. This is done through retribution, rehabilitation and reform, goals which appear to me to have been achieved in this case.

7. In this regard, this Court finds that the Petitioners are fit to be released from prison forthwith on account that the 18 years they have served in prison is adequate punishment, and that the goodwill they have as a result will help them come out as reformed prisoners and serve the society by spreading the message that crime does not pay.

8. The Petitioners herein are herewith unconditionally released from prison unless otherwise held for valid reasons.

**Dated, Signed and Delivered in Mombasa this 24<sup>th</sup> day of July, 2019.**

**E. K. OGOLA**

**JUDGE**

In the presence of:

Mr. Fedha for DPP

Petitioners in person

Mr. Kaunda Court Assistant