



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL DIVISION

PETITION NO. 176 OF 2018

BETWEEN

JOGINDA KABURU MURIUNGI.....PETITIONER/APPLICANT

AND

REPUBLIC.....RESPONDENT

(Being an application for re-sentencing brought under Articles 23(1), 165(3)(b)(d)(i), 50(2), 25(c)(d) 51(1) and 163 of the Constitution of Kenya 2010 and Section 296(2) of the Penal Code.)

JUDGMENT

The Application

1. By the Notice of Motion dated 13th April, 2018 and filed in court on 3rd May 2018, the petitioner's main prayer is that this honourable court be pleased to re-sentence the petitioner considering facts mitigation and sentence pursuant to the Supreme Court's judgment dated 4th December, 2017 in the consolidated petition Nos. 15 and 16 of 2015 between **FRANCIS KARIOKO MURUATETU & ANOTHER – VS – REPUBLIC [2017]eKLR**. The petitioner also prays for such other directions and/or reliefs as this court may deem fair and just to grant. The application is premised on six grounds that are set out on the face thereof and is also supported by an affidavit sworn by the petitioner on 26th April, 2018.

Background

2. The petitioner herein was charged and convicted for the offence of robbery with violence contrary to section 296(2) of the Penal Code vide Criminal case number 1065 of 2008 in the Chief Magistrate's court at Maua. He was sentenced to suffer death as by law provided. Thereafter, the petitioner filed his first appeal in the high court here at Meru, being Meru High Court Criminal Appeal No. 81 of 2009. That appeal was heard and dismissed. The petitioner's second appeal, to the court of Appeal at Nyeri being Criminal Appeal No. 463 of 2010 was also dismissed on both conviction and sentence, hence this application.

Submission

3. The applicant contends that during the trial, his mitigating factors were not considered by the court because of the mandatory nature of the sentence as provided under Section 296(2) of the Penal Code. He further contends that following the recent pronouncement by the Supreme Court of Kenya in the **Francis Karioko Muruatetu case** (above), the sentencing landscape for capital offences has changed since the mandatory death sentence prescribed by Section 296(2) of the Penal Code has been declared unconstitutional, thereby necessitating a fresh look by this court at the sentence imposed upon the petitioner by the learned trial court and confirmed by the High Court and the Court of Appeal respectively.

4. The petitioner also says that the 11 years he has been in prison have given him an opportunity to get rehabilitated through various prison rehabilitation programmes and that he is now ready to contribute to the country's development through legal means.

5. For the record, the petitioner, among others, attacked Jerusha Mwakimbo Kinti with pangas while pretending to be police officers on 6th April, 2008 at Thau Location of Tigania District. They stole a radio valued kshs.6,000/= and Kshs.4,000/= in cash. The complainant was injured during the attack.

Analysis and Determination

6. What the applicant is seeking from this court is a re-sentencing in light of the facts of this case and mitigation made. I also have to consider the fact that the death sentence for capital offences has been declared unconstitutional by the Supreme Court. In deciding the gravity of the sentence to be imposed upon the petitioner, I have to consider the fact that the death sentence of the petitioner's co-accused, Moses Gikunda Lithara in a judgment delivered by Hon. Majanja J on 16th October, 2018 was reduced to twenty (20) years imprisonment from 17th April 2008 when he was arraigned in court.

7. In light of all the above, I now re-sentence the petitioner to twenty (20) years imprisonment from the 17th April, 2008 when he first appeared in court.

Orders accordingly

Judgment written and signed at Kapenguria

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Meru this 24th July 2019

F. GIKONYO

JUDGE

In the presence of:

Petitioner/Applicant present in person

Namiti for Respondent

Mwenda - Court Assistant