REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

PETITION NO 10 OF 2018

SIMON GITHU MBUGUA…..…….....……1ST APPELLANT

MUHORO THUITA ……..…..…. 2ND APPELLANT

VERSUS

REPUBLIC ……..……...……STATE

JUDGMENT

1. The two Applicants herein were involved in a robbery on 04/01/2006. There were at least two other people involved. They were armed with a pistol, a home-made gun and a sword. They attacked Paul Ochieng Okoth and Joseph Maina (Victims). The Victims had driven their employer's motor vehicle to Narok to distribute beer and were attacked on their way back. The aim, it would appear, was primarily to steal the lorry Ochieng and Maina had.

2. In order to accomplish their mission, the Applicants and their colleagues threatened the Victims that they would use the guns. They assaulted them and forced them to lie on the floor of the lorry. They also stole all the valuables they had on them. The Victims, then, succeeded to escape. Unfortunately for the Applicants, they were apprehended shortly thereafter in the same night of the robbery. They were each charged with the principal offence of robbery with violence contrary to section 296(2) of the Penal Code.

3. The Trial Court thought there was enough evidence to safely convict the Applicants. It sentenced him to the death penalty as mandatorily required by law at the time. The High Court did the same as did the Court of Appeal.

4. The Applicant was given a lifeline by the recent decision in ***Francis Karioko Muruatetu & Another v Republic [2017] eKLR***. In the ***Muruatetu Case***, the Supreme Court outlawed mandatory death penalty for murder as unconstitutional and struck down section 204 of the Penal Code to the extent that it prescribed mandatory death sentence upon conviction for murder.

5. The reasoning in ***Muruatetu Case*** respecting section 204 of the Penal Code (the penalty section for murder), has been extended by the Court of Appeal to the mandatory death penalty in robbery with violence cases and probably all other similar mandatory death sentences. That was in ***William Okungu Kittiny v R [2018] eKLR***.

6. In ***Benson Ochieng & Another v Republic (Nakuru High Court Misc. Application No. 45 of 2018)***, I reached the conclusion that the High Court can invoke its original jurisdiction bequeathed to it in Article 165(3)(a) of the Constitution to re-sentence persons on death row who were sentenced pursuant to the mandatory death penalty provisions which have been declared unconstitutional. Addressing the advisory by the Supreme Court to those on death row pursuant to the mandatory death penalty provisions the Supreme Court had just declared unconstitutional that they should await a Taskforce ordered by the Supreme Court and not approach the Supreme Court with individual petitions, I had this to say:

> *As I understand it, this Application is pivoted on Article 165(3)(a) of the Constitution. That clause gives the High Court unlimited original jurisdiction in criminal and civil matters. On the other hand, the Supreme Court adviced similarly-positioned would-be Petitioners to await the formation of the Taskforce which will recommend the way forward for the thousands of prisoners presently serving the death sentence. However, the position of the Supreme Court was quite specific: it indicated that it will not consider individual Petitions presented to it by the prisoners after enunciating the constitutionality of the mandatory death sentence.*
>
> *I have taken the position that the Supreme Court neither intended nor achieved the purpose of limiting the jurisdiction of this Court to consider applications for re-sentencing by individuals such as the Applicants who were sentenced to death under the then mandatory provisions of the Penal Code. A progressive and purposive reading of the constitutional provisions relied on by the Supreme Court to reach its outcome in the **Muruatetu Case** would lead us to this conclusion. The Court, may, of course, determine for prudential reasons, to await the work of the Taskforce or other docket management considerations.*

7. It is for this reason that I take jurisdiction to re-consider the sentence imposed on the Applicant herein following the ***Muruatetu Case***.

8. Both Petitioners strongly urge the Court to find that the death penalty imposed was disproportionate in the circumstances of the case. They urge that it be substitute with a term in prison and they further urge that the term imprisonment be equal to the time served – which is about eighteen (18) years.

9. In support of their Petition, both Petitioners said that they were remorseful and that they were very sorry for their past life of crime. The 1st Petitioner (Simon Mbugua) informed the Court that he has a wife and children and that he left them as toddlers; and that they are now mature adults with their own children. He also told the Court that he developed thyroid goiter in 2010 while in Prison. He has a major operation coming up and he hopes the Court will release him to have it done while he is a civilian. The 1st Petitioner told the Court that he has been fully rehabilitated and that he has been trained as a paralegal as well as an evangelist.

10. Muhoro Thuita, the 2nd Applicant was of similar sentiments. He produced a letter from the Pentecoastal congregation in Prison attesting to how much he has changed. He also done courses in theology and is NITA-tested in tailoring.

11. Mr. Chigiti requested the Court to consider the serious aggravating circumstances in the case. He mentioned the following:

a. That the Petitioners were members of a notorious gang that terrorized the region for a long time;

b. They were armed with multiple firearms;

c. The use of the firearms led to a lot of trauma for the victims and.

12. There is no doubt that this was an aggravated robbery: multiple firearms were used in the robbery and shots fired; a gang was involved and some members were never apprehended; and personal violence was used on the victims. I accept that the Petitioners are remorseful and are rehabilitated. However, it is important that the society denounces this kind of violent robbery with unmistakable rigour. A stiff prison sentence communicates that message to the perpetrators and future criminal wannabes.

13. **Given the nature of the robbery**, **considering the entirety of the facts, it is appropriate to substitute the death sentences pronounced on each of the Applicants in this case. In their place, I will impose a sentence of twenty one (21) years imprisonment for each Petitioner commencing on 12/01/2000.**

14. Orders accordingly.

Dated and delivered at Nakuru this 7th August, 2019

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JOEL NGUGI

JUDGE