



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CRIMINAL APPEAL NO 231 OF 2005**

**JACKSON GITONGA BURI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING AND RE-SENTENCING**

**(DONE AT THE HIGH COURT OF KENYA, NANYUKI).**

1. The Appellant herein, **JACKSON GITONGA BURI**, was convicted of one count of attempted robbery with violence contrary to section 297(2) of the *Penal Code*, and two counts of robbery with violence contrary to section 296(2) of the *Penal Code*. This was vide *Nanyuki SRM Criminal Case No 774 of 2005*. He was sentenced to death on each count. His first appeal herein against the convictions and sentences was dismissed in a judgment dated and delivered at Nyeri on 01/10/2008 (Kasango & Makhandia, JJ). His second appeal to the *Court of Appeal* at Nyeri vide *Criminal Appeal No 235 of 2008* was dismissed in a judgment dated 04/11/2011; but that court ordered that the Appellant should suffer death only on count one and suspended the death sentence on counts two and three. The Appellant informed this court that subsequently his death sentence was commuted to life imprisonment by executive clemency.

2. The Appellant then applied vide *Nanyuki HC Misc Criminal Application No 5 of 2018* for re-sentencing following certain recent developments in the law. Those developments are that the *Supreme Court of Kenya* in *Petition No 15 of 2015 (Consolidated with Petition No 16 of 2015), Francis Karioko Muruatetu & Another -vs- Republic, Francis Karioko Muruatetu & Another -vs- Republic and Others, (2017) eKLR*, declared as unconstitutional the mandatory nature of the death sentence as provided for under section 204 of the *Penal Code* for the offence of murder under section 203 of the same Code. It remitted the matter back to the *High Court* for re-hearing on the sentence only. For the avoidance of doubt that apex court also stated that the declaration did not disturb the validity of the death sentence as contemplated under *Article 26(3)* of the *Constitution of Kenya, 2010*.

3. By parity of reasoning, the said declaration by the *Supreme Court of Kenya* must no doubt apply in equal measure to the mandatory nature of the death sentence under **sections 296(2) and 297(2)** of the *Penal Code*; hence the Appellant's present application.

4. For expediency, and because the *High Court* as the first appellate court has the same sentencing powers as the trial court, I directed that the Appellant's application be heard in the first appeal file. This would also prevent the mischief of multiple re-sentencing applications by the same appellant!

5. I have considered the submissions of the Appellant and those of the Learned Counsel for the Respondent. I have also seen and read the pre-sentencing report dated and filed in court on 14<sup>th</sup> November 2019. Finally, I have considered the circumstances in which the offences the Appellant stood convicted of were committed.

6. The Appellant was jointly charged with another person who was acquitted. The three robberies happened on the same day in broad daylight in the same transaction. The Appellant and his accomplices were armed with a toy pistol. There was no injury to any of the victims. In the second count only KShs 300/00 was stolen. In the third count 2 packets of cigarettes worth KShs 60/00 were stolen.

7. Clearly, given the circumstances of the attempted robbery with violence and the two robberies with violence, death sentences were not deserved at all. Substantial terms of imprisonment would have met the ends of justice.

8. In the circumstances, and having considered all relevant material, I will allow the Appellant's application for re-sentencing by setting aside the three sentences of death and substituting therefor fifteen (15) years imprisonment for each of the three counts to run concurrently from the date when he was sentenced by the trial court, which was 13<sup>th</sup> September, 2005. It is so ordered.

**DATED AND SIGNED AT NANYUKI THIS 18<sup>TH</sup> DAY OF DECEMBER 2019**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT NANYUKI THIS 19<sup>TH</sup> DAY OF DECEMBER 2019**