

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NOS 166 & 169 OF 2005 (CONSOLIDATED)

1. STEPHEN KIBERENGE (alias ZAKAYO MURIITHI)

2. DAVID MUGUNA.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

RULING AND RE-SENTENCING

(Done At the High Court of Kenya, Nanyuki)

1. The Appellants herein, **STEPHEN KIBERENGE** (alias **ZAKAYO MURIITHI**) and **DAVID MUGUNA**, were convicted of one count of **robbery with violence** contrary to **section 296(2)** of the **Penal Code**. They were each sentenced to death. This was vide **Nanyuki SRM Criminal Case No 1667 of 2004**. Their first appeals herein against both conviction and sentence were dismissed in a judgment dated and delivered at Nyeri on 29/05/2008 (Kasango & Makhandia, JJ). Their second appeal to the **Court of Appeal** at Nyeri vide **Criminal Appeal No 483 of 2010** was also dismissed in a judgment dated and delivered on 10/10/2013. This court was informed by the Appellants that their death sentences were subsequently commuted to life imprisonment.

2. Following recent developments in the law, the Appellants have now applied for resentencing vide **Nanyuki Criminal Petition No 14 of 2018**. 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 [2017] eKLR**, in its judgment dated 14/12/2017 declared as unconstitutional the mandatory nature of the death sentence provided for under section 204 of the Penal Code for the offence of murder under section 203 of the Penal Code. For avoidance of doubt the court also stated that its declaration did not affect the validity of the death sentence as contemplated under **Article 26(3)** of the **Constitution of Kenya, 2010**. It remitted back the matter to the **High Court** for re-hearing on sentence only.

3. By parity of reasoning, the said declaration by the **Supreme Court** must no doubt apply in equal measure to the mandatory nature of the death sentence under section 296(2) of the Penal Code. Hence the present application by the Appellants.

4. This being the first appellate court, it has the same sentencing power as the trial court. I considered it more expedient that this court should do the re-sentencing rather than remitting the matter back to the trial court. It was also appropriate that the re-sentencing be done in this appeal file rather than in the petition filed by the Appellants in order to avoid confusion and possible mischief of multiple applications for re-sentencing.

5. I have considered the Appellants' submissions as well as those of the learned counsel for the Respondent. I have also seen and considered the pre-sentencing report dated 12th and filed in court on 14th November, 2019. Finally, I have considered the circumstances in which the robbery was committed.

6. The Appellants, both fairly young men at the time, were armed with pangas, rungas and a spear. The complainant was cut on the face, nose and jaw. The blow to his face fractured his skull. The injuries were classified as grievous harm. The complainant was in hospital for 2 weeks. KShs 16,400/00 in cash was stolen in the robbery.

7. Though the circumstances of this robbery were certainly aggravated by the grievous injuries to the complainant, the sentence of death meted out was not appropriate. The Appellants deserved a second chance at life. A substantial term of imprisonment would have met the ends of justice.

8. Having considered all relevant matters, I will set aside the sentence of death and substitute in its place a term of imprisonment for twenty (20) years for each Appellant, effective from the date when they were sentenced by the trial court, which was 30th June, 2005. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 18TH DAY OF DECEMBER 2019

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 19TH DAY OF DECEMBER 2019