



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

(CORAM: CHERERE-J)

CRIMINAL PETITION NO. 136 OF 2018

BETWEEN

JOHN MUNENE GITIYE.....1ST PETITIONER

JOHN MUTUMA RUKUNGA.....2ND PETITIONER

AND

REPUBLIC.....RESPONDENT

JUDGEMENT

Introduction

1. The trial court in **TIGANIA Criminal Case No. 67 OF 2010**, convicted the Petitioners of robbery with violence contrary to section **296(2)** of the Penal Code and gang rape contrary to section 10 of the Sexual Offences Act NO. 3 of 2006.
2. Petitioners were sentenced to death for the offence of robbery with violence and 20 years for gang rape.
3. Petitioners' appeals to the High Court vide **Meru High Court Criminal Appeal No. 09 OF 2011** and to the Court of Appeal in **Nyeri Criminal Appeal No. 39 of 2015** were dismissed and the conviction upheld and sentences confirmed.
4. By a petition filed on 13th May, 2019, the Petitioners have petitioned this court for resentencing. It is their case that they have been incarcerated for 13 years and have been rehabilitated.
5. Ms. Mbithe, learned counsel for the state submitted that the death sentence was still lawful.

Analysis and Determination

6. At the time of the Petitioners' conviction and sentence, death was the only available sentence for robbery with violence and imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life for the offence of gang rape.
7. The Supreme Court decision in the case of **Francis Kariuki Muruatetu & Another v Republic & 5 Others [2016] eKLR** declaring the mandatory death sentence unconstitutional has necessitated resentencing of all persons previously sentenced to the mandatory death sentence. In the case of **William Okungu Kittiny v Republic KSM CA Criminal Appeal No. 56 of 2013 [2018] eKLR**, the Court of Appeal applied the **Muruatetu Case (Supra)** mutatis mutandis to the provisions of section **296(2)** of the **Penal Code (Chapter 63 of the Laws of Kenya)** which imposes the mandatory death penalty for the offence of robbery with violence and held that death was a discretionary maximum sentence.
8. In the case of **Michael Kathewa Laichena & another v Republic [2018] eKLR**, Majanja J, précised the procedure that a court considering resentencing. The court further stated that the **Guidelines** do not replace judicial discretion but are intended to promote transparency, consistency and fairness in sentencing.
9. Under the proviso to section **333(2)** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**, the court is entitled to take into account the period the petitioner has spent in custody in determining the sentence.

10. The maximum sentence for simple robbery is 14 years' imprisonment. The mitigating circumstances in this case are that the Petitioners could be considered first offenders. The aggravating factors are that the Petitioners were armed with a firearm and not only robbed and injured the complainant but also gang raped her.

11. The Petitioners have been incarcerated for the last 11 years. The offences against the complainant were heinous and must have occasioned her severe trauma and suffering.

12. Petitioners have not undertaken any form of training as a way of reformation. Petitioners are resented to an imprisonment term of **25 years** for robbery with violence contrary to section **296(2)** of the Penal Code and **10 years** for gang rape contrary to section 10 of the Sexual Offences Act from date of initial conviction within which time it is hoped that will for undertake some form of training as a way of reformation.

DELIVERED AT MERU THIS 13th DAY OF May 2021

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Kinoti

1st Petitioner - Present in person

2nd Petitioner - Present in person

For the State - Ms. Mbithe