



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL MISC. APPLICATION NO. 56 OF 2018 AND NO. 69 OF 2018

(CONSOLIDATED)

MWENDWA KILONZO.....1ST APPLICANT

JACKSON WAMBUA.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The 2 applicants were charged in Criminal Case No. 510 of 2001 in Principal Magistrate’s Court at Kitui with offence of robbery with violence contrary section 296(2) Penal Code Cap. 63 whereof they were found guilty, convicted, and sentenced to death.
2. They appealed in Machakos HCCRA No. 18, 19 and 20 of 2002 which after hearing was dismissed. They appealed to Court of Appeal No. 209 and 210 of 2004 which also after hearing dismissed the appeal.
3. They have now moved court under the window which was opened by the case of *Supreme Court of Muruatetu Petition No. 15 of 2015*.
4. The 2 applicants were arrested on 29/4/2001 and have been in custody since then for a period of about 19 years.
5. The prosecution did not oppose the application for re-sentence. The court is aware of the recent pronouncement in the cited *Supreme case of Muruatetu* and subsequent Court of Appeal decisions which have affirmed the principle that the mandatory aspect of the death sentence is unconstitutional.
6. In sentencing the applicants on 6/2/2002 the trial magistrate held that there is only one sentence provided by the law for those convicted of robbery with violence contrary to section 296(2) of the Penal Code; that is death penalty. Then the court proceeded to award each of the applicant’s death penalty.
7. Despite the mitigations tendered, the court did not consider the same or allude to the same as the court’s hands were tied by the law.
8. Thus the earlier mentioned authorities came into play. Thus the court finds that the death sentence meted to the applicants cannot stand as their mitigations were not considered.
9. Thus the court makes the following orders:

(1) The death sentence which had been commuted to life sentence is set aside.

(2) The matter is referred back to the Chief Magistrate Courts Kitui for the sentencing afresh after the court considers the mitigations and the period the applicants have been in custody.

(3) Orders accordingly.

DATED, SIGNED AND DELIVERED AT KITUI THIS 17th DAY OF JANUARY, 2020.

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C. KARIUKI

JUDGE