



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL PETITION NO. 43 OF 2018

ANDREW NYONGESA EKIRAPA.....1ST PETITIONER

NELSON SIMIYU SIERA.....2ND PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. **The Petitioners herein were** convicted and sentenced to death for the offence of robbery with violence contrary to Section 296(2) of the Penal Code in *Senior Resident Magistrates's court at Lodwar* . The 1st Petitioner was further convicted of the offence of Rape contrary to Section 140 of the Penal Code and sentenced to 10 years to be held in abeyance pending the death sentence. Both their first and second appeal were dismissed.

2. **The Petitioners have filed this Petition pursuant to** the Supreme Court decision in *Francis Karioko Muruatetu & Another v Republic SCK Pet. No. 15 OF 2015 [2017] eKLR* declaring the mandatory death sentence for the offence of murder unconstitutional. 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* decision *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.

3. The petitioners filed certificates to demonstrate that they have reformed while in custody. The 1st petitioner vide his certificates claimed he had undergone various rehabilitative programmes including training as a carpenter while the 2nd Petitioner claimed he had studied bible studies and also trained as a carpenter.

4. In response to the Petition, Mr Omooria, learned counsel for the state opposed the said petition and urged the court to consider the circumstances under which the offence was committed in view of the fact that the petitioners inflicted injuries on the complainant and were armed with pangas and knives while robbing her.

5. The Supreme Court decision in *Francis Karioki Muruatetu & Another v Republic & 5 others* declared the mandatory death sentence unconstitutional and therefore I am called upon to resentence the Petitioner.

6. I have considered the *Sentencing Policy Guidelines, 2016* which provided for a four tier methodology for determination of a custodial sentence. The first point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances.

6. Considering the fact that the aforementioned guidelines did not take into account the fact that the death penalty would be declared unconstitutional, the Court in the *Muruatetu Case (Supra, para. 71)*, considered that in re-sentencing in a case of murder, the following mitigating factors would be applicable;

(a) age of the offender;

(b) being a first offender;

(c) whether the offender pleaded guilty;

- (d) character and record of the offender;
- (e) commission of the offence in response to gender-based violence;
- (f) remorsefulness of the offender;
- (g) the possibility of reform and social re-adaptation of the offender;
- (h) any other factor that the Court considers relevant.

8. A look at other sentences that were imposed by courts after the Muruatetu case in cases of this nature implies that courts have considered a minimum of 20 years as sentence for offences of this nature. This Court in **Benjamin Kemboi Kipkone Vs Republic (2018) eKLR**, substituted the death sentence with 20 years imprisonment with effect from the date of judgment where 3 robbers armed with an Ak 47 rifle robbed the complainants of Kshs. 250,000/= and a mobile phone.

9. In **Paul Ouma Otieno Vs Republic (2018) eKLR** where the convict was armed with an AK 47 rifle and a kitchen knife and robbed the complainant of cash Kshs. 450,000/= and 3 mobile phones, **Majanja J** substituted the death sentence with 20 years' imprisonment commencing on the date of the sentence by the trial court

10. I have considered the above stated principles of sentencing and note that the petitioners have been incarcerated for almost 20 years. I have also considered that the 2nd Petitioner has an exemplary record from prison authorities. I have considered the circumstances in which the offence was committed and the seriousness of the offence committed including the further conviction of the 1st petitioner on the charge of rape.

11. In the premises, with regards to the 2nd petitioner, since there were no aggravating circumstances in the manner the robbery was executed, I take the view that a sentence of nineteen (19) years imprisonment from the date of the sentence by the trial court, that is 26/10/2001, is adequate punishment for the offence committed by the 2nd petitioner.

12. With regards to the 1st petitioner, I hereby set aside the sentence of death imposed on the offence of robbery with violence and re sentence him to **19 years** from the date of the sentence by the trial court, that is 26/10/2001. On the 2nd charge of rape that was being held in abeyance pending the death sentence, I re sentence him to serve 3 years imprisonment which should be considered served for avoidance of doubt.

Signed, dated and delivered at Kitale on this 3rd day of March, 2020.

H. K. CHEMITEI

JUDGE

3/3/2020

In the presence of:-

M/s Kagai for the Respondent

Applicant present

Court Assistant – Kirong

Ruling read in open court