



**REPUBLIC OF KENYA**

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

**CRIMINAL PETITION NO. 22 OF 2019**

**JOHN MWANIKI KITUYU.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The Petitioner was charged and convicted of the offence of causing grievous harm contrary to **Section 234** of the *Penal Code* and sentenced to life imprisonment on **11/8/2006**. His appeal to the High Court was dismissed.

2. The petitioner has now filed the instant application seeking for re-sentencing which has been necessitated by the Supreme Court decision in **Francis Karioko Muruatetu & Another –Vs- Republic (2017) eKLR** whereby the mandatory death sentence for the offence of murder was declared unconstitutional. As a corollary, in the case of **William Okungu Kittiny –Vs- Republic Kisumu 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 which imposes a mandatory death penalty for the offence of robbery with violence and in the case of **Jared Koita Injiri vs. Republic [2019] eKLR**, the Court of Appeal applied the *Muruatetu* decision to the provisions of mandatory minimum sentences as provided for in the *Sexual Offences Act*.

3. *It therefore follows that the Muruatetu decision applies mutatis mutandis to the Provisions of the section 234 of the Penal Code.*

4. Mr Omooria, learned counsel for the state filed written submissions on 14<sup>th</sup> January, 2020 opposing the Petition and urged the court to find the instant Petition as being without merit. The main bone of contention according to the State counsel is that based on the circumstances under which the petitioner committed this offence, he does not benefit from this plea for it is clearly on record that he had previously been convicted and sentenced to 4 years imprisonment for assaulting the complainant and vowed that upon release he would attack her again. It is argued that true to his words, he allegedly attacked her when he was released with the intention of ending her life.

5. In **Francis Karioko Muruatetu & Another –Vs- Republic** the Supreme Court stated the following guidelines as mitigating factors in a re-hearing sentence for the conviction of a murder charge:-

*(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 and*

*(h) any other factor that the court considers relevant.*

These factors are also applicable in a re-sentencing for the offence of grievous harm.

6. According to the *Sentencing Policy Guidelines, 2016* (“*the Guidelines*”) published by the Kenya Judiciary, the sentence imposed must meet the following objectives in totality;

1. **Retribution:** To punish the offender for his/her criminal conduct in a just manner.
2. **Deterrence:** To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
3. **Rehabilitation:** To enable the offender reform from his criminal disposition and become a law abiding person.
4. **Restorative Justice:** To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims, communities’ and offenders’ needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender’s contribution towards meeting the victims’ needs.
5. **Community protection:** To protect the community by incapacitating the offender.
6. **Denunciation:** To communicate the community’s condemnation of the criminal conduct.

7. In determining this Petition, I have considered the above factors and guidelines and the fact that the petitioner has been in custody for 14 years. It is also not lost on me that the petitioner is a second offender and the offence of which he was convicted on was aggravated.

8. In a nutshell, I am of the view that the petitioner herein has rehabilitated during his incarceration. Whereas the circumstance in which the crime was committed is serious, this court is inclined to take into account the fact that the applicant has been in custody for a long period. The Petitioner is now 59 years and was arrested when he was 45 years old. I would want to assume he has grown up to be wiser and more reformed.

9. The **life imprisonment sentence is hereby set aside and the Petitioner is sentenced to Twenty (20) years imprisonment from 11/8/2006.**

**Signed, Dated and Delivered at Kitale on this 4th day of March, 2020.**

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**H.K. CHEMITEI**

**JUDGE**

**4/3/2020**

**In the presence of:-**

**Ms Kagali for Respondent**

**Applicant – present**

**Court Assistant – Kirong**

**Ruling read in open court**