



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL PETITION NO. 21 OF 2018

JAMES KIKASE ITUKAN..... PETITIONER

VERSUS

REPUBLIC..... RESPONDENT

RULING

1. **The Petitioner herein was** convicted and sentenced to death for the offence of robbery with violence contrary to Section 296(2) of the Penal Code in *the Senior Resident Magistrates's court at Lodwar*. His appeal to the High Court, ***Kitale Criminal Appeal No. 12 of 2009*** was dismissed.

2. **The Petitioner has filed this Petition pursuant to** the Supreme Court decision in ***Francis Karioko Muruateru & 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 petitioner attached certificates to demonstrate that he has reformed and has underwent various rehabilitative programmes including studying biblical studies.

4. 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.

5. 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.*

7. 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 **Twenty 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.

8. 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

9. In **Wycliffe Wangugi Mafura –Vs- Republic Eldoret Criminal Appeal No. 22 of 2016 (2018)** the Court of Appeal imposed a sentence of 20 years imprisonment where the appellant was involved in robbing an Mpesa shop agent with the use of firearm.

10. In **Benson Ochieng & France Kibe –Vs- Republic (2018) eKLR**, Joel Ngugi J. re-sentenced the petitioners to 20 years imprisonment upon considering that the offence was aggravated by the use of multiple guns by an organized gang to commit armed robbery.

11. Section 333 (2) of the Criminal Procedure Code requires a sentencing court to consider the period spent in custody awaiting trial.

12. I have considered the above stated principles of sentencing and that the petitioner has been in custody pre and post-trial for over 14 years. I have also considered the circumstances in which the offence was committed. The offence in this case was aggravated by the use of a firearm in which the complainant was shot at the leg during the said robbery.

13. Upon considering the sentences in the above cited authorities where the accused persons were armed with fire arms, I am of the view that 21 years imprisonment will be sufficient punishment for the Petitioner.

14. The death sentence imposed on the petitioner is hereby set aside and replaced with a sentence of **Twenty one (21) years** imprisonment from the date of conviction by the trial court, **19/3/2009**.

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

H.K. CHEMITEI

JUDGE

3/3/2020

In the presence of:-

Ms Kagai for the Respondent

Applicant present

Court Assistant – kirong

Ruling read in open court