



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CRIMINAL PETITION NO. 21 OF 2019**

**JAMES LOKOYEN ETIBOR.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The Petitioner was convicted of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code and sentenced to death. His appeal to the High Court was unsuccessful.

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 Petition No. 15 of 2015 (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. The petitioner is seeking that the death sentences imposed on them be set aside and for the court to impose an appropriate sentence.

3. The facts of the case against the petitioner was that on the 6<sup>th</sup> and 7<sup>th</sup> December, 2006 at Milimani Estate in Kitale town within Tran Nzoia District of Rift Valley Province, jointly with others while armed with dangerous weapons namely Pangas, rungu, robbed JOHN DANIEL KIPRUTO some unknown amount of money, Television set make Sony 21 inch coloured, a three burner cooker, a mobile phone make Nokia 333 S/No. 350885807289237 and a Motor Vehicle Registration Number KAD 731Q make Peugeot 405 valued at KShs. 300,000 and immediately after the time of such robbery killed the said JOHN DANIEL KIPRUTO.

4. The petitioner and his colleagues were sentenced by the magistrate's court on 5<sup>th</sup> August 2010. The petitioner had thereby been in custody for 3 years while awaiting his trial and has now been in jail for 9 years.

5. The Petitioner from the certificates issued to him while in prison, appears to have reformed somewhat. He has attached some certificates to show that he is now an evangelist having undertaken theological courses and attained higher diploma in theology and psychological counselling.

6. In sentencing, the Court of Appeal in **Thomas Mwambu Wenyi Vs Republic (2017) eKLR** cited the decision of the Supreme Court of India in **Alister Anthony Pereira Vs State of Maharashtra** at paragraph 70-71 where the court held the following on sentencing:-

**“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.**

7. 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 robbery with violence.

8. The Judiciary Sentencing Policy Guidelines lists the objectives of sentencing at page 15 paragraph 4.1 as follows:

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.

9. I have considered other cases where convicts for robbery with violence were re-sentenced after the *Muruatetu case*. 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 complainant of Kshs. 250,000/= and a mobile phone.

10. 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.

11. I have considered the above stated principles of sentencing and that the petitioner has been incarcerated for a period of 13 years pre and post-trial. I have also considered that he has an exemplary record from prison authorities through the Chaplain in charge. I have considered the circumstances in which the offence was committed and the seriousness of the offence committed in that a life was lost. I do not think that the period served in prison is sufficient for the serious offence committed by the petitioner.

12. I am of the view that the petitioner deserves a sentence of at least 25 years imprisonment. The sentence of death imposed on the Petitioner is hereby set aside. I re-sentence the Petitioner to serve **Twenty five (25) years** imprisonment commencing from the date of sentence by the trial court that is, **5/8/2010**.

**Signed, Dated and Delivered at Kitale on the 3<sup>rd</sup> day of March, 2020.**

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**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**