



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL PETITION NO. 100 OF 2018

LOWAYAKARU EJUROTO ELIMELIM.....PETITIONER

AND

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 Kitale ***Criminal Case No. 4918 of 2002*** on 16/11/2004. His first appeal to the High Court, ***Kitale Criminal Appeal No. 71 of 2004*** was dismissed. He then preferred a second appeal in ***Eldoret Criminal Appeal No. 219 of 2006*** and the same was dismissed on 11/04/2008.

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 sentence imposed on him be set aside and that this court to imposes an appropriate sentence.

3. The petitioner attached certificates to this petition in a bid to demonstrate that he has reformed somewhat and has underwent various rehabilitative programmes while in incarceration.

4. 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.

5. I have considered *The Sentencing Policy Guidelines, 2016* and its application which 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.

6. In determining this Petition, I have had a look at judgments of Superior Courts in offences of this nature which were delivered after the Muruatetu's case in order to ensure consistency and fairness. In the case of *Wycliffe Wangusi Mafura v Republic ELD CA Criminal Appeal No. 22 of 2016 [2018] eKLR*, where the Court of Appeal imposed a sentence of 20 years where the appellant was involved in robbing an Mpesa shop with the use of a firearm with which he threatened the attendant but was caught before he inflicted any violence on her.

7. 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.

8. I have considered the stated principles of sentencing and the above cited authorities. I have considered the circumstances in which the offence was committed in that the offence in this case was aggravated by the use of a firearm where the deceased was murdered in the process.

9. In my view, I do not think that the period he has served in prison is sufficient for the serious offence committed by the petitioner. I hereby re sentence him to **Twenty five (25) years'** imprisonment from the date he was convicted by the trial court, that is 16/11/2004.

Signed, Dated and Delivered at Kitale on this 5th day of March, 2020.

H.K. CHEMITEI

JUDGE

5/3/2020

In the presence of:-

Ms Kagali for the Respondent

Applicant present

Court Assistant – Kirong

Ruling read in open court