

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

PETITION NO. 38 OF 2019

EZEKIEL MBURU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RE-SENTENCING

[1] The petitioner, **Ezekiel Mburu**, was charged before the Chief Magistrate's Court Criminal Case No. 3873 of 1999 at Meru for the offence of robbery with violence contrary to **Section 296 (2) of the Penal Code**.

[2] After the trial, the Petitioner was found guilty and sentenced to death. Being aggrieved by that decision, the petitioner filed appeal to the High Court at Meru through HCCRA No. 143 of 2001; his conviction and sentence were upheld. His appeal to the Court of Appeal at Nyeri, Criminal Appeal No. 282 of 2006, was dismissed.

[3] Now, the petitioner has filed a Motion dated 1/10/2019 petitioning the court to revise his sentence on the basis of the Supreme Court decision in the case of **Francis Muruatetu and Others vs Republic [2017] eKLR**.

[4] In that case, the Supreme Court of Kenya held that the mandatory nature of the death sentence under **Section 204 of the Penal Code** was unconstitutional as it denied the Court its discretion in sentencing. The Court also set out some of the important considerations in sentencing such as; *age of the offender, being a first offender, whether the offender pleaded guilty, the character and record of the offender, commission of the offence in response to gender-based violence, remorsefulness of the offender, the possibility of reform and social re-adaptation of the offender and any other factor that the Court considers relevant*.

[5] Though the Supreme Court was dealing with the offence of murder, I take the view that the principle established in Muruatetu case applies in all other cases where the law has provided for a mandatory sentence which limits or excludes judicial discretion in sentencing. For instance, mandatory sentence provided for robbery with violence has similar effects as section 204 of the Penal Code. Needless to state that I do not think the principle established in Muruatetu case is of a nature that it only applies to section 204 of the Penal Code. See the Court of Appeal decision in **William Okungu Kittiny vs. Republic [2018] eKLR**.

[6] Be that as it may, I now delve into the merit of the petition. The particulars of the offence which the Petitioner faced are that he was in the company of a gang of ten (10) people while armed with dangerous weapons when he robbed Isaac Mwenda of cash valued at Kshs. 2,500/- and used actual violence on the said victim and also upon Bernard Gituma occasioning injuries on them.

[7] According to the prisons' report, the petitioner regrets his actions, participated in rehabilitation programs as well as completing his KCPE and KCSE education, has an outstanding character for the nineteen (19) years he has been in custody and his relatives have been visiting him regularly. The transformation will allow him to integrate well into the society. According to the petitioner, he is a first offender aged 31 years old at the time of arrest but now aged 51 years old. He is remorseful for what he did and he prays for forgiveness. He submitted that he has been rehabilitated and will not indulge in any criminal activities again.

[8] I have considered the foregoing and the circumstances under which the offence was committed. I have also considered the mitigation by the petitioner and the prisons' report. Accordingly, I am convinced the application deserves a kind consideration and revision of sentence. The Petitioner has been in custody for nineteen (19) years. He has shown willingness to be productive citizen and he is remorseful for his criminal acts. I therefore, set aside the death penalty imposed on the petitioner and in lieu thereof, I sentence him to serve a jail term of 30 years from the date he was first arraigned in court. It is so ordered. Right of appeal explained.

Dated and delivered at Milimani Nairobi this 21ST day of APRIL 2020.

F. GIKONYO

JUDGE

Representation:

Applicant – In person

Respondent – DPP, Meru

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