



**REPUBLIC OF KENYA**

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

**MSC CRIMINAL APPL. NUMBER 58 OF 2018**

**TITUS MWANGI MUCHINA**

**PETER KINUTHIA**

**PETER GIBSON KIMANI.....APPLICANTS**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING ON RE-SENTENCING**

1. The Applicants were jointly charged with the offence of robbery with violence in **Nakuru Chief Magistrate's Court Criminal Case No.1606 of 2005**. On the 11/3/2008, they were convicted and sentenced to suffer death, the only statutory and prescribed sentence under Section 296(2) of the Penal Code. Their appeal to this court (High Court) was dismissed on the 23<sup>rd</sup> October 2014.

They have served slightly over eleven (11) years in prison, and (4) four in custody.

2. The Applicants approached this court with a plea for Re-sentencing following the holding in the commonly referred to as the "**Muruatetu**" **Supreme Court Judgment in Petition No.15 and 16 of 2015 (Consolidated)** delivered on the 14<sup>th</sup> December 2017 – (2017) e KLR, by their application dated the 11<sup>th</sup> May 2018 and filed on the 14<sup>th</sup> May 2018.

3. I have considered the very spirited mitigation by Mr. Maragia Advocate on behalf of the applicants and the principles stated in the "**Muruateru**" case (**Supra**).

In mitigation, they stated that they have reformed while in prison and are remorseful, that they have trained in various disciplines (certificates provided) and pray that if released they would be useful persons in their community. They pledge to be of good conduct. The applicants are now mature adults at 38, 36 and 35 years old respectively, and strong.

4. In opposing the application, the state submitted that they used dangerous weapons to threaten, rob the public and hijack vehicles and caused injuries to the victims. It is urged that the sentence be upheld.

5. The Supreme Court in the **Muruatetu** decision gave guidelines in regard to hearing applications in regard to re-sentencing. These are:

- Age of the offender
- Being a first offender
- Whether offender pleaded guilty
- Character and record of the offender
- Commission of the offence in response to gender-based violence
- Remorsefulness of the offender
- The probability of reform and social re-adaption of the offender

- Any other factor the court considers relevant.

These guidelines do not take away the courts discretion, but are only advisory.

6. Having considered submissions, and mitigating factors by both parties, and past judgments in respect hereof, I must state that the sentence prescribed under **Section 296(2) of the Penal Code** is still lawful. The **Muruatetu** decision did not outlaw the death sentence, and the court is obliged to look at the peculiar circumstances and character of each case before it can vary or affirm the other sentence.

I am minded that in this application, no life was lost during the robbery using a toy pistol.

I have also considered the primary objectives of Judiciary's sentencing as stated in the Sentencing Policy Guidelines, 2016, being

- (a) *Retribution - to punish the offender for his/her criminal conduct in a just manner.*
- (b) *Deterrence - to deter the offender from committing a similar offence as well as discourage other people from committing similar offences.*
- (c) *Rehabilitation - to enable the offender reform from his criminal disposition and become law-abiding person*
- (d) *Restorative justice - To address the needs arising from criminal conduct such as loss and damage*
- (e) *Community protection - to prevent the country by incapacitating the offender.*
- (f) *Denunciation - To communicate the community's condemnation of the criminal conduct.*

8. I have considered sentences pronounced by other courts pursuant to the **Muruatetu** case.

- In **Eldoret Court of Appeal Criminal Appeal No 22 of 2016 (2018) e KLR Wycliff Wangusi Mafura –vs- Republic**, the appellant robbed an Mpesa shop using a firearm, but was apprehended before inflicting injury. Twenty (20) years sentence was imposed.
- The **Court of Appeal in Kisumu Cr. Appeal No. 616/2010 (2018) e KLR Paul Ouma alias Collera & Another –vs- Republic**, a firearm was used in the robbery. Twenty (20) years sentence was imposed.
- In **Garissa Cr. Misc. Appln. No 22, 23, and 35, Isaac Kimanzi Musee –vs- Republic (2019) e KLR**, crude weapons, pangas and knives were used in robbery of Kshs.350,000/= and actual violence was used to the victim.

Death sentence was commuted to life imprisonment.

9. In **Elizabeth Mwiyaithi Syengo –vs- Republic (2019)** the applicant and others strangled the victim to death before gouging her eyes. The death sentence was reduced to 20 years imprisonment.

Further in **Peter Matiku Muhiru –v- Republic (2019) e KLR** the applicant violently robbed the victims of Kshs.2750/=. The life imprisonment was commuted to time served in prison, then being 17 years.

10. Considering the above and the nature of the robbery, subject hereto, and the mitigating factors, and the eleven (11) years period already served in prison by the Applicants, I substitute the death sentence to 20 years imprisonment, effective from the date of sentence before the trial court, the 11<sup>th</sup> March 2008.

It is so ordered.

**Delivered, signed and delivered at Nakuru this 2nd Day of April 2020.**

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**J.N. MULWA**

**JUDGE**