

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

PETITION NO. 191 OF 2018

BENARD KARIUKI M'MBURUNGA.... PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

1. **Benard Kariuki M'Mburunga** (“the petitioner”), was charged with 3 others before the Chief Magistrate’s Court, Maua with robbery with violence contrary to **section 296(2) of the Penal Code**.

2. It was alleged that, on 14/8/2009 at Kangeta Market, Kangeta Location, in Igembe District (as it was then known), jointly with 3 others charged with him and others not before court, the petitioner robbed **Andrew Mutea** of his mobile phone make Nokia make 1200and cash Kshs.6,800/- all worth a total of Kshs.9,300/- and at or immediately after the time of such robbery used actual violence to the said **Andrew Mutea**.

3. They faced a second count wherein it was alleged that on the same night, place and time and while similarly armed and jointly with others not before court, they robbed **Jacob Karwamba** of Kshs.8,000/- and immediately thereafter wounded the said **Jacob Karwamba**.

4. After the trial, the petitioner and his co-accused were found guilty and sentenced to suffer death. His appeals to this Court and the Court of appeal were dismissed on 4/7/2013 and 22/11/2017, respectively.

5. He has now petitioned this Court to review his sentence on the basis of the Supreme Court decision in the case of **Francis Muruatetu and Others vs Republic [2017] eKLR**.

6. 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 proceeded to set out the criteria or the principles that should guide a Court in sentencing.

7. Some of the considerations are 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.

8. Though in that case the Supreme Court was dealing with the offence of murder, the view I take is that the same principle applies in other cases where the law provides for a mandatory death sentence including cases of robbery with violence. See the Court of Appeal decision in **William Okungu Kittiny vs. Republic [2018] eKLR**.

9. I have considered the foregoing and the circumstances under which the offence was committed. The petitioner has been in custody since August, 2009 (now about 11 years). I have considered his mitigation filed in Court on 25/3/2020. I have also considered the report of the Prisons authorities dated 20/5/2020 which is positive of the petitioner.

10. I have also considered the nature of the offence. That the value of what was stolen was totaled Kshs.17,300/- and that one of the complainant was not seriously injured.

11. In this regard, having considered the foregoing, the 11 year period of incarceration is not yet enough punishment. I am satisfied his petition should be allowed. I set aside the death sentence and re-sentence the 15 years imprisonment from the date of his first sentence.

DATED and DELIVERED at Meru this 3rd day of June, 2020.

A. MABEYA

JUDGE