



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**PETITIONS NOS. 10 AND 11 OF 2019**

**DICKENS ODARI BIGE.....1<sup>ST</sup> PETITIONER**

**DAVID RUTO SIRWON.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The petitioners herein were convicted in Kakamega CMCCRC No. 296 of 2005, of attempted robbery with violence, contrary to section 297(2) of the Penal Code, Cap 63, Laws of Kenya, and sentenced to death. They filed appeals at the High Court, being Kakamega HCCRA Nos. 143 and 144 of 2005, in which the convictions and sentences were affirmed on 4<sup>th</sup> June 2008. They filed a second appeal at the Court of Appeal, Kisumu CACRA No. 649 of 2010, where the convictions and sentences were affirmed.

2. There are recent developments in the Kenyan jurisprudence with regard to mandatory sentences. The Court of Appeal and the Supreme Court has led the way. It is from that background that the petitioners moved this court, in the instant cause, through their separate petitions, which I am hereby disposing of simultaneously. They principally seek re-sentencing in view of the developments that I have referred to hereabove.

3. I note that upon conviction, the petitioners, through counsel, did not mitigate, no doubt given that the sentence available was mandatory, and mitigation would have meant nothing when it came to imposition of sentence. I have noted too the circumstances of the commission of the offence. The petitioners were armed with Somali swords, and they attempted to rob the complainant by threatening to stab him, and demanding that he surrender money to them. Nothing was stolen, and the complainant was not physically assaulted. The petitioners were convicted and sentenced on 13<sup>th</sup> October 2005. They have so far been in prison custody for fifteen years

4. I shall, and hereby, accordingly, following Francis *Karioko Muruatetu & another vs. Republic* [2017] eKLR, set aside the death sentence, and substitute it with a sentence of imprisonment to last the entire period so far served by the petitioners, since their conviction and sentence on 13<sup>th</sup> October 2005, with the effect that the petitioners herein shall be set free from prison custody forthwith, unless they are otherwise lawfully held. It is so ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 2<sup>nd</sup> DAY OF October, 2020**

**W MUSYOKA**

**JUDGE**