



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

RE-SENTENCING PETITION NO.59 OF 2019 AND NO. 19 OF 2020

DICKSON NYAGA.....1ST PETITIONER

JACKSON MURIIRA M' ITHULA.....2ND PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

1. The petitioners were charged and convicted with the offence of murder contrary to **section 203 as read with section 204 of the Penal Code** in Criminal Case No. 32 of 2015. The particulars of the offence were that on 22nd August 2009 at Kalintheria sub Location, Mituntu Location of Tigania West district within Eastern province, the petitioners murdered **Joseph Kailema**.
2. They appealed against the decision in Criminal Appeal No. 32 of 2015 but the appellate court (**S. Gatembu Kairu FCI Arb, F.Sichale, S.ole Kantai JJJA**) dismissed their appeal on 11th July 2019 and upheld their conviction and death sentence.
3. They have since filed their respective petitions seeking resentencing in line with the Supreme Court's decision in **Francis Muruatetu v Republic (2017) eKLR**. They also seek remission of their sentences pursuant to Section 46 of the Prisons Act.
4. In **Francis Muruatetu v Republic (2017) eKLR**, the Supreme Court of Kenya held that the mandatory nature of the death sentence 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.
5. 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.
6. The petitioners in this case aver that they have reformed and have attached certificates of programmes they have undertaken during their rehabilitation. They asked the court to consider their mitigation.
7. The 1st Petitioner stated that he has been incarcerated for 12 years, he was a first time offender and suffers from hypertension which is worsened by his incarceration. The 2nd petitioner averred that he has been incarcerated for 9 years, he sought forgiveness from the victims' families and he is now aged 56 years. A brief report from the officer in Charge Nyeri Maximum prison was also favourable to the 2nd petitioner.
8. The 1st petitioner filed written submissions submitting that the time he has been in custody was sufficient punishment for him. He cited **Micheal Kalewa v R (2018) eKLR, Ahamad. A. Mohammed & Anor vs R (2008) eKLR, Samson Njuguna Njoroge v R HCCR No. 150 of 2016** in support of his submissions.
9. The respondent conceded that the petitioners were first time offenders. He submitted that a term sentence of 25 years would be commensurate to the offence.
10. I have considered the foregoing together with the circumstances of the offence. The facts of the case show that the offence was pre-meditated. Pw7 testified of the threats issued to him and the deceased by the 2nd Petitioner. The deceased had also made a diary of the threats made out to him by the 2nd Petitioner.
11. Pw5, a daughter of the deceased confirmed seeing the 1st petitioner in the market when he enquired from her as to the ownership of the vehicle of the deceased. The petitioners followed the deceased to his home whereby they unleashed terror upon the deceased's family before

kidnapping him and later killing him. The family of the deceased would never heal from what the petitioners put it through.

12. Justice looks at both sides. While the petitioners crave for leniency, the Court must also look at the victims. I have taken into consideration the aggravating and mitigating factors raised by the petitioners. The defence was so brutal that apart from the loss of life, the deceased's family was inflicted with terror that will be difficult to erase.

13. Accordingly, I set aside the death sentence and re-sentence the petitioners to life imprisonment.

SIGNED at Nairobi.

A. MABEYA, FCIArb

JUDGE

DATED and **DELIVERED** at Meru this 10th day of December, 2020.

JUDGE