



## REPUBLIC OF KENYA

### IN THE HIGH COURT OF KENYA AT MURANG'A

#### PETITION NO. 5 OF 2018

PETER KABERU MUGO.....1<sup>ST</sup> PETITIONER

FRANCIS MAINGI MWAURA.....2<sup>ND</sup> PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

#### JUDGMENT

1. The petitioners were adjudged guilty of *robbery with violence* contrary to section 296 (2) of the **Penal Code**. They were sentenced to suffer *death*.
2. Their trial was conducted by G. Mwaura, the learned Principal Magistrate in Murang'a *Criminal Case Number 704 of 2004*.
3. The consolidated appeals to the High Court at Nyeri in *Criminal Appeals Numbers 67 and 69 of 2005* were dismissed by *Kasango J* and *Makhandia J* on 7<sup>th</sup> May 2008.
4. Their final appeal to the Court of Appeal at Nyeri in *Criminal Appeal Number 72 of 2008* was equally *dismissed*.
5. The *particulars* of the charge and *facts* of the case are well captured in the Court of Appeal judgment. From the nature of the present petition, I see no reason to regurgitate them.
6. This is *not* a fresh appeal. It is a petition for *re-sentencing* following the directions by the Supreme Court in *Francis Karioko Muruatetu & another v Republic*, Consolidated Petitions Nos. 15 & 16 of 2015 [2017] eKLR. The court declared that the *death* sentence has *not* been outlawed; but it is no longer *mandatory*. The learned judges held-

*“The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26 (3) of the Constitution.” [Emphasis added]*

7. The Supreme Court then gave the following directions-

*“[111] It is prudent for the same Court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners. **For the avoidance of doubt, the sentencing re-hearing we have allowed, applies only for the two petitioners herein.** In the meantime, existing or intending Petitioners with similar cases ought not approach the Supreme Court directly but await appropriate guidelines for disposal of the same. The Attorney General is directed to urgently set up a framework to deal with sentence re-hearing of cases relating to the mandatory nature of the death sentence - which is similar to that of the petitioners in this case.”*

8. The Supreme Court further directed the Attorney General, the Director of Public Prosecutions and other relevant agencies to prepare a *detailed professional review* with a view to setting up a *framework* to deal with sentence re-hearing. A report was to be submitted within 12 months of the judgment (now past).
9. The High Court has *jurisdiction* to re-sentence the petitioners notwithstanding the *lack* of the framework by those government agencies. See *William Okungu Kittiny v Republic*, Court of Appeal at Kisumu, Criminal Appeal 56 of 2013 (2018) eKLR, *Michael Kathewa Laichena & Another v Republic*, High Court, Meru, Petition 19 of 2017 [2018] eKLR.

10. The original sentence of death for the petitioners has since been commuted to *life* imprisonment.

11. The learned Prosecution Counsel, Ms. Gichuru, left the matter of re-sentencing to the discretion of the court.

12. I am alive that both petitioners were granted a full opportunity to *mitigate* in the lower court. The 1<sup>st</sup> petitioner (who was the 2<sup>nd</sup> accused) said: “*I wish to say that I was defeated [sic] because I do not know how to offer a defence. I have children who rely on me*”. The 2<sup>nd</sup> petitioner (who was the 1<sup>st</sup> accused) only said that he “*did not commit the offence.*”

13. The petitioners have been in custody since 4<sup>th</sup> May 2004 when they took *plea*. They now plead for leniency. They said they have *reformed* and learnt useful *trades* in prison including carpentry and upholstery. The 1<sup>st</sup> petitioner tendered a *positive* recommendation from the Officer in Charge Murang’a Prison dated 28<sup>th</sup> June 2018.

14. I have considered the original mitigation and the fresh clamour for clemency. The petitioners were *first offenders* but they engaged in an orgy of violence during the robbery. *Robbery with violence* is a serious *felony* that still attracts the sentence of *death*.

15. Considering the extenuating and aggravating factors; the period spent in pre-trial and post-sentence custody, I *re-sentence* each petitioner to 20 years’ *imprisonment*. For the avoidance of doubt, the sentences shall run from 3<sup>rd</sup> March 2005, the date of their *original* conviction.

It is so ordered.

**DATED, SIGNED and DELIVERED at MURANG’A this 4<sup>th</sup> day of June 2019.**

**KANYI KIMONDO**

**JUDGE**

**Judgment read in open court in the presence of:-**

Both petitioners.

Ms. R. Gichuru for the Republic instructed by the Office of the Director of Public Prosecutions.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.