



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

PETITION NO. 6 OF 2018

[CONSOLIDATED WITH MISC. CRIM. APPL. NO. 29 OF 2019]

SAMUEL MWAURA MUIRURI.....1ST PETITIONER

LAWRENCE MWANGI MUGO.....2ND PETITIONER

STEPHEN NYAMU KIOI.....3RD PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT

1. The three petitioners were adjudged guilty of *robbery with violence* contrary to section 296 (2) of the **Penal Code** and *rape* contrary to section 140 of the code.
2. They were all sentenced to suffer *death* for the *robbery*; and, to various terms of imprisonment and strokes of the cane for the *rape*.
3. Their trial was conducted by *Nyaga Njage*, the learned Senior Resident Magistrate in Murang'a *Criminal Case Number 1053 of 1995*.
4. The consolidated appeals to the High Court at Nyeri in *Criminal Appeals Numbers 135, 136 and 137 of 1998* were dismissed by *Juma J* and *Mulwa J* on 6th June 2000.
5. Their final appeal to the Court of Appeal at Nyeri in *Consolidated Criminal Appeals Numbers 117, 131 & 133 of 2008* were equally *dismissed* on 10th May 2002.
6. 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 repeat them.
7. The 1st and 2nd petitioners lodged *Petition 6 of 2018* on 16th March 2018. The 3rd petitioner subsequently filed *Miscellaneous Criminal Application 29 of 2019*. By then, the earlier petition had been heard but judgment had not been delivered. As the suits emanate from the same criminal trial, I directed the latter application be consolidated with the earlier petition. I have now also heard the 3rd petitioner.
8. 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]

9. 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.”

10. 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).
11. 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.
12. The original sentence of death for the petitioners has since been commuted to *life imprisonment* by His Excellency the President.
13. The learned Prosecution Counsel left the matter of re-sentencing to the discretion of the court.
14. I am alive that the petitioners were granted a full opportunity to *mitigate* in the lower court. The 1st petitioner (who was the 6th accused) said: “*I ask for leniency; I am innocent*”. The 2nd petitioner (who was the 4th accused) pleaded for leniency. The 3rd petitioner (who was the 2nd accused) also prayed for leniency and added “*let the court consider the period I have been in remand. I was arrested in 1994 and charged in 1995*”.
15. The lower court took into account that all the three petitioners were first offenders. The petitioners now plead for leniency. They said they have *reformed* and learnt useful *trades* in prison including carpentry and upholstery. The three petitioners tendered *positive* recommendations from the Officer in Charge Kamiti Main Prison dated 28th November 2018 and 17th July 2019 respectively. The 3rd petitioner is *hypertensive* and requires medical care.
16. 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. They also gang raped *two daughters* of MWK (PW1) [*particulars withheld*]. *Robbery with violence* is a serious *felony* that still attracts the sentence of *death*.
17. I am well guided by the recent decision of the Court of Appeal in **Mukhwana Lingodo v Republic**, Eldoret Criminal Appeal No. 29 of 2017 [2019] eKLR where the Court held:

*As regards the sentence, the appellant was sentenced to death. Although this court has in numerous decisions applied to robbery with violence cases the decision for the Supreme Court in **Francis Karioko Muruatetu v Republic [2017] eKLR** that death sentence is not mandatory, the death sentence is deserved in the circumstances of this case. The appellant not only robbed the deceased of his motor vehicle and stole his money but also killed him in an extremely cruel manner.*

18. I have considered the level of violence, cruelty and multiple gang rapes of two young and innocent women by the petitioners. They will bear the scars for life. I thus find that the sentence of death in this case is well deserved. I *decline* to disturb it. As stated earlier, the sentence has since been commuted by His Excellency the President to *life imprisonment*.
19. The upshot is that the consolidated petitions are hereby *dismissed*.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 8th day of October 2019.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:-

The three petitioners (in person)

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

Ms. Elizabeth, Court Clerks.