

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

PETITION NO. 14 OF 2019

FAITH MUTHONI M'NGONDUPETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. **Faith Muthoni M'Ngundu (“the petitioner”)** was charged with two counts of robbery with violence contrary to **section 296 (2) of the Penal Code**. The particulars of the offence were that on the 14/8/2009 at Kangeta Market, Kangeta location in Igembe District jointly with 3 others, while armed with rungas and pangas, she robbed **Andrew Mutea** of his mobile phone make Nokia 1200 and cash Kshs.6,800/- all valued at Kshs.9,300/- and at or immediately before or immediately after such robbery, wounded the said **Andrew Mutea**.

2. On count 2, it was alleged that on the same night and place while similarly armed and jointly with others, she robbed **Jacob Karwamba** of Kshs.8,000/- and at or immediately before or immediately after such robbery, wounded the said **Jacob Karwamba**. The petitioner and her co-accused were convicted and sentenced to suffer death.

3. The petitioner’s appeals to both this Court and the Court of Appeal were dismissed and the sentence of death upheld.

4. The petitioner is now in this Court for the review of her sentence. She has grounded her petition on the Supreme Court’s decision in **Francis Karioko Muruatetu & Another v Republic [2017] Eklr**. In that case, the Supreme Court declared the mandatory nature of the death sentence as unconstitutional as it denies the Court discretion on sentence.

5. The reasoning in the **Muruatetu case** has been extended to other cases where the death penalty is mandatory such as in robbery with violence. In **William Okungu Kittiny v R [2018] eKLR**, the Court of Appeal held:-

“...The appellant was sentenced to death for robbery with violence under Section 296 (2). The punishment provided for murder under Section 203 as read with Section 204 and for robbery with violence and attempted robbery with violence under Section 296 (2) and 297 (2) is death. By Article 27(1) of the Constitution, every person has inter alia, the right to equal protection and equal benefit of the law. Although the Muruatetu's case specifically dealt with the death sentence for murder, the decision broadly considered the constitutionality of the death sentence in general... From the foregoing, we hold that the findings and holding of the Supreme Court particularly Paragraph 69 applies mutatis mutandis to Section 296 (2) and 297 (2) of the Penal Code. Thus the sentence ... is a discretionary ...”

5. In the circumstances, I set aside the death sentence meted out on the petitioner and proceed to consider her mitigation.

6. In her mitigation, the petitioner told the Court that she has been in custody for the last ten years and that during her trial, mitigating factors were not considered because of the mandatory nature of the death sentence. That since she was committed to prison, she has been rehabilitated as she has gone through various rehabilitation programs. She was a first offender having been arrested when she was in her mid 20’s. Prior to her arrest, she was a casual worker with three children now aged 21, 19 and 13 years, respectively.

7. Her husband has since passed away leaving their children behind with no one to take care of them. She has atoned for her sins and is currently engaged in Outreach Ministry within the prison counselling other inmates. She was diagnosed with immunosuppressive syndrome on 15/2/2009 and has been on HIV/AIDS medication and due to the side effects of the drugs, she entirely depends on the prisoners to do her personal duties.

8. I am mindful that there should be uniformity in sentencing. However, taking into account the mitigating and aggravating factors and in particular her health, I hereby sentence the petitioner the period already served.

DATED and **DELIVERED** at Meru this 14th day of November, 2019.

A. MABEYA

JUDGE