

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

PETITION NO. 32 OF 2019

DOUGLAS GITONGA.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING ON RE-SENTENSING

1. The petitioner, **Douglas Gitonga**, with others were charged before the Senior Principal Magistrate's Court at Isiolo with the offence of robbery with violence contrary to **section 296(2) of the Penal Code**.
2. It was alleged that on 4/9/2011 at Isiolo Township, jointly with others while armed with a sword they robbed **Q I Y** of her pulse, Kshs. 5,000/- cash, mobile phone and her rack sack and in the process they killed **Ramadhan Adan Kara ("the deceased")**. They also faced an alternative count of dishonestly handling the rack sack knowing it to have been stolen.
3. The petitioner's appeals, both to this Court (Lesiit and Makau JJ) and the Court of Appeal, were dismissed on 24/7/2014 and 10/10/2017, respectively.
4. Vide his Motion on Notice dated 18/9/2019, the petitioner has petitioned this Court to review his sentence on the basis of the Supreme Court decision in the case of **Francis Muruatetu and Others vs Republic [2017] eKLR**.
5. In that case, the Supreme Court of Kenya held that the mandatory nature of the death sentence under **Section 204** of the Penal Code 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. 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. Though the Supreme Court was dealing with the offence of murder, the view I take is that the same principle applies in other cases where the law provides for a mandatory death sentence including robbery with violence. **See** the Court of Appeal decision in **William Okungu Kittiny vs. Republic [2018] eKLR**.
7. I have considered the foregoing and the circumstances under which the offence was committed. I have also considered the mitigation by the petitioner and the prisons' report. The appellant was in the company of others, the value of the property robbed was well over Kshs. 5,300/-. The person accompanying the victim was killed in the process of the robbery.
8. The state submitted that the death sentence be maintained or in the alternative, a sentence of not less than 20 years be meted out.
9. Accordingly, taking into consideration the facts of the case and the mitigation given. Considering that in the process of the robbery, a life was lost, this is the proper case where the death sentence decreed by **section 296(2) of the Penal Code** should apply.
10. Accordingly, I decline to set aside the death sentence meted out against the petitioner. The Motion is dismissed.

DATED and DELIVERED at Meru this 3rd day of December, 2019.

A. MABEYA

JUDGE