



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**PETITION NO.55 OF 2018**

**CORAM: D.S. MAJANJA J.**

**BETWEEN**

**FRANCIS KAMWITHU.....PETITIONER**

**AND**

**REPUBLIC .....RESPONDENT**

**JUDGMENT**

1. The matter before the court is a petition for resentencing necessitated by the Supreme Court decision in *Francis Karioko Muruateru & Another v Republic* SCK Pet. No. 15 OF 2015 [2017] eKLR declaring the mandatory death sentence for murder unconstitutional.

In the case of *William Okungu Kittiny v Republic* KSM CA Criminal Appeal No. 56 of 2013 [2018] eKLR, the Court of Appeal applied the *Muruatetu Case (Supra)* *mutatis mutandis* to the provisions of section 296(2) of the *Penal Code (Chapter 63 of the Laws of Kenya)* which imposes the mandatory death penalty for the offence of robbery with violence.

2. The petitioner, FRANCIS KAMWITHU, was charged, convicted and sentenced to death for the offence of robbery with violence contrary to section 296(2) of the *Penal Code (Chapter 63 of the Laws of Kenya)* following a trial before the Principal Magistrate's Court in *Maua Criminal Case No. 468 of 2007*. His first appeal to the High Court, *Meru Criminal Appeal No. 104 of 2007* was dismissed. His second appeal, *Nyeri Criminal Appeal No. 133 of 2010* was dismissed on 6<sup>th</sup> February 2013.

3. The brief facts gleaned from the record are that on the night of 7<sup>th</sup> January 2006 George Kiriba Mwirichia (PW 1) was heading home at 11.00pm from the Tigania Police Station canteen in the company of his friend. He parted ways with the friend and continued to walk alone when he was accosted by the appellant who hit him with a panga on the mouth and on the head. At the same time, he saw eight other people armed with pangas emerge from both sides of the road who surrounded him and placed pangas on him. One of them demanded money from him but he told them that he did not have any. The assailants searched him and found that he really did not have any money. The assailants then removed his wrist watch and the jacket he was wearing and left him. Inside the jacket pocket was a mobile phone and a pair of reading glasses. The following day, PW 1 asked his wife to 'flash', that is to say to ring the number of his mobile phone. His wife rang the phone but the person who answered abused her. According to the evidence of Kayiiera (PW 2) and Kaindio (PW 4) were drinking at Kanyaungi's home with the petitioner. The petitioner had a mobile phone which they suspected did not belong to him. They had heard that PW 1, who was known to them, had been robbed of his phone and a jacket the previous night. Kaindio to call PW 1 to confirm whether it was his phone. Upon arrival at Kanyaungi's home, PW 1 saw the appellant in his jacket and identified his phone. They took the petitioner the Tigania Police Station he was arrested and charged.

4. The petitioner prayed for leniency and asked the court to reconsider the sentence as he was in bad company when he committed the offence. He stated that he had been in prison for 13 years. Counsel for the State submitted that the offence was serious and that 20 years' imprisonment would be appropriate.

5. As I have stated before, this petition is one for resentencing not clemency. The petitioners have already had the benefit of their respective death sentences commuted to life imprisonment by His Excellency the President under the Power of Mercy conferred under **Article 133** of the Constitution. In this case, the court is being called upon to re-consider the facts as they existed at the time of sentencing and impose and appropriate sentence in light of the fact that the mandatory death penalty has been declared unconstitutional.

6. The *Sentencing Policy Guidelines, 2016* ("the *Guidelines*") published by the Kenya Judiciary provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. Since the *Guidelines* did not take into account the fact that the death penalty would be declared unconstitutional, the Court in the *Muruatetu Case (Supra, para. 71)*, considered that in re-

sentencing in a case of murder, the following mitigating factors would be applicable;

- (a) *age of the offender;*
- (b) *being a first offender;*
- (c) *whether the offender pleaded guilty;*
- (d) *character and record of the offender;*
- (e) *commission of the offence in response to gender-based violence;*
- (f) *remorsefulness of the offender;*
- (g) *the possibility of reform and social re-adaptation of the offender;*
- (h) *any other factor that the Court considers relevant.*

7. The Supreme Court emphasized that the **Guidelines** do not replace judicial discretion. They are intended to promote transparency, consistency and fairness in sentencing. In addition, the court noted the importance of guideline judgments of superior courts which promote an understanding of the process of sentencing.

8. I now turn to the sentence to be imposed on the petitioners. As I stated in ***Michael Kathewa Laichena and Another v Attorney General MERU No. 19 of 2018 (UR)***, I would consider the starting point for the sentence to be 14 years' imprisonment as this is the maximum sentence for simple robbery under **section 295** of the **Penal Code**. I have considered the circumstances of the case. The appellant was part of a gang armed with weapons. The complainant was attacked and subjected to actual violence.

9. According to the record, the petitioner was charged in February 2007 and convicted and sentenced in May 2007. Considering the entirety of the facts, I re-sentence the petitioner to **15 years' imprisonment** commencing from the date of sentencing before the trial court that is on **15<sup>th</sup> May 2007**.

**SIGNED AT KISII**

**D.S. MAJANJA**

**JUDGE**

**DATED and DELIVERED at MERU this 12<sup>th</sup> day of July 2018.**

**A. MABEYA**

**JUDGE**

Petitioner in person.

Mr Kiarie, Prosecution Counsel, instructed by the Director of Public Prosecutions for the Respondent.