



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**PETITION NO.53 OF 2018**

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

**BETWEEN**

**JOHN GITONGA ALIAS KADOSI.....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 the offence of 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, **JOHN GITONGA ALIAS KADOSI**, 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. 1797 of 2000*. His first appeal to the High Court, *Meru Criminal Appeal No. 213 of 2002* was dismissed. The second appeal, *NYERI Criminal Appeal No. 149 of 2012* was dismissed on 6<sup>th</sup> February 2013 hence this petition.

3. The brief facts concerning the case were that on 29<sup>th</sup> August 2000 at Anaku Sub-location, Kiengu Location, Meru North District, John Mutwa (PW 1), a miraa dealer and operator of a hotel at Kiengu Market was walking home at about 11.00pm when he met the petitioner and another person. The petitioner asked PW 1 to stop and when PW 1 shone his torch, he realized it was the petitioner. The petitioner then hit PW 1 with a metal rod on the head causing him to fall. The petitioner and his accomplice, who had a panga, then ransacked PW 1's pockets and took off with Kshs. 50,000/-. PW 1 screamed causing members of the public to come to his assistance and take him to the hospital. He reported to the police that he identified the petitioner.

4. The petitioner prayed for leniency and urged the court to consider that he had been in prison since 2006 when he was convicted. 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 petitioner has already had the benefit of his death sentence 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 an 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, and in this case robbery with violence, 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 supplant 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 being the maximum sentence for simple robbery under **section 295** of the **Penal Code**. I have considered the circumstances of the case and the only mitigating factor I can find from the record is that the petitioner could be considered a first offender. The facts show that he petitioner with another person attacked the victim and took off with his money. The victim was injured as a result of the assault with a panga.

9. The petitioner was first arraigned in court in 2000 and was convicted and sentenced in 2002. He spent two years in custody pending trial. I have taken this fact into account together with all the other factors and I re-sentence the petitioner to **15 years' imprisonment** commencing the date of sentence before the trial court that is on **20<sup>th</sup> June 2002**.

**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.