



**REPUBLIC OF KENYA**

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

**PETITION NO.49 OF 2018**

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

**BETWEEN**

**JOHN KATHIA M'ITOB**.....**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* decision *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 KATHIA M'ITOB**, 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)* at a trial before the Chief Magistrate's Court in *Maua* in *Criminal Case No. 414 of 2000*. His first appeal to the High Court, *Meru Criminal Appeal No. 32 of 2006* was dismissed. His second appeal, *Nyeri Criminal Appeal No. 356 of 2009* was dismissed on 28<sup>th</sup> November 2013.

3. According to the record, on 19<sup>th</sup> May 2005 at about 7.00am along the Kabachi/Mutuati Road in Meru North District within Meru County, Stanley Kainga (PW 1) and Geoffrey Ntonjira (PW 4) were heading to Mutuati Market to buy cattle for PW 1's butchery. As they neared the market, four people armed with pangas emerged from the bush. One of them held PW 1 by the shirt and hit him with a panga on his head. Fearing for his life PW 4 moved back and screamed. PW 1 recognised the petitioner as one of the assailants when he cut his fingers using the panga and then removed Kshs. 7,600/- from his pocket.

4. The petitioner prayed for leniency and urged the court to consider that he had been in prison since 2006 when he was convicted though he was arrested in 2004. Counsel for the State left the issue of the sentence to the court.

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, weight 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 *Muruatetu Case (Supra at 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 imposed for the offence of 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 petitioners could be considered as first offenders. The facts from the record show that the offence took place early in the morning and the petitioner was part of a gang that inflicted actual violence on the victim with a panga.

9. The petitioner remained in pre-trial custody for a period of two years from the time he was charged in 2004 upto the time he was convicted in 2006. This court, in sentencing an accused, is entitled to take into account the period spent in pre-trial custody by dint of the proviso to **section 333(2)** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**.

10. Considering the entirety of the facts, I re-sentence the petitioner to 15 years' imprisonment commencing the date of sentencing before the trial court that is from **8<sup>th</sup> March 2006**.

**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.