



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

PETITION NO.50 OF 2018

CONSOLIDATED WITH PETITION NO. 58 OF 2018

CORAM: D.S. MAJANJA J.

BETWEEN

JOSEPH WAIHARU WAIYORO.....1ST PETITIONER

JAMES MUGO NJOGU.....2ND PETITIONER

KELVIN MURERWA NJOROGE.....3RD 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 petitioners, **JOSEPH WAIHARU WAIYORO, JAMES MUGO NJOGU and KELVIN MURERWA NJOROGE**, were 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 *Isiolo Criminal Case No. 527 of 2010*. Their first appeal to the High Court, *Meru Criminal Appeals Nos. 3, 4 and 5 of 2011* was dismissed. Their second appeal, *NYERI Criminal Appeals No. 326, 329 and 336 of 2012* was also dismissed on 3rd June 2014.

3. The brief facts concerning the case were that on 15th May, 2010, at Naro Moru in Nanyuki District the petitioner jointly with others not before court, while armed with dangerous weapons namely metal bars, the petitioners robbed George Munyi Wangui (PW 1) of motor vehicle registration KAS 015F Toyota station wagon valued at Kshs. 400,000/=, his driving licence, identify card, Equity ATM card, driver's PSV license, three passport size photographs and identify card photocopy and at or immediately before or immediately after the time of such robbery threatened to use actual violence on PW 1. PW 1 testified that he was a taxi driver and on the material day he was waiting for customers when he was approached by some customers who wanted him to take them to Mubichiri to take the wife of one of them who had just delivered to the hospital. In the course of the journey they hijacked him. Another man joined them as they proceeded. He was told to stop near a certain house and when they alighted one of the men suddenly put a rope around his neck and tightened it. The group pulled him out and tied him by the hand and legs, threw him outside and went off with the vehicle. He was rescued and went to report to the police.

4. The petitioners all prayed for leniency and urged the court to consider that they had been in prison since 2006 when they were convicted though they were arrested in 2004. Counsel for the State left the issue of the sentence to the court but urged that the offence was serious.

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 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 **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, it 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 given that this is the maximum sentence prescribed 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 the petitioners acted together to hijack the complainant before making away with his vehicle.

9. I have also taken into account the tariff set by the Court of Appeal in post **Muruaretu** decisions. In **Wycliffe Wangusi Mafura v Republic ELD CA Criminal Appeal No. 22 of 2016 [2018] eKLR** where the Court of Appeal imposed a sentence of 20 years where the appellant was involved in robbing an Mpesa shop with the use of a firearm with which he threatened the attendant but was caught before he inflicted any violence on her. In **Paul Ouma Otieno alias Collera and Another v Republic KSM CA Criminal Appeal No. 616 of 2010 [2018]eKLR**, the Court of Appeal sentenced the appellants to 20 years imprisonment where the robbery was aggravated by the use of a firearm.

10. Considering the entirety of the facts and cases I have cited, I re-sentence the petitioners to **15 years’ imprisonment** commencing the date of sentencing before the trial court that is from **3rd February 2012**.

SIGNED AT KISII

D.S. MAJANJA

JUDGE

DATED and DELIVERED at MERU this 12th day of July 2018.

A. MABEYA

JUDGE

Petitioners in person.

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