



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

PETITION NO. 66 OF 2018

CORAM: D.S. MAJANJA J.

BETWEEN

PETER GITIYE.....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, **PETER GITIYE**, 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. 969 of 2000*. His first appeal to the High Court, *Meru Criminal Appeal No. 188 of 2007* was dismissed. The second appeal, *Nyeri Criminal Appeal No. 65 of 2013* was dismissed on 30th April 2014 hence this petition.

3. The brief facts of the case were that on 12th March 2000 at Kianjai Location, Meru North District, Kimathi Gichara (PW 1) was at home alone lying on his bed reading. At about 11.00pm, he heard a door and before he could respond, there were very loud bang and thereafter people came through the window and were shining a torch on him. They demanded money from him and he gave them Kshs. 500/-. In a short while, he saw a crowd gathering outside and the assailants ran away. When he opened the door, he found that the people who had come to rescue him had arrested the petitioner.

4. Counsel for the petitioner prayed for leniency. He urged the court to consider that the petitioner had been in prison for 13 years and that he had reformed and accepted his guilt. He told the court that the petitioner had three children and had left behind his mother who was very old. Counsel for the State submitted that the offence was serious and that 15 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, 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. 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 259** of the **Penal Code**. I have considered the circumstances of the case. The appellant was part of a gang that confronted the complainant. There is no evidence that actual violence was used though it was threatened and had the villagers not intervened in time, the case would have been different.

9. Under the proviso to **section 333(2)** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**, the court may take into account the time spent in pre-trial custody. The petitioner was arraigned in court in March 2006 and convicted and sentenced in October 2007. 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 on **24th October 2007**.

SIGNED AT KISII

D.S. MAJANJA

JUDGE

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

A. MABEYA

JUDGE

Mr Munene, Advocated for the Petitioner.

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