



IN THE HIGH COURT OF KENYA AT MERU

PETITION NO. 54 OF 2018

CORAM: D.S. MAJANJA J.

BETWEEN

SIMON MWANGANGI JOHN.....PETITIONER

AND

REPUBLIC.....RESPONDENT

JUDGMENT

1. **SIMON MWANGANGI JOHN**, the petitioner, was charged, convicted and sentenced to death in *Meru Criminal Case No. 1738 of 1998* for the offence of robbery with violence contrary to **section 296 (2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. His first appeal to the High Court, *Meru HCCRA No. 154 of 1999*, was dismissed on 28th November 2006 and the second and final appeal to the Court of Appeal, *Nyeri Criminal Appeal No. 330 of 2006*, was dismissed on 6th June 2008.

2. The petitioner has now moved the court for resentencing following the Supreme Court decision in *Francis Karioko Muruatetu & Another v Republic SCK Pet. No. 15 OF 2015 [2017] eKLR* declaring the mandatory death sentence for the offence of murder unconstitutional. The Court of Appeal in *William Okungu Kittiny v Republic KSM CA Criminal Appeal No. 56 of 2013 [2018] eKLR*, following the *Muruatetu Case (Supra)* held the mandatory death penalty for robbery with violence under **section 296(2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)* was unconstitutional.

3. The petitioner was accused of robbing Aniceta Muthoni Nkonge of assorted items while she was in her house at about 8.00pm on 11th June 1996 while she was in her house at Kibunga Market. She recalled that one of her visitors went out of her house briefly and noticed there was man with a rifle outside. When she returned and told Aniceta, she took it as a joke. Another visitor then ran into her house followed by three gangsters one of whom was carrying a rifle. He aimed a rifle at her while the other gangsters took assorted household items. He also demanded money from her and the visitors. Since Aniceta could not produce money, the gangster threatened to shoot her but he was restrained by the other gangsters. After the taking various household items, the gangsters retreated and as they did, they started shooting in the air causing neighbours to come to the rescue. After the incident the petitioner was arrested and identified at an identification parade. The petitioner also led the police to where the items stolen were recovered.

4. At the hearing of this petition, the petitioner prayed for leniency. He urged the court to consider that he had been in prison for 19 years, that he had reformed and accepted his guilt. Counsel for the State submitted that the offence was serious and that a sentence of life imprisonment would be appropriate.

5. I am now 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. I have considered the circumstances of the case. The offence of robbery with violence is a serious offence. The petitioner was part of a gang that was terrorizing the community. Their actions were aggravated by the possession of a firearm when robbing the complainant. On the other hand, the petitioner was a first offender and expressed remorse for what he had done. I have also taken into account the time spent in pre-trial custody under the proviso to **section 333(2)** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**.

9. I have taken into account some decisions from the Court of Appeal. In **Wycliffe Wangusi Mafura v Republic ELD CA Criminal Appeal No. 22 of 2015 [2018] eKLR** where the Court 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 sentenced the appellants to 20 years' imprisonment where the robbery was aggravated by the use of a firearm.

10. The petitioner was arraigned in court on 25th June 1996, convicted and sentenced on 27th July 1999. Considering the entirety of the facts, I re-sentence the petitioner to **20 years' imprisonment** commencing the date of sentencing before the trial court that is on **25th June 1996**.

11. Since the petitioner has served the sentence, he is set free unless otherwise lawfully held.

DATED and DELIVERED at MERU this 16th day of October 2018.

D.S. MAJANJA

JUDGE

Petitioner in person.

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