



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 165 OF 2018

ABDALLAH MWINYI HAMISI.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT

1. The Petitioner herein was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. He was found guilty and sentenced to suffer death. The Petitioner was pardoned by the President and his sentence was reduced to life imprisonment. The Petitioner appealed to have his sentence reduced from life imprisonment but unfortunately his appeal was dismissed on 22/5/2000.

2. The Petitioner and others not before the court were armed with dangerous weapons such as knives and pangas at the time of committing the offence. They stole a bicycle, documents, sleeping bag, towel, one pair of shoes, a waist money belt containing a passport No. K3164416 London air ticket, cheques amounting 750US Dollars, Kshs. 3,000/=, Tanzania Shs. 15,200 and 95 US Dollars all valued at Kshs. 165,845/=.

3. The Petitioner's appeal having been dismissed, the Petitioner is now in this Court pursuant to **Francis Karioko Muruatetu & Another v Republic SCK Pet. No. 15 of 2015 [2017] eKLR** in which the Supreme Court stated that the mandatory nature of the death sentence is unconstitutional.

4. In mitigation the Petitioner states that this Court has powers of hearing this matter until determination as required by the law; that this is the first time he has been accused of breaking the law; that he is remorseful of this incident even though he never committed the same; that during his stay in custody he attended and learnt skills in rehabilitation programmes both spiritual and commercial which will assist him when given a chance to re-join the society; that he has been in custody for the last 21 years serving his sentence and has lived well with his fellow inmates and the authorities; that he promises to live well with other people in the society and be a good example and that he is a family man and its only breadwinner for his family.

5. **Mr. Fedha** learned Counsel for the State submitted on two limbs. On the first limb, counsel submitted that since the Petitioner's sentence had been committed to life imprisonment from death, this Court has no jurisdiction to resentence the Petitioner. On the second limb counsel submitted that should this Court find that it has the jurisdiction to resentence the Petitioner, then the Petitioner should be jailed for 25 years because the offences he committed was grave and he used very crude weapons.

6. I have carefully considered the petition and rival submissions. The issues for determination are whether this Court has the jurisdiction to resentence the Petitioner; and secondly, if so, how long should the sentence be.

7. On the issue of jurisdiction, this Court is persuaded by the finding in Muruatetu case. Although the Petitioner's death sentence had been committed to life in prison, the underlying sentence was death sentence. Secondly, in the same case of Muruatetu, the apex Court left it open for trial courts to determine what constitutes a 'life sentence'. Accordingly, Courts have been giving time value to life sentences, thereby making inmates be aware of the time they have to spend in prison. In my view nothing would be more unconstitutional than letting a prisoner stay in prison infinitely. Therefore, it is an aspect of human rights to value, in terms of time, how much time life imprisonment means. This Court therefore has the jurisdiction to resentence the Petitioner.

8. The second issue is how much time in jail should the Petitioner serve. The Petitioner has already served 21 years in jail. That is not a short period of time. I have carefully noted the circumstances of the robbery. I have also noted that the Petitioner pleads that he has reformed and is willing to rejoin the civilized society.

9. **Mr. Fedha**, learned Counsel for the prosecution submitted that a jail term of 25 years would be adequate. In my view, however, the 21 years already served by the Petitioner is adequate punishment for the crime. The Petitioner has atoned for his crime, and this Court will give him a second chance, and hope that when he rejoins the free society he will not revert to crime. Should be do that he will only blame

himself, for there will not be a third chance.

10. For the foregoing reasons I make the following orders:

- (a) The life sentence imposed on the Petitioner is hereby lifted.
- (b) Instead thereof the Petitioner is sentenced to serve a sentence equivalent to that already served.
- (c) The Petitioner is hereby released and set free unless lawfully held.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 23RD DAY OF MARCH, 2021.

E. K. O. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Petitioner in person

Ms. Anyumba for DPP

Ms. Peris Court Assistant