



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 78 OF 2019

BEN LEMANGA OLE MAGILO.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT

1. The Petitioner was charged and convicted for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code and was sentenced to death in Kwale Criminal Case No. 138 of 2006. His appeal to the High Court in Criminal Appeal 59 of 2008 was dismissed.
2. The Petitioner is now in this Court for resentencing pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** in which the Apex Court found that the mandatory nature of the death sentence is unconstitutional.
3. I have considered submissions on resentencing both from the Petitioner and from the Director of Public Prosecutions. The Petitioner has been in jail for fifteen (16) years now. He submits that he has already paid his debt to the society and he has learnt his lesson. He promises never to repeat the offence again.
4. On her part, learned Counsel **Ms. Anyumba** for the DPP submitted that taking into account the circumstances of this case and the fact that the victim in this case sustained injuries at the time of the robbery, the Petitioner ought to be jailed for 20 years.
5. The objective of sentencing is to mete out proper retribution for the offence. It also aims at reforming the convict. I have also considered some other sentences imposed by courts in robbery with violence cases after the Supreme Court judgment in the **Muruatetu case**. In **Nicholas Mukila Ndeti v Republic [2017] eKLR**, where the Appellant and others robbed several people while armed with machetes and other crude weapons and in the course of the robbery cut their victims, the Court observed that the offences committed were serious. The court reduced the sentence of 30 years imprisonment imposed by the trial court to 25 years imprisonment.
6. The proceedings of the trial Court indicate that the Petitioner was not a first offender. Further, during the robbery, the Petitioner was armed with a sword and a “*rungu*”, and that he inflicted many blows on the victim while threatening to kill him if he raised an alarm. In my view, the vicious beating of the victim aggravated the Petitioner’s offence. However, in my view the 16 years already served by the Petitioner is adequate atonement for the offence.
7. The upshot is that the sentence of death imposed on the Petitioner is hereby set aside. Instead thereof the Petitioner is herewith jailed to the term already served with the result that the Petitioner is hereby released from prison unless lawfully withheld.

That is the Judgment of the Court.

Dated, Signed and Delivered at Mombasa this 23rd Day of March, 2021

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Petitioner in person

Ms. Anyumba for DPP

Ms. Peris Court Assistant