



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

PETITION NO. 158 OF 2019

THOMAS OTIENO OLUTA.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT ON RESENTENCING

1. The Petitioner herein was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code and thereafter sentenced to mandatory death sentence in Criminal Case No. 158 of 2010. The particulars being that on 9/9/2010 at Bahati area within Changamwe Location in Mombasa District jointly with others not before court while armed with dangerous weapons namely a baretta pistol S/No. 44834 and knives robbed Atanasio Muteki Miriti of his case Kshs. 20,200 and at or immediately after the time of such robbery threatened to use actual violence to the said Atanasio Muteki Miriti.

2. The Petitioner was in the company of two others; the Petitioner frisked the complainant while the other opened the cash drawer. After the robbery the robbers attempted to escape the scene by use of a motor cycle which was on standby. However, the motorcycle failed to start. The Petitioner was arrested by members of the public and one of the assailants, the one with the gun was shot dead. The complainant did not suffer any injuries.

3. The Petitioner was convicted and sentenced to death. The Petitioner is now in this Court pursuant to **Francis Karioko Muruatetu & Another v Republic [2017] eKLR**, where the Supreme Court declared that the mandatory nature of the death sentence is unconstitutional.

4. M/S Wanjohi, learned Counsel for the State submitted that this court can resentence the Petitioner. Counsel further submitted that an appropriate sentence would be 18 years in prison.

5. On his part, the Petitioner submitted that he has been in jail for 10 years. During that time he has reformed and now shuns evil. He is currently a Deacon with the Seventh Day Adventist church in Prison, and he attached several spiritual certificates of Bible courses he has attended. He is also a paralegal and a counselor in prison. He is also suffering from diabetics and pulmonary disorder and has undergone two operations on account of those illnesses.

6. I have considered these submissions. The Petitioner was involved in a robbery with violence offence in which, fortunately no injury was occasioned. That fact of there being no injury does not of itself lessen the offence. However, the Petitioner has demonstrated his reformed attitude by his conduct in prison. He is a deacon in the Prison Church. He is a paralegal and a counselor. In **Court of Appeal Case No. 12 of 2013 (Mombasa), Mulamba Ali Mebanda v Republic**, the Court sentenced the Appellant, who was convicted of the offence of robbery with violence, to nine (9) years already served. The Court observed as follow:

“From the said mitigation, we note that the appellant was a first offender, he had a young family he was taking care of; he was said to have reformed; the items robbed from the complainants were of modest value; the complainants were not injured; the appellant has already been incarcerated for almost nine years. In our view, he has already paid his debt to society and learnt his lesson. In the circumstances the appropriate sentence that commends itself to us is one that is reduced to the term already served. We therefore order that the appellant be released from prison custody unless he is otherwise lawfully held.”

7. In the light of the forgoing, and considering the mitigation herein and the fact that the Petitioner has served 10 years I now make the following Judgment;

(a) The death sentence imposed upon the Petitioner is hereby **lifted**.

(b) Instead thereof the Petitioner is sentenced to serve a sentence of thirteen (13) years from the date of arrest.

Right of appeal in 14 days.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 22ND 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