



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**PETITION NO. 93 OF 2019**

**MBAI MWALIMU MBAI.....PETITIONER**

**AND**

**DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT**

**JUDGMENT**

1. The Petitioner was convicted for the offence of Robbery with Violence contrary to Section 295 as read with 296(2) of the Penal Code and sentenced to death in Voi Cr. Case No. 142 of 2011. He appealed in Mombasa HCCRA No. 119 of 2012 and his Appeal was dismissed and sentence upheld.

2. The Petitioner has now petitioned this Court for review of sentence in view of the Supreme Court declaration in **Francis Kariokor Muruatetu & Another v Republic SCK Pet. No. 15 of 2015 [2017] eKLR** in which the apex court found the mandatory nature of the death sentence to be unconstitutional.

**Brief Circumstance of the Offence**

3. The particulars are that on 6/2/2011 at Manyani area with others not before Court, while armed with dangerous weapons namely pistols, they robbed Pius Nyerere Ndili Kshs. 3,700/=, a driving licence, a Nokia Mobile phone and one motor vehicle registration number KBL 381L Toyota succeed all valued at Kshs. 608,700/= and immediately before or immediately after the robbery used actual violence on their victim and threatened to kill him.

4. The Petitioner submitted that at the time of his arrest, he was a first offender at only 19 years, and that the over 10 years he has been in prison, he has been of good behavior and he is now reformed. He further stated that he regrets the incident, and that he is very remorseful and he promises not to repeat that crime or any other crime in his life when given an opportunity to rejoin the society. The Petitioner also urged this Court to consider the time he served since his arrest in resentencing him.

5. **Ms. Wanjohi** for the prosecution submitted that taking into account the circumstances of the case, a deterrent sentence of 25 years including time served would be appropriate.

6. I have considered the petition, the submissions by the Petitioner and the D.P.P. Sentencing is a discretion of the trial court. In **Ambani v Republic [1990] KLR**, Bosire J. (as he then was) stated that a sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and that the court should look at the facts and the circumstances of the case in its entirety before settling for any given sentence.

7. Section 333 (2) of the Criminal Procedure Code requires a sentencing court to take into account the period spent in custody awaiting trial.

8. I have now considered the mitigating and aggravating circumstances in the case. In my view, the nature of this robbery does not call for invocation of the death penalty. The serious aggravating circumstances which involve the use of a firearm and threatening to kill their victim are however, counter-balanced by the mitigating circumstances in the case. They include the relative age of the Petitioner, at only 19 years old at the time of the commission of the offence); being a first offender; and remorsefulness expressed.

9. I have also considered the sentences imposed in some other cases where convicts of robbery with violence were re-sentenced after the Supreme Court decision in the *Muruatetu case*. In **Wycliffe Wangugi Mafura v Republic Eldoret Criminal Appeal No. 22 of 2016 [2018]** the Court of Appeal imposed a sentence of 20 years' imprisonment where the appellant was involved in robbing an Mpesa shop agent with the use of firearm.

10. In conclusion, and in consideration of the facts here, this court substitutes the death sentence herein, and hereby sentences the petitioner to serve a jail term of nineteen (19) years from the date of arrest.

That is the Judgment of the court.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29<sup>TH</sup> DAY OF APRIL, 2021.**

**E. K. O. OGOLA**

**JUDGE**

Judgment delivered via MS Teams in the presence of:

Petitioner in person

Ms. Wanjohi for DPP

Mr. Mohamed Court Assistant