



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 234 OF 2019

GEORGE WALUSIMBI.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT ON RESENTENCING

1. The Petitioner herein was arraigned before the Mombasa Chief Magistrate's Court in Criminal Case No. 404 of 2006 on a charge of robbery with violence contrary to Section 296(2) of the Penal Code.
2. The particulars of the offence were that on 27/1/2006 at around 10.30 p.m. at Likoni Flats jointly with others not in court while armed with dangerous weapons namely knives and iron bars robbed David Gatune Kimani Kshs. 10,000/=, one mobile phone Siemens, one identity card, one ATM card and at or immediately before or immediately after the time of such robbery used actual violence on the said David Gatune Kimani.
3. The Petitioner entered a plea of 'not guilty' and his trial commenced. Ultimately, the learned trial magistrate found the Petitioner guilty of the said offence, convicted him and sentenced him to death.
4. By this petition, the Petitioner is seeking a re-sentence pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR where the court decided that a mandatory death sentence is against the constitution.**
5. **Ms. Wanjohi**, learned prosecutor submitted that the Petitioner and two other people attacked the victim and the victim positively identified the Petitioner as one of his attackers. The Petitioner and the other attackers were armed with dangerous weapons namely a knife and an iron bar when they attacked the victim. The Petitioner and the other attackers used the said knife and iron bar to inflict severe injuries upon the victim, namely a cut on the head. The Petitioner and the other attackers robbed the victim of Kshs. 10,000/=, one mobile phone Siemens, one identity card and one ATM card.
6. The Petitioner has been in prison for 14 years. During that time, he has undertaken various training as a means of rehabilitation. The prison authorities have also prepared favourable reports on his conduct on the time that he has been in prison. Ms. Wanjohi submitted that the aove notwithstanding, the aggravating circumstances of the offence committed by the Petitioner far outweigh the mitigating circumstances in this case. Further, the offence the Petitioner committed was a heinous one and its physical and psychological effect on the victim cannot be underestimated. It is therefore in the interest of the public that a deterrent sentence be meted upon the Petitioner to prevent the commission of this offence by other people. Counsel submitted that this Court re-sentences the Petitioner to serve a term of 30 years in prison, including time served.
7. In his submissions the Petitioner stated that he was 29 years old when he committed the offence. Now he is 43 and is mature and that he has learnt from his crime. He urged the Court to release him after serving 16 years already.
8. I have considered both submissions. The Petitioner used a knife and caused head injury to the victim. I am satisfied, however, that this Court has the jurisdiction to lift the death sentence meted on the Petitioner and to substitute the same with a term period in prison, which I herewith give of 17 years from the date of arrest.
9. Accordingly therefore, the death sentence imposed on the Petitioner by the trial court is hereby lifted, and the Petitioner sentenced to serve 17 years in prison from the date of arrest.

That is the Judgment of the Court.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 31ST DAY OF MAY, 2021.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Petitioner in person

Ms. Wanjohi for DPP

Ms. Peris Court Assistant