



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 210 OF 2019

HAMISI IDD MWATABU.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT ON RESENTENCING

1. The Petitioner herein **Hamisi Idd Mwatabu** was arraigned before the Kwale Senior Resident Magistrate's Court in Criminal Case No. 1576 of 2006 on a charge of robbery with violence contrary to Section 297(2) of the Penal Code.
2. The particulars of the offence were that on 21/9/2016 at about 7.00 p.m. at Mruruni village of Diani Location Kwale District within Coast Province, with others not before court while armed with a dangerous weapon namely a knife robbed Omar Baraza, a mountain bike valued at Kshs. 4,900/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Omar Baraza.
3. The Petitioner entered a plea of '*not guilty*' and on 19/6/2007 his trial began. On 28/9/2007 the learned trial magistrate found the Petitioner guilty of the said offence, convicted him and sentenced him to death.
4. Being aggrieved by the said conviction and sentence, the Petitioner filed Mombasa High Court Criminal Appeal No. 63 of 2008 which the court dismissed vide its judgment delivered on 13/9/2010.
5. The Petitioner is seeking a re-sentence in the instant petition pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** where the court decided that the mandatory nature of the death sentence is against the constitution.
6. The circumstances of the crime are that the victim was attacked by a group of eight men and the victim positively identified the Petitioner as one of his attackers. The Petitioner was armed with a dangerous weapon namely a knife when he and the other people attacked the victim. The knife was recovered on the Petitioner when he was arrested. The Petitioner robbed the victim of a mountain bike valued at Kshs. 4,900/= and the mountain bike was recovered in the Petitioner's house.
7. **Ms. Wanjohi**, the learned prosecutor submitted that the Petitioner be jailed to 20 years, and cited **Nicholas Mukila Ndeti v Republic [2019] eKLR** where for the similar offence the appellant was sentenced to 15 years in prison.
8. On his part the Petitioner submitted that he has reformed during the 15 years he has been in jail; that he did not cause any harm, or injury; that he has a family, that he only threatened his victim and took away the victim's bicycle which was later recovered.
9. I have carefully considered both aggravating and mitigating factors in this petition. The objective of sentencing is to allow the convict to reform, and the victim to be vindicated. The Petitioner has been in jail for 15 years. Although the crime he is charged with is serious, it is my view that he has atoned for his crime, and having now learnt a trade while in prison, he will hopefully be a useful member of the society.
10. I therefore hereby lift the death sentence imposed on the Petitioner by the trial court. In place thereof I hereby sentence the Petitioner to serve a term in prison **equivalent to that period already served**. The net effect is that the Petitioner is hereby released and set free unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 27TH 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