



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 192 OF 2019

SIMON NYUMU KAKWAI.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT

1. The Petitioner herein **Simon Nyumu Kakwai** was charged with two counts. The charge in the first count was for preparation to commit a felony contrary to Section 308(1) of the Penal Code. The particulars of the charge were that on the 9th day of June 2017 at about 4.00 a.m. at Maji ya Chumvi road block Mariakani within Kilifi County was found with dangerous weapon namely 10 rounds of .38 special ammunition with intent to commit a felony.
2. The second count was being in possession of ammunition contrary to Section 89(1) of the Penal Code. The particulars of the charge were that on 9th June 2017 at about 4.00 a.m. at Maji ya Chumvi police road block Mariakani within Kilifi County while aboard motor vehicle registration No. KCH 821B Simba Bus, was found in possession of 10 rounds of .38 ammunitions which raised a reasonable presumption that the ammunition was for a purpose prejudicial to public order.
3. The Petitioner pleaded not guilty to both counts and upon conclusion of trial he was found guilty on the second charge of being in possession of ammunition and was sentenced to serve 11 years in prison.
4. The Petitioner being dissatisfied with the conviction and sentence of trial court filed an appeal to this Court which dismissed the appeal and upheld the conviction and sentence.
5. 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 the mandatory nature of any sentence to be unconstitutional
6. However, from the outset the learned prosecutor Ms. Wanjohi, rightfully in my view, objected to the jurisdiction of this Court to entertain this matter. This is so because the sentence given to the Petitioner in the trial court, and which was confirmed in appeal at the High Court, was not mandatory minimum sentence. In fact the trial court, as correctly observed by the High Court, did not impose the maximum sentence but exercised discretion in sentencing the Petitioner to 11 years imprisonment, after considering the Petitioner's mitigation.
7. Therefore, this Court cannot now entertain the petition, except to state that under Section 333(2) of the Criminal Procedure Code the Petitioner is entitled to have the period during which he was held in custody while undergoing trial as part of his sentence.
8. Accordingly therefore, the sentence of 11 years shall run from the date of arrest, that is from 9/6/2017. Otherwise the petition is dismissed.

That is the Judgment of the Court.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 26TH 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