

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CONSTITUTIONAL PETITION NO. 41 OF 2020

MAXWELL SHIHUNZA.....PETITIONER

VERSUS

REPUBLIC.....DIRECTOR OF PUBLIC PROSECUTIONS

RULING

1. The petitioner herein was convicted, on 14th September 2017, in Kakamega CMCCRC No. of 1600 of 2015, of robbery with violence, contrary to section 295, as read with section 296(2) of the Penal Code, Cap 63, Laws of Kenya, and was sentenced to death. The petitioner filed an appeal at the High Court, Kakamega HCCRA No. 124 of 2017, where the conviction was affirmed, but the sentence of death was set aside, and substituted with imprisonment for 40 years.

2. The instant petition challenges the 40 years' sentence imposed by the appellate court. The appellate court had discretion to interfere with the death sentence, in the spirit of *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR. (*Maraga CJ. Mwilu DCJ, Ojwang, Wanjala, Ndung'u and Lenaola SCJJ*)

3. I, therefore, do not see the constitutional basis upon which I can revisit the sentence imposed by a court of concurrent jurisdiction on appeal. What the petitioner should have done was to challenge the sentence, imposed upon him by the High Court, at the Court of Appeal.

4. I find no merit in the petition at all. I hereby dismiss the same. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 24th DAY OF June, 2021

W MUSYOKA

JUDGE