REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

PETITION NO. E013 OF 2021

(From Original Criminal case No.831 of 2021)

THE CONSTITUTION OF KENYA 2010(SUPERVISORY JURISDICTION AND

PROTECTION FUNDAMENTAL RIGHTS AND FREEDOMS OF AN INDIVIDUAL

HIGH COURT PRACTICE RULES 2013.

AND

IN THE MATTER OF ARTICLE 22 (1) OF THE CONSTITUTION

AND

IN THE MATTER OF ARTICLES 23 (1) OF THE CONSTITUTION

AND

IN THE MATTER OF ARTICLE 19,20,21,22,23,24,25,

27,28,48,50,258 AND 259 OF THE CONSTITUTION

NICKSON BARAWA.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Nickson Barawa – Petitioner

Mr. Mwangi for the state

R U L I N G

The petitioner was tried, convicted and sentenced to death for the offence of robbery with violence contrary to section 296 (2) of the Penal Code in **Criminal Case No.831 of 2011**. From the record, it is clear the petitioner was aggrieved with the conviction and sentence. He appealed to the High Court which heard and determined the appeal on 27.4.2016. In that judgement **Justices Chitembwe** and **Ongeri J**. rejected the appeal on both conviction and sentencing by concurring with the finding of the trial court. The record also shows that the petitioner's sentence was later convicted to life imprisonment.

He now approaches the court to review the sentence under Article 50 (2) of the Constitution, section 216, 329 and 333(2) of the Criminal Procedure Code.

Determination

Applying the framework under **Francis K.Muruatetu V R [2017]eKLR** for determining whether the principles applies to cases of this nature filed by the petitioner on collateral review of sentence, I am of the view that the petition raises substantive issues and the principles in that decision should be applied retroactively. The predominant principles on the features of record on death sentence alters, the range sentiments also under section 296 (2) of the Penal Code.

The Supreme Court observed that the sentencing guidelines establish the essential framework for sentencing convicts and noted that the court must remain cognizance on the age of the offender, the antecedents, the gravity of the offence, the aggravating factors, mitigation offered by the offender, etc. to determine an appropriate sentence. Relying on the decision of the Supreme Court in **Muruatetu,** the petitioner was convicted of robbery with violence contrary to section 296 (2) of the penal code. Based on the prior provision under our penal code, the sentencing court applied the mandatory clause by imposing the death penalty. There was no room for an alternative sentence. By the Supreme Court decision, a mandatory sentence entered under section 296 (2) of the penal code will generally be considered unconstitutional and eligible for a sentence reduction. The court stated further that receipt of aggravating and mitigation factors should be considered in the context of the trial court final opinion on the nature of the sentence to be imposed against the convicted offender.

Therefore by implication the kind of violent offence that makes an offender more likely to be dangerous with again deserves a significant enhancement of sentence, that the one who uses minimal force to convict the offence. It is clear from the record that the case on point involved minimal force and resistance.

In addition, the subject matter cycle registration No. KMCN 539K was recovered by the police in this regard, our justice system considers that sentiments imposed on offenders should reflect the crime convicted and be proportionate to the seriousness of the offence. Incidentally, without other comparative jurisdiction. Since, the paramount consideration is the exercising of the discretion by the trial courts, it is incumbent upon that court to consider a variety factors prior to passing a specific sentence. However, even in those circumstances, our criminal justice system still experiences disparities and disproportionate sentences which fail to promote transparency and consisting in sentencing offenders. There is therefore no uniformity as some judges and magistrates impose lenient or punitive sentences under the power that discretion has been exercised as such.

As the **Supreme Court of India in Alister Antony Paneira V State of Maharashhra [2002] 2 Scc 648** stated;-

> **"Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done."**

The matter stands dissimilar from other similar robbery felonies in which offenders use excessive or fatal force against their victims before, during or after commission of the offence. A different approach as suggested by the petitioner is applicable for the court to deviate from the prescriptive penalty of death for the offence. This court going by the principles in **Muruatetu case** can depart from that provision and impose an alternative sentence with that of death as special features of this case supports that position.

There is no straight jacket formula for sentencing an accused on proof of crime. The Courts have evaluated certain principles. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the record, the gravity of the crime, motive for the crime, nature of the offence and all other attendance circumstances". When this is so, in this petition I factor in the application of balancing mitigating and aggravating factors of the crime, there is every reason to review the death sentence which was later convicted to life imprisonment.

Plainly, when taking into account various strands of evidence in the petition, the matter turns out on the doctrine of exhaustion. An object of Article 50 (6) (a) of the Constitution is for the High Court to be seized of jurisdiction upon a petitioner demonstrating that he has exhausted his right of appeal to the apex court. It shall be the duty of the court to consider whether it would be appropriate as to exercise those powers when the appeal is pending before a superior court.

This constitutional statement of principle raises a question of jurisdiction for this Court to entertain the petitioner. By Article 50 (6) (a) and (b) of the constitution, the mandate as imposed on the Court must be exercised within the required threshold. This leads me to rule that the petition has not crystalized for this court to conclusively determine the issues. It concerns me that the petitioner is able to approach the court with full knowledge of the pending appeal and in absence of any evidence of withdrawal of the appeal for that matter, the petition is denied.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF JULY, 2021

.....

R. NYAKUNDI

JUDGE

In the presence of

Edward Katana Safari Petitioner

Mr. Mwangi for the state