



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

PETITION NO. 170 OF 2019

JOSEPH WAMBUA MASOO.....PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT

1. The Petitioner was convicted for the offence of Robbery with Violence contrary to Section 295 as read with 296(2) of the Penal Code and sentenced to death in Kwale Cr. Case No. 1956 of 2007. He appealed in Mombasa HCCRA No. 263 of 2008 and Appeal was dismissed and sentence upheld. He also appealed to the Court of Appeal and the appeal was dismissed and sentence upheld.

2. The Petitioner has now petitioned this Court for review of sentence in view of the Supreme Court declaration in *Francis Kariokor Muruatetu & Another v Republic SCK Pet. No. 15 of 2015 [2017] eKLR* in which the apex court found the mandatory nature of the death sentence to be unconstitutional.

Brief Circumstance of the Offence

3. The particulars are that on 4/10/2007, near Kinondo Kwetu Hotel, area, the Petitioner jointly with others not before Court, while armed with dangerous weapons namely metal bars, robbed **Nils Filip Ossian Andersson**, his wife, **Ida Orgy Anderson** and their driver **Mr. William Ngala Chirao** of a Sony Erickson phone, a Motorola phone, a Nokia 3310, wrist watches, shoes, a cap and a pen knife, and immediately after the robbery used actual violence to the said victims. The victims were subsequently examined and the injuries they sustained were classified harm caused by a blunt object.

4. The Petitioner on his part submitted that the life imprisonment meted upon him by the trial magistrate was unconstitutional since the mandatory nature of the sentence is dehumanizing having denied him the prospect of release. He further submitted that he regretted the offence and he is reformed. He prayed for mercy and leniency since he was just a first offender.

5. **Ms. Wanjohi** for the prosecution submitted that taking into account the circumstances of the case, a deterrent sentence of 20 years including time served would be appropriate.

6. I have considered the petition, the submissions by the Petitioners and the D.P.P. Sentencing is a discretion of the trial court. In **Ambani v Republic [1990] KLR**, Bosire J. (as he then was) stated that a sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and that the court should look at the facts and the circumstances of the case in its entirety before settling for any given sentence.

7. Section 333 (2) of the Criminal Procedure Code requires a sentencing court to take into account the period spent in custody awaiting trial.

8. In the cause of these proceedings the Supreme Court on 6/7/2021 issued fresh directions on applicability of the Muruatetu case and limited it to murder offences. By that act, this Court was divested of the jurisdiction to resentence the Petitioner. So this petition is dismissed. However, the Petitioner is entitled to have time he spent in remand to be deducted from his sentence. **The prison authority is directed to ensure this is done.**

9. Save for the above paragraph (8) the petition is dismissed.

That is the Judgment of the Court.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29TH DAY OF JULY, 2021.

E. K. O. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Petitioner in person

Ms. Wanjohi for DPP

Ms. Peris Court Assistant