



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 62 OF 2019 (CONSOLIDATED WITH PETITION NO. 103 OF 2020)

1. MOHAMED BAKARI SULEIMAN

2. HUSSEIN HAMISI MOHAMED.....PETITIONERS

AND

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT

1. The Petitioners were 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 Mombasa Cr. Case No. 3764 of 2007. They appealed in Mombasa HCCRA No. 212 of 2009 consolidated with Mombasa HCCRA 209 of 2009, and the Appeal was dismissed and the conviction and sentence upheld. The petitioners have already served 12 years imprisonment.
2. The Petitioners have 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 17/11/2007, along Kingorani road, the Petitioners jointly, robbed **William Chagusia Luvunga** of Kshs. 300/=, and immediately before or immediately after the robbery slashed the said victim with a panga on the head.
4. The Petitioners on their part submitted that the life imprisonment meted upon them by the trial magistrate was unconstitutional since the mandatory nature of the sentence fettered the court's discretion in passing the sentence and considering their mitigation. The Petitioners further submitted that they regretted the offence they committed and they are reformed having paid their debt to the society.
5. **Ms. Wanjohi** for the prosecution submitted that the aggravating circumstances of the offence committed outweigh the mitigating circumstances in this case. Therefore, taking into account the circumstances of the case, a deterrent sentence of 30 years including time served would be appropriate.

The Determination

6. It is noteworthy that when the Supreme Court made the landmark judgment in the **Muruatetu** case in December 2017, many convicts approached the court for lesser sentences in all cases where the penalty clause prescribed a fixed and mandatory sentence; the argument being, that such sentences denied the court discretion in sentencing, and therefore, inconsistent with the Constitution. However, on 6/7/2021, the Supreme Court gave directions on the application of Muruatetu case to sentences in murder cases only. The Supreme Court has reiterated that its decision in the Muruatetu case did not invalidate mandatory sentences or minimum sentences in the Penal Code, the Sexual Offences Act or any other statute, thus: -

***“[14] It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the Constitution. It bears restating that it was a decision involving the two Petitioners who approached the Court for specific reliefs. The ultimate determination was confined to the issues presented by the Petitioners, and as framed by the Court.*”**

[15] To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under Section 40 (3), robbery with violence under Section 296 (2), and

attempted robbery with violence under Section 297 (2) of the Penal Code, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases.”

10. Accordingly, in so far as this petition is founded on Muruatetu decision, and this court having dealt with the petitioners’ appeals, this court is functus *officio*. In the circumstances, the court cannot assume jurisdiction on this petition for review of sentence.

That is the Judgment of the Court.

Dated, Signed and Delivered at Mombasa this 28th 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