



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 147 OF 2018

DOMINIC MUTISYA NZAUMI.....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 Mombasa Criminal Case No. 233 of 1999. The petitioner has been in jail for the last 23 years.

2. The Petitioner has now petitioned this Court for review of sentence pursuant to Article 50(2) (q) of the Constitution, and 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 the petitioner committed a robbery using a knife to rob his victim and immediately before the robbery threatened to use violence on his victim. However, the Petitioner did not injure his victim during the robbery.

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 fettered the trial court's discretion in passing sentences once it had considered his mitigation. He further submitted that he regretted the offence, he is very remorseful, and he is reformed having paid his debt to the society. He prayed to be sentenced for the time served since he was just a first offender.

5. Ms. Wanjohi learned prosecutor for the Respondent did not comply with the court orders issued on 19/5/2021. Consequently, the petition will be considered without the respondent's submissions.

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. The Court stated 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.”

7. Accordingly, in so far as this petition is founded on Muruatetu decision this court is functus *officio*. In the circumstances, the court cannot assume jurisdiction on this petition for review of sentence.

8. In light of these guidelines, this Court now lacks the jurisdiction to consider this petition and so the same is dismissed to await further development in the law in that regard.

DATED, SIGNED, AND DELIVERED AT MOMBASA THIS 28TH DAY OF SEPTEMBER, 2021.

E. K. O. OGOLA

JUDGE

JUDGMENT DELIVERED VIA MS TEAMS IN THE PRESENCE OF:

PETITIONER IN PERSON

MS. ANYUMBA FOR DPP

MS. PERIS COURT ASSISTANT