



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

PETITION NO. 37 OF 2018

1. HAMISI MBELA

2. DAVID ANYILA KISOLO.....PETITIONERS

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT

1. The Petitioner/Applicants herein **Hamisi Mbela Davis** and **David Anyila Kisolo** were charged, tried and convicted of the offence of Robbery with violence contrary to Section 296(2) of the Penal Code vide Taita Taveta SRM Court and sentenced to death.

2. Aggrieved by the conviction and death sentence imposed, the Petitioners filed an appeal vide Mombasa High Court Criminal Appeals No 319 of 2009 which appeal were heard and dismissed vide judgment dated 16/3/2012.

3. The Petition before court for determination is for resentencing where the Petitioners filed their submissions separately. The 1st Petitioner Hamisi Mbela submitted that the punishment meted upon them was degrading and inhuman. That the same was excessive and ought to be revised by the court. In mitigation he stated that he had been incarcerated for the past 13 years and had left a young family behind who to date were suffering because of his absence. He asked the court to extend leniency as was in the infamous case of **Francis Karioko Muruatetu** and further in **Malindi HC Criminal Case No 4 of 2015 Aden Abdi Samba Versus Republic** where the court set aside the death penalty and replaced the same with a 15-year sentence. He submitted that he had reformed and undergone useful training in prison which included polishing grade 3.

4. The 2nd Petitioner submitted that Article 25 of the constitution provided for freedom from torture and inhuman treatment and was of the view that the sentence meted upon him and his co accused was degrading. That he had reformed and learnt several skills while in prison and which could be useful if he was allowed back into the society. He prayed for the sentence to be revised to enable him join his family.

5. The Respondent on the other hand submitted the Petitioners robbed the victim of one bicycle valued at Kshs 2,500/- and cash Kshs 1,500/=. That the same was recovered at a house belonging to the 2nd Petitioner's mother and in the course of carrying out the offence the Petitioners were armed with dangerous weapons including a panga. That the death sentence had been commuted to life in prison, and that the Petitioners be resentenced to 30 years imprisonment including the time already served of 14 years.

6. Article 26(3) of the Constitution provides that a person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law. The death sentence which was handed down as mandatory sentence having been commuted to life imprisonment is therefore not unconstitutional as stated by the Petitioner. It has been clearly stated by the Constitution that a person can be deprived of life to an extent authorised by the law. Be it as it may, what the Supreme court found in the now infamous **Francis Karioko Muruatetu vs Republic [2017] eKLR** decision is that mandatory death sentence is unconstitutional in so far as it deprives the trial court of the judicial discretion in sentencing and further denies the accused person the opportunity to mitigate before sentence is meted out.

7. The Supreme Court has now, through directions given on 5/7/2021 made it clear that the Francis Muruatetu decision is only applicable in murder cases. The Supreme Court stated *inter-a-lia*:

“To clear the confusion in regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason and robbery with violence, that a challenge of those sentences should be properly filed in court”.

8. The court further said that the cases filed should be presented and fully argued before the High Court and escalated to the Court of Appeal if necessary, at which a similar outcome as Muruatetu may be reached. It stated:

“Muruatetu cannot be the authority for stating that all the provisions of the law prescribing mandatory or minimum sentences are inconsistent with the constitution,”

9. From the foregoing, the petition before the Court is dismissed for lack of jurisdiction.

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

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Petitioners in person

Ms. Anyumba for DPP

Ms. Peris Court Assistant