



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**PETITION NO. 99 OF 2019**

**IBRAHIM KATANA KAZUNGU.....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 Mariakani Cr. Case No. 318 of 2009. He appealed in Mombasa HCCRA No. 408 of 2010 and Appeal was dismissed and the conviction and sentence upheld. The petitioner has already served 11 years imprisonment.

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 24/11/2009, at Kwa Gurundi area at Tsangatsini in Kaloleni District within Coast province, the Petitioner jointly with **Ali Henry Ngala alia Mava**, robbed **Mwanyule Jonathan Mwayaa** of one Motorcycle registration number KMCG 646E and a Nokia 1200 mobile phone all valued at Kshs. 88,000, and immediately before the robbery slashed the said victim with a panga.

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 court's discretion in passing sentences. The petitioner further submitted that he regretted the offence, and that he is reformed having paid his debt to the society. He prayed to be sentence for the time served since he was a first offender.

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. 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.”***

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

11. 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 JULY, 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**