

THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 104 OF 2018

ANDREA NAHASHON MWAKISHA..... PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT

1. The Petitioner herein was charged with the offence of robbery with violence contrary to Section 292(2) of the Penal code. The particulars were that the Petitioner on 24th April, 2010, at about 7.30 a.m. at Ndegeni area of Kwale County jointly with others not before court robbed the complainant one motor cycle registration number KMCK 377T make Tianma, mobile phone make Nokia 3310 and cash Kshs. 945/= all valued at Kshs. 85,110/= and immediately before the time of such robbery beat the complainant.

2. On 5/9/2011, the trial court delivered its Judgment in which it convicted the Petitioner and sentenced him to death. Being aggrieved by the conviction and sentence, the Petitioner lodged a first appeal to the High Court which was dismissed and he subsequently lodged a second appeal to the Court of Appeal which was also dismissed.

3. The Petitioner having exhausted his appeal is now in this court for purposes of resentencing pursuant to the Supreme court decision in **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR** in which the apex court found the mandatory nature of the death penalty unconstitutional.

4. The complainant operated a motor cycle transport business commonly referred to as boda boda at Kinaarini area of Kwale County. On the morning of 4/4/2010 a would be customer who was well known to him and whose name was Omari Sanzua approached him and requested to be ferried to Ndegani area. They both set off, midway and in a forested area, Omari Sanzua pulled out a knife and ordered the complainant to stop. He then called out loud to one Hamisi who emerged from the Golini forest in the company of another person who according to the complainant is the Petitioner herein. The three men then gagged the complainant, dragged him deep into the forest and tied him to a tree. They then robbed him of his Nokia cellphone, cash Kshs. 75,000/= and the motor cycle on which they rode away with.

5. In his mitigation the Petitioner regretted his crime and submitted that he acted as a result of peer pressure. He submitted that he has learnt trade in prison and that he should be released. He was also baptized in prison and has renounced sin. He prayed that the court jails him for the 8 years he has spent in prison.

6. On his part Mr. Fedha, learned counsel for the prosecution submitted that the crime of robbery with violence once proved should be adequately punished. In this case counsel submitted that the Petitioner should be jailed for 18 years, including the 8 years already served in prison.

7. I have considered those submissions. I appreciate that no life was lost during the robbery and that the Petitioner is remorseful and has changed. Yet, this court must still adequately punish the crime. I therefore set aside the death sentence given by the trial court, and in place thereof I jail the Petitioner to a term of fourteen (14) years from the date of arrest.

8. Right of appeal in 14 days.

Dated, Signed and Delivered at Mombasa this 30th day of January, 2020.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Fedha for DPP

Petitioner in person

Mr. Kaunda Court Assistant