



**THE REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 236 OF 2018**

**WILSON NGAO MBURA.....PETITIONER**

**VERSUS**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT**

**JUDGMENT**

1. The Petitioner was charged and convicted for the offence of robbery with violence and sentenced to death. The death sentence was later commuted to life imprisonment.
2. The charge was that Petitioner jointly with another, and contrary to Section 296(2) of the Penal Code on 29/7/2009 at about 10 p.m. at Chanagande Village of Kaloleni District robbed Paul Njoroge Kimotho of his motor cycle make Haojin Chasis No. 69986 valued at Kss. 88,000/= and during the robbery struck the victim with a hammer on the head.
3. The Petitioner has exhausted his appeals and is now in this court pursuant to the Supreme court decision in **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR** in which the said court declared the mandatory nature of the death sentence as unconstitutional.
4. Mr. Fedha, learned counsel for the State agreed that this court can resentence the Petitioner, and submitted that the offence of robbery with violence is so grave and should be punished heavily, and in this case a prison sentence of 25 years would be sufficient.
5. The Petitioner on his part submitted that he is 55 years old and has a family of seven dependants who are surviving and schooling; he has served about 10 years since he was jailed for the offence of robbery with violence; that he is a changed individual basing on his rational thinking, attitude and personality. Furthermore, prior social inquiries by Kaloleni Probation Office gave positive remarks about his general conduct and reformation; he has initiated reforms that are evident and is a mentor, teacher, trainer and counselor to those placed on custodial sentences; his wife, children and family members have shown willingness and commitment to receive him and accord him social, economic and psycho-social support; within the community, he had valuable ties with fellow residents and is well known to the local administration for good causes; the victim was injured and never recovered his movable asset (motor cycle). The victim is said to have sold out his investments at Kaloleni town and relocated to Kiambu town years after the Petitioner's conviction. The Petitioner urged the court to set him free or to jail him for the time already served.

**The Determination**

6. I have carefully considered the petition and submissions. I have also considered the role of sentencing in criminal justice system. I have also looked at the authorities and case law.
7. The court caused to be filed a Social Enquiry Report herein on 6/9/19. The said report speaks well of the Petitioner, and the achievements and progress he has made in prison. His attitude has completely changed. He is a teacher in the prison and is highly respected. He should be given a chance to contribute to the society and to take care of his family. I am persuaded that the Petitioner will benefit from an early release, even if that release is made subject to some conditions.
8. I therefore make the following orders:
  - (i) the Petitioner is sentenced to serve a jail term of 15 years.
  - (ii) of the said 15 years five are suspended.
  - (iii) The Petitioner shall report to the Kaloleni Probation Office every 1<sup>st</sup> day of the month for a period of one year commencing

from 1<sup>st</sup> February, 2020 to 1<sup>st</sup> January, 2021.

(iv) During the period of the suspended sentence of 5 years if the Petitioner should engage in any crime he shall be arrested and taken back to prison to complete his sentence.

(v) Consequently, the Petitioner is released from prison unless otherwise legally held.

Right of appeal in 14 days.

**Dated, Signed and Delivered at Mombasa this 28<sup>th</sup> day of January, 2020**

**E. K. O. OGOLA**

**JUDGE**

In the presence of:

Mr. Fedha for DPP

Petitioner in person

Mr. Kaunda Court Assistant