



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CONSTITUTIONAL PETITION NO. 30 OF 2019

ALI KASSIM ADAM.....1ST PETITIONER

Haidari Ahamed Shahibu.....2ND PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Mr. Nyoro for State

RULING ON RESENTENCING

Background

The petitioners named herein above were jointly charged with the offence of robbery with violence contrary to Section 296(2) of the Penal code.

Briefly, the facts which constituted the offence were that on the night of 24th/25th February, 2008 at Buntwani Beach near Malindi Court the petitioners jointly with two others not before court, while armed with offensive weapons namely a panga, and stick robbed Hussein Bahassan Said alias Babichwa of his one packet of safari blue cigarettes and cash Kshs.40 all valued at Kshs.100 and at or immediately before or immediately after such robbery used actual violence to the said Hussein Bahassan Said, alias Babichwa.

The petitioners pleaded not guilty to the charge and the prosecution called evidence in support of the offence. At the conclusion of the trial each of the petitioners was found guilty, convicted and sentenced to suffer death by the Senior Resident Magistrate Hon. Nyambu.

Being aggrieved with the entire judgement an appeal was preferred to the High Court and later to the Apex Court on appeals of this nature which heard the appeals and on determination dismissed it on both conviction and sentence on the 10th June, 2010.

Submissions to this court

The petitioners argued their case by relying on the written submissions. In both petitioners filed the petition pursuant to Articles 22, 23 of the Constitution as a crosser to Articles 19, 20, 21, 25, 27, 28, 48, 50, 258 and 259 of the Constitution. It is contended by the petitioners that the death sentence is in violation of the Kenyan Constitution as founded in the Supreme Court of **Francis Muruatetu v R (2017) eKLR**. The sentence infringes Article 25(a) freedom from torture and cruel, intention or degrading, treatment and punishment. Article 26, on right to life, Article 27 on guaranteeing equality. Article 28 on human dignity and Article 50 on the right to a fair trial.

It was also argued by the petitioners that the death sentence was disproportionate with the circumstances of the offence.

The State did not oppose the petition. For this court consideration I will apply the principles in **Muruatetu case** in favour of the petitioners.

Determination

The constitutional challenge to the mandatory death sentence has appropriately been settled in the case of **Francis K. Muruatetu** (supra). In this regard the mandatory death sentence for any offence in Kenya was declared unconstitutional. The court emphasized a sentencing regime leveraging on judicial discretion, mitigation, aggravating factors, victim impact statement.

In addition the salient features as to the age of the offender, the personal circumstances, the public interest, the gravity of the offence, whether the offender is a repeat offender, any extenuating circumstances to provide a bench mark for the appropriate sentence.

It was also the court's position the purpose and objections set out in the sentencing policy guideline framework of the judiciary do form part of a significant resource to draw from in judicial exercise of discretion with regard to sentence to fully determine a fair, just and appropriate sentence for the offence.

The Supreme Court decision permissibly by striking down the mandatory death sentence through a plurality of reasoning granted leave the trial courts to approach sentencing in a manner which takes in account the specific circumstances of each case.

The court also restated the long held legal position that sentencing is a judicial discretion function to give effect to the right to a fair hearing.

Given this determinants on sentencing the present petition could be reviewed by considering the mitigating factors and aggravating factors for the offence of robbery which the petitioners were tried, convicted and sentenced to suffer death.

In regard to the record, the petitioners are stated to be first offenders, they have been in custody since the 6th March, 2008 when they were first arraigned in court and did plead not guilty to the charge. The trial was concluded and the sentence of death passed on 16th July, 2009.

I take judicial notice that at the time of trial and conviction, robbery with violence contrary to Section 296(2) of the Penal Code was not bailable. Therefore the petitioners had been in remand custody with effect from the 6th March, 2008 to 16th July, 2009. Under Section 333(2) of the Criminal Procedure Code it provides that the period spent in remand custody be taken into account by the sentencing court. If the record serves me right the petitioners have been in custody for a total period of or about 12 years consecutively. When it comes to the aggravating factors, the armed robbery did not involve any serious harm to the victims of the offence. The constant factor running through the offence under Section 296 (2) of the Penal Code remained to be armed with dangerous weapon and threats to actual violence. Apparently, the record of the trial is silent as to whether the panga and sticks were even used against the victim of the robbery. The same concern is also reflected on the particulars to do with the items of the robbery.

It was alleged that the petitioners robbed their victim a packet of cigarettes and fourty shillings cash.

My view therefore is there was no serious threat to violence and the highlighted stolen property is a characteristic of misdemeanor and not a felony. Though it was the law then adopted by the courts in terms of the construction of the statute it could not be said that the sentence in relation to Section 296(2) of the Penal Code was either rational or proportionate to the offence.

In assessing the weight of the mitigating and aggravating factors through the lens of the Supreme Court decision in **Muruatetu** (supra) I am persuaded that the mandatory sentence ought to be interfered with, that it was cruel, and degrading for the petitioners to have been subjected to such a punitive sentence.

Having considered all the variables and determinants of the unconstitutionality of the death sentence I am inclined to vary, set aside the death penalty to the period already served by each of the petitioners.

The petitioners are hereby set free unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 25TH DAY OF FEBRUARY, 2020.

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R. NYAKUNDI

JUDGE