



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

PETITION NO. 231 OF 2018.

ALI CHARO MATANO.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT

1. The Petitioner was charged with four counts of robbery with violence contrary to Section 296 (2) of the Penal Code in Mombasa Criminal Case No. 1007 of 2006. The Petitioner was found guilty and was sentenced to suffer death. The Petitioner subsequently lodged a first appeal before the High Court and a second appeal in the Court of Appeal. Both appeals were dismissed and as it stands the Petitioner is serving a life sentence after his death sentence was commuted.

2. The brief facts of the case are that on 3.3.2006 at [Particulars Withheld] area in Mombasa region, jointly with others while armed with dangerous or offensive weapon pangas, torches and stones robbed the family of MKM various households and other valuable items. The said MKM was asleep in her house with her husband, HMM, her two sons and her daughter EK. Their sleep was interrupted when a group of thugs invaded the compound. E was the first to see them after she was awakened by people talking in low voices outside the widow to her bedroom. She was able to see the thugs who numbered five by use of security light outside. He noticed the Petitioner among the gang but the Petitioner was left outside when the rest forced the house door open.

3. They stole the following items from the family members. From E, the thugs stole her two mobile phones, radio, camera, a golden ring and cash Kshs. 3,000/=. The thugs threatened to rape her and sexually molested her. From MKM and her husband, they stole two earrings, mobile phones, wrist watch, wallet, gas cooker cylinder, DVD, bow and arrows and Kshs.50/=. The Thugs further stole from one of the sons Kshs. 1,500/= DVD player, Sanyo music player, three Mobile phones and gas cylinder. During the incident one of the thugs armed with iron bar hit HMM on the head and he fell on the ground and was rendered comatose. Unfortunately, he did not recover from the injuries inflicted on him and he succumbed to injuries. The Petitioner was arrested in his escape and was identified.

4. By his petition filed on 02.10.2018, the Petitioner is seeking to have his conviction and sentence set aside and reviewed on basis of his mitigation. He avers that his rights under Articles 19, 20, 21, 22, 23, 24, 25, 27, 28, 48 and 50 of the 2010 Constitution were violated and that he was condemned to life in prison for the rest of his life.

5. The Petitioner filed written submissions in support of his petition. He contends that he was entitled to fair trial and less severe sentence under Article 50 of the Constitution. He further submitted that the sentencing to death was unconstitutional as decided in the Supreme Court decision in *Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR*. He averred that for the period he has been in prison he has reformed and has peacefully lived with other inmates. He pleads with the court to consider that he was a first time offender and that he is remorseful of his actions. The Petitioner submits that a jail term of 20 years including the years served would be appropriate.

6. Mr. Fedha, learned Counsel for the State opposed the petition. The State contends that the gang was armed with dangerous and offensive weapons when the incident happened. That they attacked and killed the complainant's husband and stole the complainant's property. In the circumstances, the state seeks for resentencing to a jail term of 45 years including the years already served.

7. I have carefully read the petition and the submissions of the Petitioner. There is no complaint on the conviction. The only issue being raised is that the sentence is harsh because it violates the Petitioner's constitutional rights.

8. In exercise of its discretion on similar circumstances, this court should consider the principle in sentencing and whether it has served its purpose. The Court should take into account the mitigation offered by the Petitioner, the facts of retribution, rehabilitation and reformation.

The court should ask itself whether the Petitioner is remorseful, and has sufficiently been rehabilitated and reformed to reasonably be expected to assume life in a free and orderly society. This court must also look at the nature of the offence the Petitioner was convicted for, and how it has affected the victims.

9. In the instant case the Complainant is said to have been assaulted and her husband killed in the process. The gang also robbed valuable households.

10. On the issue of sentence, this court agrees with the Petitioner that the Supreme Court in the case of **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR** declared the mandatory nature of the death sentence as provided for under Section 204 of the Penal Code to be unconstitutional. To that extend this court has the jurisdiction to resentence the Petitioner.

11. On sentencing it is the finding of this court that the crimes committed by the Petitioner were so grave and caused death to an innocent person. That crime must be met with adequate punishment to send a clear message that crime does not pay and shall be heavily punished once established. For the foregoing reasons I hereby set aside the death sentence imposed on the Petitioner by the trial court.

12. In place thereof, the Petitioner is hereby sentenced to serve a term of thirty (30) years from the date of arrest.

13. Right of appeal in 14 days.

14. That is the Judgment of the Court.

Dated, Signed, and Delivered at Mombasa this 30th Day of March, 2020.

E. K. OGOLA

JUDGE

In the presence of:

Petitioner in person via video link

Ms. Mwangeka for DPP

Mr. Kaunda Court Assistant