



**THE REPUBLIC OF KENYA**

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

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 37 OF 2017**

**ATHUMAN SALIM ATHUMAN.....PETITIONER**

**VERSUS**

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

**JUDGMENT**

1. The Petitioner herein was charged in the Principal Magistrate's Court at Kwale with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. Upon completion of trial, the Petitioner was found guilty and was sentenced to death on 6/6/2013. The Petitioner subsequently filed a first appeal to the High Court at Mombasa on 18/7/2014. Muya J. found the appeal to be devoid of merit and dismissed it in its entirety. The Petitioner was aggrieved and lodged a second appeal to the Court of Appeal which upon hearing of the said appeal held as follows, "*Having however concluded that the Appellant was properly and positively identified by PW1 and PW 4, it matters not whether the doctrine of recent possession was applicable in this case. The identification of the Appellant was reliable and safe... Ultimately we have come to the conclusion that this appeal has no merit and the same is accordingly dismissed in its entirety.*"
2. The background on the charge against the Petitioner was the events that took place on the night of 2/9/2011 at Kombani market, Tiwi Location, Kwale County. On the material day the complainant, Swaleh Mohamed Tenga (PW1) was taking refreshments at Kombani bar, Kombani market, when a friend of his called Bakari and two other people who were unknown to him, joined him. One of the two was the Petitioner.
3. The Petitioner and others ordered drinks and were together in the bar for between forty five minutes to one hour. When the bar closed, PW 1 with the two strangers relocated to a nearby disco. After a while, PW 1 opted to retire for the night and his two companions offered to get him a motor cycle (boda boda) to take him home. As PW 1 got on the motor cycle, the Petitioner switched the same off and with his companion set upon PW 1, assaulted him and robbed him of a Nokia C3 phone valued at Kshs. 10,500/=, a wallet containing Kshs. 800/= and ATM and voter's card. Fearing for his safety, the owner of the motor cycle, Salim Hamadi Baya (PW 4) rode off and left PW 1 with his assailants, who soon escaped.
4. PW 1 reported the incident at Diani Police Station at around 4.30 a.m. and was treated at kaya Medical Clinic. He was also issued with a P3 form. When Dr. Alfred Baya (PW 3) examined him on 5/9/2011, he noted a swollen face and a tender neck. He classified the degree of the injuries as harm.
5. Subsequently, PW 1 went to his friend Bakari to inquire the identity of his assailants. Bakari led him to their respective homes, but the suspects were not there. At the Petitioner's home, he met the Petitioner's uncle. A few days later that uncle called and informed PW 1 that the Petitioner had been arrested whilst trying to sell a phone. PW 1 then proceeded to Diani Police Station where he found the Petitioner under arrest and identified him as one of the assailants. He also identified his stolen phone.
6. The Petitioner is now before this court pursuant to the decision of the Supreme Court in **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR** that outlawed the mandatory nature of the death sentence.
7. The Petitioner submitted that he regretted the offence which he had committed, and prayed to be jailed for the 9 Years he has served in prison, and in any event not more than 15 years.
8. Mr. Fedha, learned counsel for the State submitted that the Petitioner should be jailed for 30 years to serve as an example to would be robbers.
9. I have carefully considered the mitigation offered by the Petitioner. I have also noted that he is a responsible member of the prison and advocates against drug use, and has become responsible. He is a proper advocate that crime does not pay.

10. In resentencing, I hereby set aside the death sentence and in place thereof I jail the Petitioner to a term of sixteen (16) years from the date of arrest.

11. Right of appeal in 14 days.

**Dated, Signed and Delivered at Mombasa this 30<sup>th</sup> day of March, 2020.**

**E. K. O. OGOLA**

**JUDGE**

In the presence of:

Ms. Mwangeka for DPP

Petitioner in person via video link

Mr. Kaunda Court Assistant