



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

PETITION NO. 90 OF 2018.

1. BENARD MAGANGA MJOMBA

2. GEORGE MWAKUDUA MUNA.....PETITIONERS

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT

1. The Petitioners were charged and convicted with robbery with violence contrary to Section 296 (2) of the Penal Code in Voi Criminal Case No. 196 of 2008 and sentenced to death by the Chief Magistrate's court. The Petitioners 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 Petitioners are serving a life sentence after their death sentence was commuted.

2. The brief facts of the case are that the complainant was a taxi driver at Voi town and operated a taxi registration number KBA 914K Toyota Caldinaa Station Wagon. On 12.3.2008 while operating the taxi in Voi Town the Complainant was approached by two the Petitioners who sought his services to drive them to a place called Sisera. On the way, the Petitioners asked him to stop by a certain bar where they were joined by two other men; one with a bandaged hand. Upon reaching their destination at Sisera the man with bandaged hand drew a gun and forced the Complainant to proceed towards Msau area, beyond Sisera. They stopped at a homestead and the Petitioners together with the other two men tied the complainant's limbs with a telephone cable and beat him up. They stole the complainant's taxi vehicle together with Kshs.2100/=, a mobile phone, ID card and a driving license. The Complainant was later left tied up in the forest. The Complainant was able to untie his feet and with this freedom walked to the main road. He boarded a bus and after a 2KM drive, the bus was flagged down by two men who the complainant straight away identified as part of the gang members who had robbed him. They were the Petitioners herein. The bus was then driven to Voi police station and the Petitioners were arrested.

3. Parties herein filed submissions in respect of the petition. Both the Petitioners submitted that the sentencing to death by the trial court as well as the two appellate courts was unconstitutional as decided in the Supreme Court decision in *Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR*. They submitted that for the period they have been in prison custody they have reformed and that they are remorseful of their actions. They seek this court to release them since they have reformed and have young families to take care of. The 2nd Petitioner prays for a jail term of 13 years.

4. Mr. Fedha, learned Counsel for the State opposed the petition and submitted that the petitioners were armed with a gun and had beaten up the Complainant before leaving him tied in the bush. Based on the circumstance of the charge Mr. Fedha submitted that the Petitioners be subjected to a jail term of 20 years from the date of their arrest.

5. I have considered the submissions. Time and again this court has pointed out that in sentencing 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.

6. In the instant case the Complainant is said to have been beaten up shortly before he was robbed. This Court cannot tell the condition of the Victim by now.

7. 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 extent this Court has the jurisdiction to resentence the Petitioners.

8. The Petitioners have served 12 years in custody. This court is cognizant of the fact that the pain done to the complainant cannot be atoned for by any imprisonment. When all the factors are considered, therefore, I am persuaded that a sentence of twelve years serves the denunciation; rehabilitative and deterrence functions of sentencing in this specific case. In the circumstances, I do hereby set aside the death sentence imposed upon the Petitioners and in substitution the Petitioners are hereby jailed to a term of 12 years which they have already served in prison, with the result that the Petitioners are forthwith released unless otherwise lawfully held.

That is the Judgment of this 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