



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

PETITION NO. 76 OF 2018.

JAMES WAFULA *Alias* EDWARD WADOGERA.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT

1. This is Judgment for the undated petition filed on the 3.04.2018 in which the petitioner avers that his Constitutional rights were violated when he was convicted and sentenced to suffered death sentence. He avers that the death sentence is unlawful and seeks review of the same. He places reliance on Article, 19, 20, 21, 22, 23, 24, 25, 27, 28, 48 50(2)(q), 258 and 259 of the Constitution.

2. According to the Petitioner he was charged, tried, convicted and sentenced to death vide Kwale Chief Magistrate's Court Criminal Case NO.1111 of 2007 for the offence of Robbery with violence. He appealed against the said death sentence to the High Court which appeal was dismissed. Being dissatisfied with the High Court's decision, the Petitioner appealed to the Court of Appeal vide Malindi Criminal Appeal NO. 9 OF 2013 which appeal was dismissed.

3. Having exhausted all the appeal mechanisms, the Petitioner is now lawfully serving life imprisonment. However, all was not lost after all, light came at the end of the tunnel when on 14.12.2017 the Supreme Court of Kenya in the **Supreme Court Pet. Nos 15 and 16 of 2015 (consolidated) Francis Karioko Muruatetu and Others vs. Republic** rendered a landmark decision declaring unconstitutional, the mandatory nature of the death sentence in capital robbery.

4. The Petitioner submitted that he has reformed fully, and that he committed the offence under the influence of alcohol. He has since been saved and is an elder of the SDA church in prison and a preacher in prison. The Petitioner prays that he be jailed for the 12 years that he has served, and if that is not possible, then a maximum of 15 years should be adequate.

5. Mr. Fedha, learned counsel for the State in opposition to the petition submitted that the Petitioner in company of several people robbed the complainant while armed with a pistol and hit the complainant severally. However, the DPP observed that according to the prison progress report dated 6/5/2019 the Petitioner has totally reformed and is very disciplined. Counsel prayed that the Petitioner be jailed for a term of 30 years including time served.

The Determination

6. On the issue of sentence, this court considers Supreme Court decision in the case of **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR** especially as far as giving an alternative sentence is concerned. Accordingly, I find and hold that the Petitioner has a right to seek for resentencing and hearing of his mitigation.

7. The mitigation given is that the Petitioner has learnt several skills while in prison; he is a leader in the prison church; he has also learnt how to relate with people in society. That he is reformed and that he should be considered for a jail term of 15 years. I have also considered the recommendation from the prison officer in charge at Shimo La Tewa Maximum Security Prison. The Petitioner is said to be disciplined and he has acquired certificates in Life's skills including Biblical studies.

8. The Petitioner further submitted that he is an elderly man aged 57 years and that if he is jailed for 30 years as submitted by the State's, then he would spend the rest of his life in jail.

9. The victims of the robbery are said to have been physically injured and that the weapons used in the commission of the robbery were

pistol and pangas. However, the property robbed was not recovered.

10. What this court should consider is 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.

11. In the premises, I hereby set aside the death sentence which was given to the Petitioner. In place thereof I hereby jail the Petitioner to serve a term of 18 years in jail from the date of arrest.

12. Orders accordingly.

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