



**IN THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 51 OF 2019**

**JOHN NJERU IRERI.....PETITIONER**

**VERSUS**

**THE DIRECTOR OF PUBLIC PROSECTIONS.....RESPONDENT**

**JUDGMENT**

1. The Petitioner herein was charged and convicted with two counts of Robbery with Violence contrary to Section 296 (2) of the Penal Code in Chief Magistrate's Court Criminal Case No. **4006 of 2009** and sentenced to death. The Petitioner subsequently lodged a first appeal before the High Court and second appeal in the Court of Appeal. Both appeals were dismissed.

2. Brief facts of the case are that on 26.11.2009 at Zain Shop along Lebanon round about in Mombasa district within coast province jointly with others while armed with dangerous weapons namely A.K 47 Rifle and two Pistols robbed Said Abdallah Ali cash Kshs. 15,000/= 14 assorted Nokia mobile phones, 4 assorted Motorola mobile phones, 2 Samsung mobile phones, one Dorado mobile phone, one HGCR mobile phone, one multi-media mobile phone, one Eurocel N-Series among other assorted valuable items. On the second count the Petitioner had robbed Elisha Sadama Wagongo.

3. The Petitioner now claims that the sentencing to death by the trial court as well as the two appellate courts was an infringement of his fundamental rights. He now seeks resentencing pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another vs. Republic [2017]eKLR** which decided that the mandatory nature of the death sentence is unconstitutional.

4. The Petitioner has been in custody for 10 years. He submitted that the said period of 10 years is enough punishment for the crime he was convicted for; and that he has reformed while in prison custody and remorseful of his actions therefore he should be released to integrate with the society. He invited the Court to consider cases with similar circumstances as his to wit, the case of **Sabastain Okweru Mrefu vs. Republic Petition No. 151 of 2012** at Kakamega High Court, **Mulamba Ali Mabanda -vs- Republic Appeal No. 12 of 2013 Mombasa Court Appeal** and in **Brown Tunje Ndago vs. Republic**.

5. Mr. Fedha, learned Counsel for the prosecution opposed the petition. He orally submitted that the Petitioner was armed with dangerous weapons namely A.K 47 Rifle and two Pistols at the time of incident and used actual violence against the victims. He further submitted that no one was injured and seeks the court to subject the Petitioner to a jail term of 20 years.

6. I have considered the submissions. Time and again this court has reiterated the principle 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.

7. In the instant case the Complainants was not injured in the cause of the robbery.

8. On the issue of sentence, this court is bound by the Supreme Court decision in **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR**, as affirmed by the decision of the Court of Appeal in **Wycliffe Wangusi Mafura vs. Republic [2018] eKLR**. To that extent this Court has the jurisdiction to resentence the Petitioner.

9. I have considered the mitigation by the Petitioner that he is a first time offender, that he has acquired skills which he can use to benefit the society and that he is very remorseful of his actions. I have also considered the Prisoner's progress report which indicates that the Petitioner has been of good discipline for the time spent in prison and that he has acquired some knowledge in prison and he can be very useful to the society. The report also indicates that the Petitioner is currently 61 years and has served 10 years in prison

10. This court is cognizant of the fact that the pain done to the complainant cannot be atoned for by any imprisonment having stated that the Complainants were not physically injured. However, 10 years in prison is not a short time. In the circumstances, I do hereby set aside the death sentence imposed upon the Petitioner and in substitution the Petitioner is hereby jailed to a term of 10 years which he has already served in prison, with the result that the Petitioner is forthwith released unless otherwise lawfully held.

That is the judgment of this Court.

**Dated, Signed and Delivered at Mombasa this 30<sup>th</sup> 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