



**THE REPUBLIC OF KENYA**

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

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 208 OF 2018**

**DONALD ONDAYO OMODO.....PETITIONER**

**VERSUS**

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

**JUDGMENT**

1. The Petitioner was charged and convicted for the offence of robbery with violence in Case No. 2232 of 2007 Kwale and was sentenced to death. Both his appeals to the High Court and to the Court of Appeal have been dismissed. The Petitioner is now in this court pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR** in which the apex court found the mandatory nature of the death penalty unconstitutional.

2. The Petitioner, together with one Brown Tunje Ndago, was charged with 12 counts of robbery with violence, convicted and sentenced to death. The Court of Appeal allowed counts 1-4 but dismissed 1-8 which were robbery with violence. It was proved in trial court that on 16/11/2007 at Diani, while armed with a pistol the Petitioner together with another robbed the complainant of cash Khs. 25,000/= and a watch. On the same day they robbed another complainant while armed with a pistol. Another robbery with violence was committed on 27/11/2007 at the Asian Supermarket in Diani while armed with a pistol and a knife. They robbed Kshs. 15,000/=. On the same day at the same venue they robbed a cashier of gold necklace, cash and other valuables.

3. Mr. Fedha, learned Counsel for the prosecution submitted that these are grievous offences which should be properly punished. Counsel submitted that the Petitioner should be jailed for 30 years including the 12 years already spent in custody.

4. On his part the Petitioner submitted that his colleague was jailed by a Malindi Court for 12 years and has already left prison. The Petitioner submitted that he should equally be jailed for 12 years.

5. I have carefully considered the petition and submissions. This court has the jurisdiction to resentence the Petitioner in light of the aforesaid Supreme court decision in Muruatetu case.

6. The robbery with violence offences committed by the Petitioner here are very grave and this Court must send a clear signal to would be offenders that crime does not pay. The Petitioner does not regret his crime. He does not show any remorsefulness. All he says is that since his co-criminal was jailed by another court for 12 years, he should equally be jailed for 12 years so that he may go home.

7. The Petitioner should know that each case shall be decided on its own particular circumstances. For resentencing it matters a lot what each convict tells the court in mitigation. In this case the Petitioner has not said anything in mitigation except that since his co-offender was sentenced to 12 years by another court he should also be given 12 years imprisonment.

8. This court is not satisfied that the Petitioner should be jailed for 12 years. He committed serious offences of robbery, all in the same day, and using crude weapons including a pistol. In my view, the Petitioner should be jailed in a manner that sends out a clear message that crime does not pay.

9. In the premises I hereby set aside the death sentence imposed on the prisoner by the trial court, and in the place thereof I now sentence the Petitioner to a term in jail of Eighteen (18) years from the date of conviction.

10. Right of appeal in 14 days.

11. That is the Judgment of the Court.

**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