



**REPUBLIC OF KENYA**

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

**PETITION NO. 23 OF 2019**

**JOHANNA NDUNGU.....PETITIONER**

**AND**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The Petitioner was convicted for the offence of Robbery with Violence contrary to Section 296(2) of the Penal Code and sentenced to 10 years imprisonment with 15 strokes in Criminal Case No. 282 of 1993. He appealed in HCRA. No. 183 of 1993 which dismissed the Appeal against conviction but reduced the sentence to 6 years imprisonment with 6 strokes. Further the Petitioner Appealed to the Court Of Appeal in Criminal Appeal No. 116 of 1995. The appeal was dismissed and death sentence imposed upon the Petitioner.

2. The Appellant has now petitioned this court for review of sentence in view of the Supreme Court declaration in *Francis Kariokor Muruatetu & Another vs. Republic SCK Pet. No. 15 of 2015 [2017] eKLR*.

**Brief Circumstance of the offence**

3. The particulars are that on 3<sup>rd</sup> day of March, 1993 at Shella Beach in Lamu Island of Lamu District within the Coast Province jointly with others not before the court, being armed with dangerous weapon namely knife and stick robbed Richard Birmingham of his two Nikon Cameras valued at Ksh. 140,000 and or immediately before or immediately after the time of such robbery used actual violence to the said Victim.

4. The Petitioner submitted that the Death Sentence which was commuted to life imprisonment is unconstitutional. He has now exhausted his right of appeal and approaches this court to declare that the death sentence was unconstitutional and impose an appropriate sentence upon him.

5. He further avers that the death penalty upheld upon him by the Court of Appeal was unfair and that it is the duty of this Court to impose an appropriate sentence. That at the time of the offence he was a first offender, has reformed and if given a chance would be useful member in the society as he has learn his lesson.

6. The prosecution submitted that the Petitioner together with others robbed a tourist armed with knives and sticks stealing two cameras and injuring the tourist who was left bleeding. The Prosecution further submitted that the Petitioner has undergone Tailoring and Carpentry Grade 1 and the skills acquired can help him earn a living when he completes his sentence and that he has not broken any rules and is actively involved in prison activities. The Prosecution further proposed a definite sentence of 40 years including time served

7. On his part the Petitioner submitted that the 26 years he has served in jail is adequate punishment for the crime he committed.

8. I have considered the Petition as well submissions of the parties, on the issue of sentencing the Petitioner submitted that he has reformed this is evidenced by the Prisoner's Progress Report. Indeed, he may have reformed and may even have been rehabilitated going by the responsibilities he carries on in prison. However, the element of retribution must be seen to be evident.

9. Pursuant to the Supreme court decision in *Francis Kariokor Muruatetu (supra)*, this court has the jurisdiction to resentence the Petitioner. Accordingly, and in consideration of the facts here, this court replaces the death sentence herein, and hereby sentences the Petitioner to the prison term already served with the result that the Petitioner is forthwith set free unless lawfully held.

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

**E. K. O. OGOLA**

**JUDGE**

In the presence of:

Petitioner in person via video link

Ms. Mwangeka for DPP

Mr. Kaunda Court Assistant