



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 82 OF 2018

MSANZI KARISA.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT

1. The Petitioner herein was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code and another count of giving false information to a person employed in the public service contrary to Section 129 of the Penal Code.
2. The Petitioner was convicted and sentenced to serve death. The Petitioner is now in this court for resentencing pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR** in which the said court declared the mandatory nature of the death sentence unconstitutional.
3. The facts surrounding this petition are that the Petitioner and one Mangale Nyawa (deceased) left their respective homes to buy cattle at an auction at Samburu market on 17/4/2004. While the Petitioner purchased one cow, the deceased purchased two. As the two headed back home with the cows on the night of 17th/18th April, 2004 they were allegedly attacked by robbers at 11.00 p.m. and their cows stolen. In the course of the robbery the deceased was strangled and killed. The Petitioner managed to escape and later reported the incident to PC Charles Oyoo at Kinango Police Station at 5.00 a.m. on 18/4/2004.
4. Upon investigations into the incident, it emerged that on 18/4/2004 the 2nd accused (Petitioner's wife) had driven two cows to the home of Juma Chimbonya where Mbodze Nzai wife to Juma Chimbonya kept them until he returned from safari. When he returned from safari two days later and saw the cows in his compound, he returned them to the Petitioner's home the following day as he had not been informed about such arrangements. It however emerged that these were the same cows the deceased had bought from Samburu market auction on 17/4/2004 before they were stolen from him in the alleged robbery. The Petitioner was arrested and taken to his home by police where the two cows were recovered.
5. The Petitioner admitted to have met the deceased at the cattle auction at Samburu market on 17/4/2004 where he bought one cow while the deceased bought two cows. He stated that on their way home at 11.00 p.m. they met four people who attacked them but he ran away and escaped to the forest where he hid until 5.00 a.m. when he went to Kinango Police Station and made a report of robbery. However, the Petitioner was convicted for the murder of the deceased.
6. Ms. Mwangeka, learned counsel for the prosecution submitted that the Petitioner killed his colleague in a most undeserving manner, and that for that reason the Petitioner should be jailed to 40 years in prison.
7. On his part the Petitioner submitted that he regretted the offence and that he acted because of being a youth. He submitted that he should be jailed for not more than 23 years. The Petitioner has been in jail for 15 years.
8. The purpose of sentence is to secure the objectives of retribution, rehabilitation and reformation. It should also take into account the circumstances under which the offence was committed. In this matter, the Petitioner robbed his own colleague of his two cows which they had together gone to purchase. In the process his colleague lost his life. The Petitioner's action was most heartless and this court must punish that appropriately.
9. I have considered the mitigation by the Petitioner, and the fact that in prison he has learnt a trade. However, the weight of the offence demands that the Petitioner be sentenced to a custodial sentence.

10. I hereby set aside the death sentence imposed on the prisoner by the trial court, and in place thereof I hereby jail the Petitioner to a prison term of thirty five (35) years from the date of arrest.

11. A Right of appeal within 14 days.

Dated, Signed and Delivered at Mombasa this 30th 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