



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 166 OF 2018

PAUL MWANIKI KITILI.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT

1. The Petitioner herein was charged in Mombasa Chief Magistrate's Criminal Case No. 3252 of 1999 with three counts. The first count was robbery with violence contrary to Section 296(2) of the Penal Code. The particulars were that on 26th day of September, 1999 at Port-Reitz village in Mombasa District within the Coast Province, jointly with others not before court, while armed with dangerous weapons namely, pangas, slashers, bars and arrows robbed Michael Mowesley various items valued at Kshs. 1,380,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Michael Mowesley.
2. The second count was similarly robbery with violence contrary to Section 296(2) of the Penal code. The particulars of the charge were the same save that the robbed victim was named as Stella Mowesley and the items robbed from here were valued at Kshs. 500,000/=.
3. In the third count the Petitioner was charged with rape contrary to Section 140 of the Penal Code. The particulars were that on 27th day of September, 1999 in Mombasa District within Coast Province he had unlawful carnal knowledge of one EM without her consent.
4. The Petitioner was tried and convicted on all the three counts. On counts one and two he was sentenced to suffer death, and on count three he was sentenced to 10 years. The Petitioner appealed against the trial court judgment in High Court Criminal Appeal No. 29 of 2000. Upon hearing the appeal, the High Court allowed the appeal against the sentence of ten years and quashed the conviction. However, the High court dismissed the appeal against the sentences of death and held that, "*Having perused the record of proceedings in the lower court and after evaluating the same alongside with the judgment it is out finding that the learned magistrate came to the right conclusion as regards the convictions on the first and second counts.*" The death sentence was later committed to life imprisonment in line with the presidential decree issued in 2009.
5. The Petitioner has exhausted all his chances of appeal and is now in this court for resentencing pursuant to the decision of the Supreme Court in **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR** which outlawed the mandatory nature of the death sentence.
6. The Petitioner submitted that he has reformed, and prayed for forgiveness and submitted that he be jailed for the 20 years he has served in jail.
7. Mr. Fedha, learned counsel for the prosecution submitted that the Petitioner used very crude weapons, and should be jailed for a total of 30 years to serve as an example to would be robbers.
8. I have carefully considered the submissions of parties and the mitigation offered by the Petitioner. The Petitioner was in the company of about ten other men during the robbery. They were armed with weapons like pangas, slashers, iron bars, stones and arrows. Any sentence meted out must reflect the gravity of the crime. Nonetheless I am satisfied that the 20 years the Petitioner has spent in jail is adequate punishment for the crime he committed.

9. I therefore make Judgment as follows:

(i) The death sentence herein is set aside.

(ii) In place thereof the Petitioner is jailed for a period of 20 years already served.

(iii) The Petitioner is hereby set free and released from prison unless lawfully held.

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