



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CONSTITUTIONAL PETITION NO. 17 OF 2020

THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA 2010

AND

THE MATTER OF ARTICLES 23(1) AND 165(3) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL UNDER ARTICLES 19, 29, 21, 22, 24, 25 (C), 27(1)(2)(4), 28, 29(a) (C) (D) (F) 35(1), 48, 50(2) AND OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTION 216 AND 329 OF THE C.P.C

AND

IN THE MATTER OF SECTION 295 AS READ WITH 296(2) OF THE PENAL CODE

BETWEEN

KITSAO CHARO NGATI.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Petitioner in person

Mr. Alenga for the state

RE-SENTENCING

The petitioner and two others were initially charged in various Magistrate Courts', with the offence of robbery with violence contrary to Section 296(2) of the Penal Code and the petitioner faced an additional charge of rape contrary to Section 3(1)(1)(a) of Sexual Offences Act No. 3 of 2006. After a full trial, he was convicted and sentenced to death. The petitioner was in addition convicted on the charge of rape albeit the sentence on this particular charge was held in abeyance. The petitioner appealed up to the Supreme Court for grounds *inter alia* that: the bench that heard and determined his case was unconstitutionally empaneled. The Supreme court held in the affirmative and ordered the appeals were sent to the High Court for re-hearing.

The petitioner's appeal was re-heard, determined and the judgement and sentence were handed down by **Justice Korir** on the 14th day of February of 2019. The Honorable Court dismissed the appeal on conviction but however he was sentenced in light of the Supreme Court decision in **Francis Karioko Muruatetu & Another v Republic (2017) eKLR** and in that regard his mitigation was taken into consideration. It is however bewildering that the petitioner has once again come under **Muruatetu** seeking to be resentenced to the period already served. **Justice Korir** in dispensing the upshot of the petitioner's case on appeal stated as follows:

“39. In light of the Supreme Court decision in Francis Karioko Muruatetu & another v Republic [2017] eKLR this court ought to take into account the Appellant’s mitigation and impose an appropriate sentence.

40. In mitigation the Appellant had stated during trial that he was helping them (I suppose this means PW1). He has also added that he is a first offender, is reformed and has been in custody since the time of his arrest. The aggravating factors are the injuries sustained by PW1 including the rape. It is noted that the Appellant was a first offender and the sentence of death would be inappropriate in the circumstances. However, taking into account the aggravating circumstances, a long jail term is necessary in this case. The death sentence imposed on the Appellant is therefore set aside and substituted with imprisonment for thirty years with effect from the date of sentencing by the trial court.”

This therefore means that the petitioner’s petition herein is incompetent since the right he is seeking has already been granted to him. His mitigation was considered as required in the **Muruatetu Case**. I therefore dismiss the instant petition for the want of merit. The sentence of thirty years with effect of the date of sentencing by the trial court stands.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 26TH DAY OF OCTOBER 2020

.....

R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Alenga for the state
2. The petitioner