



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

PETITION NO. 21 OF 2019

KAHINDI MWATSUMA CHIVATSI.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Petitioner in person

Mr. Alenga for the state

RULING

Background

The petitioner filed a constitutional petition against a life imprisonment sentence for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code.

The petitioner raises the following grounds that: He is aggrieved and dissatisfied with the sentence of life imprisonment for the offence of robbery with violence since as of now he feels reformed and remorseful for the offence.

Further, in his affidavit the petitioner avers that following the conviction and sentence which was also confirmed by the Court of Appeal, there is no doubt the fourteen years in custody has appropriately assisted him to transform his life to a Law abiding citizen.

Determination

In my considered view the petition involves the application of Article 50 (2) (p) and (6) (a) and (b) of the Constitution in terms of subsection 2 (p).

“The petitioner has a right to the benefit of the least severe of the prescribed punishment for the offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.”

Further, in subsection (6) (a) a person who is convicted of a criminal offence may petition the high Court for a new trial if:

“the persons appeal, if any, has been dismissed, by the highest court to which, the person is entitled to appeal, or the person did not appeal within the time alluded to appeal and need and compelling evidence has become available.”

The changes on which the petitioner relied on to assert his position arises out of the Supreme Court decision in **Francis Karioko Muruatetu v R {2017} eKLR**. In that Judgment the Court held the aforementioned mandatory death penalty for the offence of murder under Section 203 and 204 of the Penal Code to be unconstitutional. It is not in dispute that the substratum of the petition relates to the original death sentence for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code based on the charge he was tried and convicted by the Magistrate Court. It is also not in dispute that the petitioner preferred an appeal to both the High Court and Court of Appeal respectively. The said Courts substantially confirmed the conviction and death sentence which in the pendency of the trial appeal had been commuted to life imprisonment by the state.

The petitioner now urges this Court to reconsider the sentence afresh. Regarding the issue of mandatory sentences the Supreme Court in **Karioko Muruatetu** entrenched the following principles:

First, sentencing process and verdict is a reserve of judicial discretion by the respective trial Courts. Secondly, in sentencing a convicted offender, Courts should take into account personal circumstances i.e, the age of the offender, whether he has any previous convictions, any mitigation offered by the convict, the aggravating factors of the offence, the sentencing principles on rehabilitation, deterrence, retribution and other exigencies towards an appropriate adjudication of a fair and proportionate verdict on sentence as determined by the trial Court. Finally, Courts should take into account the provisions of Section 333 (2) of the Criminal Procedure Code with regard to time spent in custody pending trial and conclusion of the case. As was also held by the Supreme Court in Muruatetu (supra) the possibility of reform and social re-adaptation of the convicted prisoner seeking re-sentencing are also matters within the jurisdiction of the re-sentencing Court.

In my view, the matters which fall within the ambit of this petition are therefore spelt out in the **Muruatetu** dictum and the constitution. On the basis of the foregoing petition, the facts as presented by the petitioner warrant an interference of the life imprisonment sentence, initially a commutation of the death sentence for the offence of robbery.

From the petition and extracts of the Superior Court Judgments it would appear that the petitioner was not given a chance to offer mitigating factors at the time of conviction and sentence. This was a trial conducted at the time when the offence of robbery with violence contrary to Section 296 (2) of the Penal Code was not bailable. The period in remand custody statutorily required to be discounted not to occasion an injustice was never factored for the simple reason of the death sentence being prescribed as mandatory for the offence.

Further, arguably the petitioner's age, personal circumstances and possibility of rehabilitation indeed lacked an entry point during the sentencing hearings. I do so at this stage because I felt that these factors did not form the main part of the exercise of discretion and reasons for the death penalty against the petitioner.

In view of the record in that regard, I think the prosecutor had no opportunity to submit on aggravating factors and the manner in which the offence was committed. Upon a review of the petitioner and all relevant evidence, I have no doubt that the petitioner has established a prima facie case for a re-sentencing order. Needless to say, the petitioner has served close to 14 years imprisonment for the offence.

For these reasons, I allow the petition, vary the death sentence, being served as a convicted life imprisonment in lieu of 17 years sentence with a condition that the remainder of the period three years be community based under the supervision of the probation officer within his home sub-county.

By this order, the probation officer Malindi is directed to sign the necessary instruments with the petitioner for an early release and for home based rehabilitation for a further three years period.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 27TH DAY OF NOVEMBER 2020

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R. NYAKUNDI

JUDGE