



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTION AND HUMAN RIGHTS DIVISION

CRIMINAL APP. NO.117 OF 2007 AT MOMBASA

FROM ORIGINAL FILE NO.2990/200 CM's COURT AT MOMBASA

PETITION NO. 126 OF 2019

IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010 (SUPERVISORY AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOM OF INDIVIDUAL) HIGH COURT PROCEDURE PRACTICE AND PROCEDURE RULE 2013

AND

IN THE MATTER OF: ARTICLE 22(1) OF THE CONSTITUTION

AND

IN THE MATTER OF: ARTICLE 23(1) OF THE CONSTITUTION

AND

IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF INDIVIDUAL UNDER ARTICLES 23(1)(2)(3), 32(1)(2)(3)(c), 26(1)(2), 48, 50(2)(b)(c) & (p) OF THE CONSTITUTION AND SECTION 295 AND 296(2) OF THE PENAL CODE

AND

IN THE MATTER OF: ARTICLES 19(3)(A), 20(1), 25(c) 50(q), 159(1)(2) (a)(b)(d) and (e), 258(1), 259(1)(3) OF THE CONSTITUTION

BETWEEN

SAMSOM ALEX MCHESI.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.... RESPONDENT

JUDGMENT ON RESENTENCING

1. The Petitioner **Samson Alex Mchesi** was charged and convicted for the offence of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code** and sentenced to death.
2. The particulars of the charge were that on the **29th day of July 2005**, at **Bokole Village Changamwe in Mombasa District within Coast Province** jointly with others not before court, while armed with offensive weapons namely pangas, robbed **Mercy Chao** of cash **Kshs.20/=** and at or immediately before or immediately after the time of such robbery used actual violence to the said **Mercy Chao**.
3. The Petitioner appealed both the conviction and the sentence to the High Court. The Appeal was dismissed.

4. The Petitioner is now before this Court for resentencing pursuant to the Supreme Court decision on **Francis Karioko Muruatetu & Another –vs- Republic (2017)eKLR**, in which the apex court found that the mandatory nature of the death sentence is unconstitutional.

5. **M/S Wanjohi**, Learned Counsel for the State conceded that pursuant to the aforesaid **Muruatetu Case**, this Court has the jurisdiction to resentence the Petitioner. Counsel submitted however, that there are aggravating circumstances in this matter which the court should consider in resentencing. These are that the Petitioner together with five others assaulted the victim at **4.45am** using a panga. They cut their victim on the ear and right leg. The victim was left psychologically traumatized. Although the Petitioner has learnt a course at the prison, and although he is a first offender, Counsel submitted that the offence committed is grave and a deterrence sentence of **twenty-five(25) years** in prison should be given.

6. On his part, the Petitioner submitted that he was remorseful, and that he has reformed and he is sickly and that he should be jailed for a maximum of **twenty (20) years** from the date of arrest.

7. I have considered the Petition. I have also considered both aggravating and mitigating factors. The Petitioner has served **fourteen (14) years** in jail since arrest. Record from prison shows that the Petitioner is sickly; is hypertensive, and suffers from Peptic Ulcers and other ailments. The prison progress report also shows that the Petitioner is of good conduct and relates well with other inmates. He is currently the leader of inmates with disabilities. He is also a born again Christian and has obtained several Certificates in Bible Study. The Petitioner attached eight copies of various Certificate of Merit. In my view, the Petitioner has shown a desire to change. Although the offence the Petitioner committed is a very serious one, the Petitioner has demonstrated that he has reformed.

8. Further, the Petitioner is sickly, and suffers various forms of disabilities. In my view, and especially with a view to decongest our prisons at this time of Covid-19 pandemic, the time the Petitioner has served in prison of **fourteen years** is adequate punishment in the circumstances.

9. I therefore, now lift the death sentence imposed on the Petitioner, and instead thereof I jail the Petitioner to a term equivalent with that he has already served.

10. The consequence of the above is that the Petitioner is forthwith released from prison unless validly held for other reasons.

DATED, SIGNED and DELIVERED at MOMBASA on this 15th day of DECEMBER, 2020.

E. K. OGOLA

JUDGE

Judgment delivered in chambers via MS Teams in the presence of:

Mr. Fedha for State

Petitioner in person

Note:

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Judgment has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all Judgments and Rulings be pronounced in open Court.

E. K. OGOLA

JUDGE