



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

MISC. PETITION CASE NO. 2 OF 2017.

JOB WILLIAM NAMACHANJA.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G.

The Petitioner Job William Namachanja was charged with the offence of robbery with violence in Bungoma CM CRI. 2481/2009, together with others who were acquitted. He alone was convicted and sentenced to death. He appealed against the conviction and sentence in Bungoma HC. CRI. APPEAL NO. 52/2010. The appeal was dismissed by F. Muchemi and D.A. Onyancha Judges on 22.6.2011. The appellant thereafter appealed to the Court of Appeal in Eldoret in C.A. CR. APP No. 146/2013 which on 10.12.2015, was dismissed by Justice Maraga, Musinga and Murgor JJA.

The Petitioner then filed this petition pursuant to Articles 35(1) A, 50(2) (B), 5(1), 49(1)(F)(I), (G) AND ARTICLES 25(C), 27(1), (2) OF THE CONSTITUTION OF KENYA 2010.

AND.

IN THE MATTER OF SECTION 214(1), (i)(ii), (3), 89(1), 134, 137 OF THE CRIMINAL PROCEDURE CODE AS READ WITH 159.

AND.

IN THE MATTERS OF SECTION 163(C), 165, 107 OF THE EVIDENCE ACT.

AND.

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

He prays for the following orders;

- 1) The petitioner's fundamental rights and freedom were threatened, under Article 25, 27 of the Constitution 2010 by being accorded an unfair trial. Was charged on an incurably defective charge sheet.
- 2) The petitioner was charged for robbing Kshs.4,320/= whereby no single witness supported the same. The courts were biased.
- 3) The names of the complainant differ or are in variance between the charge sheet and evidence of chief. This has made the charge sheet incurably defective. It was not amended hence the Judgment was null and void.

The appellant filed written submissions in support of his Petition. He submits that upon conviction he was sentenced with death sentence which is an inhuman and cruel and is therefore unconstitutional. He submits that during the trial he was not accorded the services of an advocate paid for by the state in contravention of Article 50(5) and therefore during his trial he was not accorded a fair hearing. The petitioner submits that he was arrested and not informed of the charges against him and this infringes his fundamental rights and that the evidence on record did not prove the charge against as conditions of identification by the witnesses were not conducive for positive identification.

In his oral submissions in court the petitioner informed court that his sentence of death was commuted to life imprisonment in 2017 and is now serving a life imprisonment.

Mr. Akello for the state opposed the petition submitting that the matter having been adjudicated by the court of appeal, this petition will amount to a second appeal. He submitted that the petitioner has not demonstrated how his fundamental rights were infringed. He submits that the sentence of death for robbery with violence is still legal although now not mandatory. He urged the court to dismiss the petition.

The petitioner has in this petition relied on Article 26(1) and (2). The right to life Article 50 – fair hearing, Article 49 access to justice, Article 25 fundamental rights and freedom. His petition premised of infringements of his Constitutional rights during and after trial.

The petitioner fought the complainant is that he was charged with the offence of robbery with violence, found guilty, convicted and sentenced to the death. The conviction and sentence was affirmed by both the High Court and in HCR. 52/2010 and court of Appeal in CA. CR. Appeal 146/2013. He submits that the sentence of death is cruel, inhuman and a breach of the fundamental rights enshrined in the Constitution. He invites the court to be guided by the supreme court decision in Muruatetu case.

Article 26 of the constitution of Kenya 2010 provides; **26(1)** *Every person has the right to life. 26(2) The life of a person begins at conception. 26(3) A person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law.*

The Supreme Court has an opportunity to express itself on similar issue the In **Francis Karioko Muruatetu & Another Vs. Republic [2017] eKLR** where it stated where it stated;

[112] Accordingly, with regards to the claims of the petitioners in this case, the Court makes the following Orders:

a) The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of the Constitution.

From the above it is clear that the supreme court did not, has never declared the death penalty unconstitutional. Indeed the court affirmed that the sentence is still legal but not mandatory. The petitioner informed court that he is now serving life sentence. Based on his submissions there is no Death Sentence against him which ought to be varied and/or set aside. I therefore find this Petition without merit and is hereby dismissed.

Dated and signed at Bungoma this 30th day of January, 2019.

S.N. RIECHI

JUDGE