

REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISII

CONSTITUTIONAL PETITION NO. 53 OF 2018

BETWEEN

DOMINIC NYAMACHE NYABUTI.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The petitioner seeks resentencing. He was convicted of the offence of robbery with violence contrary to section 296 (2) of the Penal Code and was sentenced to death. His appeal in the High Court, in HCCR No. 209 of 2010 was dismissed and his second appeal to the Court of Appeal Criminal Appeal No 11 of 2013 was also dismissed.

2. The petitioner relies on the Supreme Court decision in Francis **Karioko Muratetu & Another vs. Republic SCK Petition No. 15 of 2015** declaring the mandatory death penalty unconstitutional. This Court of Appeal's decision in **William Okungu vs. Republic Criminal Appeal No. 56 of 2013** held as follows;

[9] From the foregoing, we hold that the findings and holding of the Supreme Court particularly in paragraph 69 applies mutatis mutandis to Section 296 (2) and 297 (2) of the Penal Code. Thus, the sentence of death under Section 296 (2) and 297 (2) of the Penal Code is a discretionary maximum punishment.

3. I have read the proceedings in the lower court, the circumstances of the case and also noted that the petitioner has been in custody since 14th October 2010, about 8 years. I sentence the petitioner to a period of 15 years from the 14th October 2010.

Dated signed and delivered at Kisii this 28th day of March 2019.

R.E.OUGO

JUDGE

In the presence of;

1st Petitioner Present in person

2nd Petitioner Present in person

3rd Petitioner Present in person

Mr. Otieno Senior Prosecution Counsel Office of the DPP

Rael Court Clerk