



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 142 OF 2018

THOMAS MORARA NYAMBEGA..... PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS....RESPONDENT

JUDGMENT

1. The Petitioner was charged and convicted of the offence of Robbery with Violence contrary to Section 296 (2) of the Penal Code in Chief Magistrate's Court Criminal Case No. 2177 of 2007 and sentenced to death by the Chief Magistrate's court. The Petitioners subsequently lodged a first appeal before the High Court and a second appeal in the Court of Appeal. Both appeals were dismissed and as it stands the Petitioner is serving a life sentence.

2. The Petitioner now claims that the sentencing to death by the trial court as well as the two appellate courts was an infringement of his fundamental rights. The Petitioner avers that the said Courts interpreted the provisions of Section 296(2) of the Penal Code to mean that death sentence was the only sentence available to the Petitioner and that the said Courts held the view that the death sentence under the said provisions was mandatory and no other sentence.

3. The Petitioner further claims that the said Courts did not consider the Petitioner's mitigation and that he was a first offender and the circumstances under which the offence was committed were also not considered.

Response

4. The Respondents opposed the Petition by way of Grounds of Opposition, The Respondents contend that the Petition lacks the Jurisdiction to re-hear and re-determine a criminal case whose Appeal has been determined and further that this Court is an inappropriate forum to grant reliefs sought.

5. Further, the Respondent claims that the effect of grant of the orders sought by the Petitioner will be to upset the hierarchy of the Courts as the Petitioner was properly tried, convicted and sentenced and availed all avenues of appeal.

Hearing and Submissions

6. The Petition came up for hearing on 22nd October, 2018. **Mr. Wamotsa** appeared for the Petitioner while **Mr. Jami** appeared for the Respondent. However parties chose to rely on their submissions.

7. It was the Petitioner's submissions that following the celebrated decision in **Francis Karioko Muruatetu & Another –vs- Republic SC PET NO. 15 & 16 of 2015** (consolidated) the mandatory aspect of the death sentence in Section 296(2) of the Penal Code is unconstitutional and that a Court can impose a lesser sentence other than a death sentence.

8. The Petitioner further submitted that the death sentence violates the Petitioner's rights and offends the provisions of Article 2(5) & (6) 25 & 28 of the Constitution as well as Articles 3 & 10 of the International Covenant on Civil and Political rights (ICCPR)

9. The Petitioner submitted that death sentence as provided for under Section 296(2) is excessive, cruel and disregarding in view of the fact that the punishment is only retributive but does not recognize and disregard the fact that a human being should have a chance to reform and atone for his sins to society and that even though the sentence is not mandatory there is no criteria legislated under these provisions setting

out when a death sentence may be awarded and to what class of persons. The Petitioner concluded that they sought to rely on the mitigation and the constitutional aspect of the trial and other constitutional challenges.

10. The Respondent opposed the Petition stating that the Petitioners exhausted all the appellate possibilities that they had.

11. It was further submitted that the Respondent was not opposed to jurisdiction of this Court to hear constitutional petitions but rather on the Jurisdiction of the Court to rehear the mitigation and sentence.

The Determination

12. The first issue for determination is whether this Court has the jurisdiction to entertain this matter. Article 22(1) of the Constitution states that every person has the right to institute court proceedings claiming that a right of fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Article 23(1) and 165 (3)(b) of the Constitution grants the High Court the jurisdiction to hear and determine applications for redress or denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

13. The Petitioner herein contends that his rights as expressed under Article 22 have been infringed and therefore the Petition falls within the Jurisdiction of this Court.

14. Article 23 of the Constitution gives this Court the jurisdiction to hear and determine matters involving violation of fundamental rights under the Bill of Rights. It states as follows:

23. (1)The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.

15. The jurisdiction of the High Court to determine issues of violation of fundamental rights is further cemented by Article 165 which establishes the High Court and at sub-article (3) (b) gives the court jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

16. The Petitioner clearly submitted that his criminal case had run its course. The Petitioner comes to this Court seeking redress for alleged violation of his rights under the Bill of Rights. This being the case this Court finds that it does have the jurisdiction to entertain this matter by virtue of Article 23 and 165 (3) (b) of the Constitution.

17. Having established that the Court has jurisdiction, the next issue for determination is whether the Petitioner's rights were infringed. He claims that the High Court and Court of Appeal did not find it necessary to consider the Petitioner's mitigation that he was a first offender and the circumstances under which the offence was committed were also not considered.

18. On the issue of sentence, this Court agrees with the Petitioner that the Supreme Court case in the case of **Francis Karioko Muruatetu & Another -vs- Republic [2017] eKLR declared** the mandatory nature of the death sentence as provided for under Section 204 of the Penal Code to be unconstitutional. The Petitioner was sentenced to 30 years imprisonment by the High Court. This sentence was set aside by the Court of Appeal which imposed the death sentence. In that case the Judges of the apex Court opined that a Court has to take into consideration mitigation offered by the accused person in order to impose an appropriate sentence. However the court noted that the death sentence may be imposed if the court is convinced that all circumstances taken into consideration, the sentence is appropriate.

19. This Court sitting as a constitutional Court cannot consider the mitigation offered by the Petitioner on the Sentencing. The Court can only direct that the file be placed before the trial Court for that consideration.

20. For these reasons the Petition herein is hereby dismissed and orders issued as follows:

a. The sentence rehearing proceedings shall take place in the Chief Magistrates Criminal Court Case Number. 2177 of 2007 (Mombasa)

b. Parties to bear own costs herein.

Dated, Signed and Delivered in Mombasa this 28th day of March, 2019.

E. K. O. OGOLA

JUDGE

In the Presence of:

Mr. Isaboke for DPP

Mr. Wamotsa for Petitioner

Mr. Kaunda Court Assistant