



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL PETITION NO. 5 OF 2018

ALI MOHAMED WANJALA.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. **Ali Mohamed Wanjala**, the petitioner herein, was convicted for the offence of robbery with violence contrary to section 296(2) of the Penal Code in Busia Chief Magistrate's Court criminal case No. 514 of 2002. He was sentenced to death. He appealed to the High court and to the Court of Appeal where his appeals were dismissed. He now petitions this court for and order for resentencing. His petition is premised on the following grounds:

- a) That petitioner is currently serving life sentence after the death sentence was commuted.
- b) That the petitioner was making his application pursuant to the Supreme Court's decision in the case of **Francis Karioko Muruatetu & another vs. Republic [2017] eKLR**.
- c) That the mandatory death sentence that had been imposed on the petitioner was excessive, arbitrary and inhumane.
- d) That the death penalty is invalid.

2. The petitioner premised his petition on Articles 165 (3), 159 (2) (a) and (b) 50 and 22 (1) of the Constitution of Kenya.

3. Article 22 of the Constitution of Kenya is on enforcement of the Bill of Rights. Since the Constitution of Kenya has not outlawed death penalty, the Bill of Rights must be enforced subject to the Constitution and other written laws. Article 26 (3) of the Constitution provides:

A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law.

In the instant case, the death penalty imposed in the trial court and subsequently upheld by the superior Courts on appeal cannot be described as excessive, arbitrary and inhumane. This was a legal sentence prescribed by the Penal Code.

4. The applicant cited the decision of the Supreme Court in the case of **Francis Karioko Muruatetu & another vs. Republic [2017] eKLR**. This is a decision that has been overstretched in a bid to try luck to the detriment of the court process.

5. The decision in the **Muruatetu** case is not only good law but very progressive one. However, courts have a duty to ensure that it is not misused. Briefly the facts were that the petitioners were arraigned before the High Court for the offence of murder. Upon their conviction, they were sentenced to death as decreed by Section 204 of the Penal Code. Their appeal to the Court of Appeal against both conviction and sentence was dismissed. Aggrieved by that decision the moved to the Supreme Court. The court made 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.

b) This matter is hereby remitted to the High Court for re- hearing on sentence only, on a priority basis, and in conformity with this judgment.

c) The Attorney General, the Director of Public Prosecutions and other relevant agencies shall prepare a detailed professional review in the context of this Judgment and Order made with a view to setting up a framework to deal with

sentence re-hearing cases similar to that of the petitioners herein. The Attorney General is hereby granted twelve (12) months from the date of this Judgment to give a progress report to this Court on the same.

d) We direct that this Judgment be placed before the Speakers of the National Assembly and the Senate, the Attorney-General, and the Kenya Law Reform Commission, attended with a signal of the utmost urgency, for any necessary amendments, formulation and enactment of statute law, to give effect to this judgment on the mandatory nature of the death sentence and the parameters of what ought to constitute life imprisonment.

6. The decision in **Muruatetu** case addressed itself to section 204 of the Penal Code. Even if we assume that **cases similar to that of the petitioners herein**, contemplated cases like the petitioner's in this case, I am not aware whether the order directed to the Attorney General, the Director of Public Prosecutions and other relevant agencies has been complied with. The Court was alive to the dangers of acting without a framework which ought to inform courts from what period this decision is to be effected. This will clarify the scope of that application and address the issue of retroactivity.

7. I therefore find that the petition herein lacks merit and the same is dismissed.

DELIVERED and SIGNED at BUSIA this 27th day of March, 2019

KIARIE WAWERU KIARIE

JUDGE