



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL MISC. APPLICATION NO. 1 OF 2015

DAVID MWANZA MUTEMI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From Original Conviction and Sentence in Mwingi Senior Resident Magistrate's Court Criminal Case No. 698 of 2009 by Hon. H. M. Nyaberi (SRM) on 19/10/11)

J U D G M E N T

1. **David Mwanza Mutemi**, the Appellant approached this Court by way of Chamber Summons seeking to benefit from the decision in **Petition No. 15 of 2015 Francis Karioko Muruatetu & Another vs. Republic (2017) eKLR**.
2. It is averred by the Appellant that he was charged and convicted of the offence of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code**, and sentenced to death, a decision that was affirmed by the High Court and Court of Appeal. And having exhausted the Appellate process he seeks to be re-sentenced. He has also urged the Court to take into consideration the term of sentence served amounting to ten **(10) years imprisonment**.
3. In response the State/Respondent through the learned State Counsel **Mr. Mamba** argues that death penalty is allowed under **Article 26(3)** of the **Constitution** to the extent authorized by law. That the Appellant has not demonstrated the nature of violation of his constitutional rights that would call for the Court's intervention.
4. I have considered rival submission of both parties herein.
5. The Supreme Court in the **Muruatetu Case** (supra) declared death sentence unconstitutional and gave some guidelines to be considered in such Application namely:
 - The age of the offender.
 - Whether he is a first offender.
 - Whether the offender pleaded guilty.
 - The character and record of the offender.
 - Remorsefulness of the offender.
 - The possibility of reform and social adaptation of the offender; and
 - Any other factor that the Court considers relevant.
6. I have perused the Judgment of the Court of Appeal. From the facts the Appellant and his co-accused robbed the Complainant of **Kshs. 3,575/=** plus assorted items and occasioned upon him actual bodily harm.
7. In view of the **Muruatetu Case**, I set aside the death sentence imposed and substitute it with a sentence of **twelve (12) years imprisonment** to be effective from the date of conviction.
8. It is so ordered.

Dated, Signed and Delivered at Kitui this 30th day of April, 2019.

L. N. MUTENDE

JUDGE