



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

CONSTITUTIONAL PETITION NO. 59 OF 2016

G O.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT

1. The Petitioner herein 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 against conviction and sentence was dismissed by the Court of Appeal on 15th March, 2012.
2. The current petition is for resentencing after the Supreme Court outlawed the mandatory death sentence in the now famous **Francis Muruatetu** case.
3. The Petitioner submitted that he has stayed in jail for twelve (12) years since 11th July, 2007 when he was arrested. Further, the Petitioner states that he has since reformed and is a law abiding person. The Progress Report from the prison speaks well of the Petitioner, that he has reformed and is able to engage in petty trade.
4. The Petitioner also suffers from HIV, hypertension and had an operation for hernia. He is constantly on medication.

Probation Report

5. A report was prepared on the Petitioner. The report is dated 27th May, 2019. The Petitioner's parents died while he was in jail. The Petitioner has a wife who is engaged in fish hawking in Kisauni in Mombasa County. He has three children aged between 14 and 19 years. The eldest child is mentally challenged and requires close supervision. The Probation Report recommends that the Petitioner will be well received both in his family and in the community. The victims of his offence no longer live where the offence took place and the Petitioner's family also moved away. **Mr. Isaboke** for the DPP submitted that the Petitioner was a member of a gang of robbers and that the punishment should seek to deter the offence. **Mr. Isaboke**, however, agreed that due to his reformation and sickness the Petitioner should be sentenced to seventeen (17) years in total, five (5) of which should be suspended and on probation.

Sentence

6. I have carefully considered the Petitioner's sentence. I have also considered submissions of Petitioner, the Probation Report and the Progress Report. The Petitioner appears remorseful, and also appears to have reformed in prison. The Petitioner is also sickly and would benefit from an early release. However, although there were no fatalities during the crime, the offence is a grave one and shall be punished with an aim to deter the same. Accordingly, I accept the submissions of the prosecution that seventeen (17) years is adequate punishment. However, considering the health status of the Petitioner, this Court orders that the Petitioner be and is hereby sentenced to fifteen (15) years in prison. The Petitioner has served twelve (12) years already. The remaining three (3) years shall be suspended during which time the Petitioner shall be under probation. Accordingly, Judgment is made as under:

- i. The Petitioner is sentenced to fifteen (15) years in prison.
- ii. Of the above fifteen (15) years three (3) years are suspended to be served under probation.
- iii. The **Kisauni District Probation Officer** shall supervise this order on probation.

iv. During the probation period the Petitioner shall not be engaged in any offence, and if he does, the suspended sentence herein will automatically lapse, and the Petitioner shall be taken to Shimo La Tewa Prison to serve the balance of the sentence, and any other lawful sentence.

v. The Petitioner is herewith forthwith released from prison unless lawfully held.

That is the Judgment of the Court.

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

E. K. OGOLA

JUDGE

In the presence of:

Mr. Fedha for DPP

Petitioner in person

Mr. Kaunda court Assistant