



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 239 OF 2018

THE CONSTITUTION OF KENYA 2010 (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF AN INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES 2013

IN THE MATTER OF: ARTICLE 22(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ARTICLE 23 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ARTICLES 19, 20, 21, 22, 23, 24,25, 27, 28, 48, 50, 258 AND 259 OF THE CONSTITUTION

BETWEEN

AM.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT

1. The Petitioner **AM** and one Salim Juma Abdulla, were jointly charged in the Chief Magistrate’s Court at Mombasa with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. The facts of the offence were that on 4th December, 2004 at around 5.30 p.m. in Mombasa jointly with others not before the Court and while armed with dangerous weapons namely knives robbed Monicah Mweni Muthamia a mobile phone make Samsung and cash Kshs. 250/= all valued at Kshs. 9,750/= and at or immediately before or after the robbery threatened to use actual violence to the said Monicah Mweni. The Petitioner was convicted and sentenced to death.
2. The Petitioner is now in this Court for resentencing pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR** that the mandatory death sentence is unconstitutional.
3. The Petitioner appears to have been a minor at the time the offence was committed. He is now 30 years yet he has already served 17 years in prison. This fact appears to have never been brought before the trial Court with the consequence that the Petitioner suffered jail as a minor and lived with convicted adults. This was a gross violation of the Petitioner’s right, which, although has been occasioned, this Court is not entirely helpless to ameliorate the same to the extent legally possible.
4. Mr. Fedha for the prosecution has submitted that the Petitioner be jailed for 20 years including the term he has served. The Petitioner on his part submitted that he should be released to go home to his family. He has already lost a big part of his youth.
5. The Petitioner appears to me to be remorseful. The Prison Progress Report speaks well of the Petitioner. The Social Inquiry Report was filed in Court dated 24th September, 2019. The report paints a person who is reformed and remorseful and whose relatives are willing to receive at home. He also has a positive attitude and shows willingness to live in peace.
6. In the circumstances this Court takes into account the objectives of sentencing which is retributive, rehabilitative and reformative. In my assessment the Petitioner has satisfied the said objectives. He has a positive attitude, recognizes that he did wrong and pledges to abide within the law.

8. As I have stated earlier, the Petitioner was jailed and lived with convicted adults. This was a major derogation and breach of his fundamental rights, which this Court should have in mind in sentencing him.

9. In the totality of the foregoing, it is the finding of this Court that the time the Petitioner has served in jail is adequate to satisfy the above objectives to be achieved by sentencing. Accordingly therefore, this Court sentences the Petitioner for a term equivalent to that the Petitioner has already served.

10. The result is that the Petitioner is herewith forthwith discharged and released from prison and is set free unless lawfully held.

Right of Appeal in 14 days.

That is the Judgment of the Court.

Dated, Signed and Delivered in Mombasa this 24th day of September, 2019.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Fedha for DPP

Petitioner in person

Mr. Kaunda Court Assistant