

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CONSTITUTIONAL PETITION NO. 3 OF 2019

CHARLES IRUNGU NDUNG’U.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in Criminal Case No. 1173 of 1999 of the Chief Magistrate’s Court at Mombasa – F. N. Muchemi SPM)

RULING

The petitioner was charged, tried and convicted of the offence of robbery with violence contrary to section 296(2) of the Penal Code. The trial court sentenced him to suffer death.

The petitioner filed appeals to the High Court and finally the Court of Appeal both of which were dismissed for lack of merit.

I have considered the petition on re-sentence and being grounded upon the principles in **Francis Karioko Muruatetu & Another vs Republic & Others, Petition No. 15 & 16 of 2016** – where the mandatory death penalty is stated to be unconstitutional though still a lawful sentence in Kenya. The petitioner argues that is not one such person who deserves the death penalty. The post-conviction sentence shows that the petitioner is no longer a danger to society or immediate community members. In the last 21 years the evidence and character reference from the prisons is illustrative of a person who has undergone transformation and rehabilitation. The petitioner has embraced the Holy Word of Jesus Christ as his personal saviour. He is likely to be a special ambassador of the Ministry to deliver lost souls to the Lord, using his own personal experience. He is therefore unlikely to revert back to his previous life of crime. The fact that the petitioner had no previous conviction related to the instant crime as a positive indicator that would act as a mitigating factor. The victim impact statement shows that the punishment meted out by the court has served their sense of justice in the matter.

Taken together all these factors establish a presumption in favour of release rather than imprisonment or a further custodial sentence. Following **Muruatetu** decision courts are aware that death penalty is no longer a first option. It is just among the sentences to be passed against an offender on the circumstances of a case to case basis.

Having considered the petition, aggravating factors, the mitigation they are all in favour of the petitioner.

I am satisfied that the petitioner has met the criterion for resentencing the order on conviction having been litigated upto the Court of Appeal and failed the substantial test is therefore even at this stage dismissed for want of jurisdiction.

The death sentence imposed against the petitioner for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code is varied in consonant with the principles in **Muruatetu case** and substituted with the 21 year custodial sentence. In view of the circumstances of this case, this court considers the period to be proportionate for the offence and having served it already the accused is released forthwith. Is at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 31ST DAY OF OCTOBER, 2019.

.....

R. NYAKUNDI

JUDGE