



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 249 OF 2018

(Originating from original conviction and sentence meted upon me by Hon. D. M. Ochenja (SRM) in Criminal Case No. 2849/2005 at SRM's Court at Kwale HCCR App. No. 307/2006 and Court of Appeal No. 337 of 2010 both at High Court, Mombasa)

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: SECTION 18(1) (2) POLICE ACT CAP 84 LAWS OF KENYA

AND

IN THE MATTER OF: SECTION 121 (1) (2) OF THE CPC CAP 75 LAWS OF KENYA

AND

IN THE MATTER OF: ARTICLES 2 (1) (2) (3) (4), 3(1), 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29 & 51 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ARTICLES 157, 159, 164(3), 165, 258(1) (2), 259(1) (a) (b) (d), & 51 OF THE CONSTITUTION OF KENYA

BENJAMIN MBITHI KAVEVA.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT

1. The Petitioner **BENJAMIN MBITHI KAVEVA** was charged with and convicted for the offence of capital robbery and sentenced to death. His appeal to the High Court was dismissed on 11th may, 2010. His appeal to the Court of Appeal was also dismissed, on 14th November, 2014
2. The petition before the Court is for resentencing pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR** which decided that a mandatory death sentence is unconstitutional.
3. The Petitioner has been in custody for 14 years. He submitted that the said period of 14 years is enough punishment for the crime he was convicted for, and that he should be released to go home.
4. Mr. Fedha for the prosecution submitted that the offence committed was heinous and should be punished with a sentence of 35 years.
5. I have considered the submissions. The principle in sentencing is that the Court should take into account the mitigation offered by the Petitioner, the facts of retribution, rehabilitation and reformation. The Court should ask itself whether the Petitioner is remorseful, and has sufficiently been rehabilitated and reformed to reasonably be expected to assume life in a free and orderly society. The Court must also look at the nature of the offence the Petitioner was convicted for, how it was effected and the impact it had on the victims.
6. In this case the Appellant, **Benjamin Mbithi Kaveva**, was charged jointly with three other persons before the Senior Resident

Magistrate's Court in Kwale. The Appellant and his colleagues were charged with several counts including one of robbery with violence contrary to **Section 296** of the Penal Code; being in possession of police uniforms without authority contrary to **Section 184(3)** of the Penal Code; handling suspected stolen property contrary to **Section 322(2)** of the Penal Code; being in possession of a firearm without a firearms' certificate contrary to **Section 4(1)** as read with **Section 4(2)(b)** of the Firearms Act; and being in possession of ammunitions without a firearms certificate contrary to **Section 4(1)** as read with **Section 4(2)(b)** of the Firearms Act. The particulars of the charge of which the appellant was convicted were as follows:

On the 18th day of August, 2005 at Maweni village in Kwale district within coast province, jointly with others not before court, while armed with dangerous weapons namely AK 47 rifle and pistols, (sic) robbed Samuel Mubea Waweru cash Kshs 52,000/-, one sony DVD video player, one celtel payphone serial number 0412220808, one mobile charter (sic), one handbag all valued at Kshs. 84,000/- and at immediately (sic) after the time of such robbery threatened to shoot the said Samuel Mubea Waweru.

7. From the record of appeal, the circumstances leading to the appellant's arrest were as follows: The complainant, **Samuel Mubea Waweru** (PW2) was a shopkeeper then operating a shop at Maweni village. On the material date, at around 7.00pm he was attending to customers when a person came to his shop window and at gunpoint, ordered the customers to lie down. The man ordered the complainant to open the door to the shop, whereupon about six people entered the shop and demanded money from the complainant at gunpoint. He gave them Kshs. 15,000/- and they also took his mobile phone and the charger. He was then ordered to lie down alongside his customers. The robbers thereafter proceeded to raid the complainant's house which was located at the back of the shop. They found the complainant's wife, **Emily Njeri Chege** (PW3) who was forced at gun point to show the robbers where the money was kept. The robbers took Kshs. 25,000/- which was under the bed, as well as a black bag and a Sony DVD video player. Having accomplished their mission, the robbers took off, whilst firing in the air. This attracted the attention of police officers on patrol in the area including No. 39591, **Corporal Thomas Wafula** (PW4), who rushed to the scene and found the complainant and his customers still lying on the ground. In a bid to get the robbers to surrender, the police fired shots in the air. The gangsters refused to heed this warning and continued running while shooting at the police who returned the fire. The exchange of fire resulted in the shooting of one of the suspects. This resulted in a trail of blood, which led the police to the perimeter fence. They found the appellant who was bleeding profusely from a gunshot wound to the leg, lying on the outer side of the fence. The police also managed to recover one AK47 rifle, a pistol, a mobile phone, a DVD player and a black bag near the complainant's shop. Upon his arrest the appellant led the police to arrest of his co accused persons. The appellant was then taken to Msambweni Hospital, where he was admitted and treated before being arraigned in court about two weeks later. It was on the above evidence, that the appellant having opted to say nothing in his defence was convicted by the trial magistrate.

8. I have considered the submissions of the Petitioner. They are very brief. The Petitioner does not show any remorse. There is no indication that he has reformed or is willing to live within the law in a free society. In my view, the three objectives of sentencing being retribution, rehabilitation and reformation are yet to be realized in the Petitioner, and it is the finding of this Court that he should not be released yet.

8. Although the prosecution has submitted that the Petitioner be jailed for 35 years, this Court finds that in the circumstances of this case 35 years is not justifiable, and that a term of 25 years would achieve the above said objections of sentencing.

9. Accordingly, this Court hereby sentences the Petitioner to serve a term of 25 years in prison with effect from the date of arrest.

10. There is right of appeal within 14 days.

That is the Judgment of the Court.

Dated, Signed and Delivered in Mombasa this 30th day of October, 2019.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Fedha for DPP

Petitioner in person

Mr. Kaunda Court Assistant