



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 4 OF 2018

FERDINAND INDANGASI MUSEE.....PETITIONER

AND

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Petitioner was convicted for the offence of robbery with violence in CR. 1972/2007 and sentenced to death. He appealed in HCRA. No. 249 & 250 of 2008. The appeal was dismissed and death sentence upheld.

2. The Appellant has now petitioned this court for review of sentence in view of the Supreme Court declaration in **Francis Kariokor Muruatetu & Another vs. Republic SCK Pet. No. 15 of 2015 (2017) eKLR** which declared mandatory death sentence for the offence of murder unconstitutional.

Brief Circumstance of the offence

One Wycliffe Khaemba a security guard stationed at Nyali Estate was on the night of 16th June, 2007 pinned down by the Petitioner who ordered him to remain silent or they would kill him. They tied his hands and led him to the main compound and laid him under the fence. The attackers carried the fridge and a generator which were in the main corridor. The appellant had a black pistol.

3. The prosecution submitted that the appellant has invoked a wrong procedure to approach the court. He has not exhausted his right of appeal. After the dismissal of his appeal by the High Court, he still has an avenue to appeal to the Court of Appeal.

Article 50 (2) of the Constitution states:-

(2) Every accused person has the right to a fair trial, which includes the right-

(a)

(b)

(q) If convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

4. The prosecution submitted that the petition before court is wrong, unprocedural and the same should be dismissed. The issues being raised should be raised in the Court of Appeal and be dealt with.

Article 50

(6) A person who is convicted of a criminal offence may petition the High court **for a new trial if-**

(a) The person's appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and

(b) New and compelling evidence has become available.

5. The prosecution submitted that should the court find it fit to entertain the petition as it is, the court should consider the *Sentencing Policy Guidelines 2016 at Para 4.1* especially the need for retribution, deterrence and denunciation in order to communicate the society's condemnation of the criminal conduct. In that regard the prosecution proposed a sentence of 30 years in view of the fact that the petitioner was armed with a pistol at the time of the offence.

6. On his part the Petitioner submitted that this court has jurisdiction to entertain this Petition and pleaded with the court to sentence him to fifteen (15) years two (2) of which should be suspended. He has already served 13 years in jail.

7. I have considered the submissions of the parties. In my view, on the issue of jurisdiction this court has the jurisdiction to entertain this matter in terms of resentencing. Indeed the resentencing should as far as possible be done by the trial court so that the parties have a chance to appeal the verdict should they not agree with it. That is why in my view it does not matter that the Petitioner has not appealed to the Court of Appeal. He can still move to the Court of Appeal to appeal against the sentence in this Judgment. In any event a right to appeal cannot be imposed on a party. If a party chooses not to appeal the party cannot be faulted. Therefore, the submission by the prosecution that this court has no jurisdiction herein is faulty and baseless.

8. On the issue of sentencing I agree with the prosecution that sentencing must be in accordance with the law and must achieve the element of retribution, rehabilitation and reformation. The Petitioner submitted that he has reformed. Indeed, he may have reformed and may even have been rehabilitated going by the responsibilities he carries on in prison. However, the element of retribution must be seen to be evident. The society expects sound policy judgment from the courts. A person who has been convicted of a crime must be adequately punished to achieve all the above three objectives.

9. In conclusion, and in consideration of the facts here, this court replaces the death sentence herein, and hereby sentences the petitioner to serve a jail term of twenty (20) years from the date of conviction.

That is the Judgment of the court.

Right of appeal in 14 days.

Dated, Signed and Delivered at Mombasa this 29th day of October, 2019.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Fedha for DPP

Petitioner in person

Mr. Kaunda Court Assistant