



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 84 OF 2018

HASSAN HUSSEIN MWAMBIEGA.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT

1. The Petitioner herein was charged and convicted of 6 counts of Robbery with Violence contrary to Section 296 (2) of the Penal Code in Mombasa Chief Magistrate's Court Criminal Case No. 3304 of 1997 and sentenced to death on counts I to VI. Two counts of arson contrary to Section 332 (a) and (b) of the Penal Code in Counts VII and VIII; and one count of assault causing actual bodily harm contrary to Section 251 of the Penal Code and Count XI . The Petitioner was sentenced to death which was committed to life imprisonment in High Court Criminal Case 3304 of 1997

2. Brief facts of the case are that on 23rd October, 1997 at 9:00 a.m Samuel Njuguna Muiruri the Complainant in the Lower court case went to the Shop where the Petitioner was speaking to other 8 people, three of them bearing guns while the other five were standing in line. The Complainant gave out Kshs. 20 for cigarettes but was immediately attacked for being Kikuyu. On the same day at 5:30 p.m a group of people raided Kanana Trading Center some of them bearing masks and entered a shop belonging to Jane Wanjiru Njuguna and demanded money, removed assorted shop goods and then set the shop on fire. Further they also raided a bar and lodging where Joel Gikeria Kamau and Francis Kamau were staying. One was armed with a gun and others with pangas, sledge hammers and sticks. They beat up Kamau and took Kshs. 8,000 and box from his room while Francis Njuguna Njoroge was killed. The premises of John Ngutungi was also raided and various goods were stolen from his kiosk.

3. The Petitioner now claims that the sentencing to death by the trial court as well as the two appellate courts was an infringement of his fundamental rights. The Petitioner avers that the said courts interpreted the provisions of Section 296(2) of the Penal Code to mean that death sentence was the only sentence available to the Petitioner and that the said courts held the view that the death sentence under the said provisions was mandatory and no other sentence was tenable.

4. The Petitioner further claims that the Appellate courts did not consider the Petitioner's mitigation therefore the sentence of life imprisonment is an infringement of the Petitioner's rights under Article 25 (c) and 50(2) Constitution.

Hearing and Submissions

5. The matter came up for hearing on 24th September, 2019.

6. It was the Petitioner's submissions that at the time he was convicted he was 27 years and that he is now 45 Years. That he has no family save for a sister and prays that he should be jailed to 26 Years inclusive the number of years served.

7. The Respondent (DPP) through its Counsel Mr. Fedha submitted that the Petitioner should be jailed for 45 years including the number of years served since a victim was murdered in the commission of the offence.

The Determination

8. On the issue of sentence, the Supreme Court case in the case of **Francis Karioko Muruatetu & Another -vs- Republic [2017] eKLR** declared the mandatory nature of the death sentence as provided for under Section 204 of the Penal Code to be unconstitutional. To that extent this court only has to resentence the Petitioner.

9. On sentencing it is the finding of this court that the crimes committed by the Petitioner were so grave and caused death to an innocent person. That crime must be met with adequate punishment to send a clear message that crime does not pay and shall be heavily punished once established. For the foregoing reasons I hereby set aside the death sentence imposed on the Petitioner by the trial court. Instead thereof I jail the Petitioner for a term of 40 Years from the date of arrest.

10. Right of Appeal in 14 days.

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

E. K. O. OGOLA

JUDGE

In the Presence of:

Mr. Fedha for DPP

Petitioner in Person

Mr. Kaunda- Court Assistant