



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 55 OF 2019

IN 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: ARTICLE 22(i) OF THE CONSTITUTION

AND

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

AND

BETWEEN

JAMES MWAZUZU MWAZOME.....PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT

1. The Petitioner **JAMES MWAZUZU MWAZOME** was charged with the offence of robbery with violence contrary to Section 296 (2) in Criminal Case No. 207 of 2004 of the Penal Code and sentenced to death. His appeal to the Court of Appeal was dismissed on 18th January, 2001.
2. The petition is now before the Court 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 27 years. He submitted that the said period of 27 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 27 years including the 27 years he has been in custody.
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, and how it has effected the victims.
6. The particulars in the cause of robbery injured the complainant using a sharp instrument. The Court does not know now the condition of the victim.

The Determination

7. On the issue of sentence, this court agrees with the Petitioner that the Supreme Court in **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. Therefore, this Court has the mandate to resentence the Petitioner. The Petitioner has already served 27 years in custody. The pain done to the complainant cannot be atoned for by any imprisonment. However, 27 years in prison is not a short time. In the circumstances, I do hereby set aside the death sentence imposed upon the Petitioner and in substitution the Petitioner is hereby jailed to a term of 27 years which he has already served in prison, with the result that the Petitioner is forthwith released unless otherwise lawfully held.

That is the Judgment of the Court.

Dated, Signed and Delivered in Mombasa this 26th day of November, 2019.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Fedha for DPP

Petitioner in person

Mr. Kaunda Court Assistant