



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 134 OF 2018

TITUS MULWA MUIA PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT

1. The Petitioner herein was charged and convicted with Robbery with violence contrary to Section 296(2) of the Penal Code in Nairobi Senior Resident Magistrate's Court Criminal Case No. 4329 of 1989 and sentenced to death. The Petitioner subsequently lodged a first appeal before the High Court and a second appeal in the Court of Appeal which were both dismissed.

2. Brief facts of the case are that on 14th August, 1989 the house of Norman Whelan in Hardy Estate, Nairobi was raided between 9.00 a.m. and 3.00 p.m. and several items stolen. In the course of the robbery his servant Charles Mukanzi Bukha was strangled to death. The Petitioner and two others were then charged in court.

3. The Petitioner now claims that the sentencing to death by the trial court as well as the 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.

Hearing and Submissions

4. The matter came up for hearing on 7th October, 2019.

5. It was the Petitioner's submissions that the offence was as a result of domestic issues. That he is now 63 Years old having spent 32 years in custody. The Petitioner prayed to be jailed for the 32 years he has served in jail.

6. The Respondent (DPP) through its Counsel Mr. Fedha submitted that as a result of the offence someone's life was lost and prayed that the Petitioner be convicted to 50 years to serve as adequate warning to such offenders.

The Determination

7. On the issue of sentence, the Supreme Court 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 296(2) of the Penal Code to be unconstitutional. To that extent this court only has to resentence the Petitioner.

8. I have perused the Petitioner's Progress Report as annexed to his written submissions. I have also considered Petitioner's mitigation. It is important to note that a result of the trial courts sentencing the Petitioner has already served 32 years in custody. In the circumstances, I do hereby set aside the death sentence imposed upon the Petitioner.

9. The offence which for which the Petitioner was convicted is serious. To serve as a warning the Petitioner is hereby jailed to a term of Thirty Eight (38) years from the date of arrest.

Right of appeal in 14 days.

Dated, Signed and Delivered in Mombasa this 18th day of December, 2019.

E. K. O. OGOLA

JUDGE

In the Presence of:

Ms. Mutua for DPP

Petitioner in person

Mr. Kaunda Court Assistant