REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CONSTITUTION PETITION NO.3 OF 2018

ABDUBA DEBANO BOYE.....1ST APPELLANT

MORU NDENGE BORU .....2ND APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

The two petitioners were charged with five other co-accused with six counts of robbery with violence contrary to section 296(2) of the Penal Code. The brief particulars of the offence in the six counts were that the appellants and their co-accused on the 25th January, 1997 in Marsabit District of Eastern Province, jointly with others not before court and while armed with dangerous weapons, namely rifles and rungus, robbed Abadasso Guyo Jillo of Ksh.1,615, three dresses, one red shirt, one pink-blouse and other such like things all valued at Ksh.9,915/= (Count 1), Ali Nassir of Ksh.3,000/= (count 2), Kenyatta Said Chutte of Kshs.10,000/= and other items (count 3), Omar Abdullahi Warsame of Kshs.1800/= and other items, all valued at Ksh.12,000/= (count 4), Tuke Hirbo Tuke of Kshs.3,700/= and other items all valued at Kshs.11.400/= (count 5) and Miriam Mohamed of various clothing items all valued at Ksh.500/=(count 6) and that during the robberies, the accused persons used personal violence to each of the person robbed.

The 1st Petitioner (Abdul Debano Boye) was also charged alone in Counts 7 and 8 for being in possession of a firearm and ammunition without relevant certificate. The particulars of the offence were that the petitioner, on 26.1.1997 at Manyatta Gorgesa was found with a simonon self loading Carbine rifle serial number 2201259 and four rounds of 7.62X39mm ammunition without a firearm certificate. The 1st petitioner was sentenced to seven years imprisonment for counts 7 and 8 in relation to the firearm and ammunition. The petitioners were sentenced to suffer death.

The petitioners filed criminal appeal number 198 of 1997 before the Meru High court. The appeal was dismissed on 30th May, 2000. Undeterred by the dismissal, the petitioners filed criminal appeal number 19 of 2001 before the Nyeri Court of Appeal. The appeal suffered the same fate and was dismissed on 13th May, 2005.

The petitioners have now filed the current petition seeking a review of the sentence. The Petition was filed on 12th April, 2018. It is stated that the Petition was filed in pursuance to the decision of the Supreme Court in the case of **FRANCIS MURUATETU & ANOTHER –V- REPUBLIC Supreme Court Petition numbers 15 and 16 of 2015.** The petitioners maintain that in its said decisions, the courts were directed to re-sentence convicts as the mandatory death sentence has been declared unconstitutional. The supporting affidavit of the 1st Petitioner indicate that the petition is solely based on sentence. The Supreme Court determined the matter of sentence in relation to capital offences. The Petitioners are not seeking a re-trial. The Petitioners have served over twenty (20) years imprisonment. They rely on the Court of Appeal case of **WILLIAM OKUNGU KITTINY –V- REPUBLIC KISUMU (C.A), Kisumu Criminal Appeal, No.56 of 2013, (2013) eKLR.** The Court of Appeal stated as follows**:-**

> **From the foregoing, the learned judge having partly found infavour of the appellant erred in law in not remitting the case for sentence re-hearing and the appeal is allowed to that extent. Now that the Supreme Court has opened the door for sentence re-hearing, the matter is remitted to the Chief Magistrate's Court, Kisumu for sentence re-hearing and sentencing only. The Registrar of this Court to return the record of the Chief Magistrate court at Kisumu. Criminal Case No.181 of 2004 as soon as reasonably practicable for sentence re-hearing and sentencing by the Chief Magistrate."**

Mr. Chirchir, learned prosecution counsel, did not oppose the petition. Counsel submit that a task force has been formed but a report is yet to be presented to the Attorney General.

The only issue for determination is whether this court can entertain the petition and review the sentence imposed upon the petitioners. The

petitioners contend that their death sentences have been commutted to life imprisonment.

In the **FRANCIS MURUATETU CASE (Supra**) the Supreme Court stated as follows:-

> **"Section 204 of the Penal Code deprives the court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to *exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Article 25 of the Constitution; an absolute right"***

The Supreme Court did not outlaw the death penalty but its mandatory nature. The court further held as follows:-

> **"In the meantime, existing or intending petitioners with similar cases ought not approach the Supreme Court directly but await appropriate guidance for the disposal of the same. The Attorney General is directed to urgently set up a frame work to deal with sentence re-hearing of cases relating to the mandatory nature of the death sentence which is similar to that of the petitioners in this case".**

The appellants were charged with six counts of robbery with violence. There were six complainants. The total value of the items robbed violently from the complainants is less than Ksh.60,000 as indicated herein. None of the victims was injured or harmed seriously. The petitioners were armed but did not shoot at any of the complainants. They have served over twenty one years in prison. They were arrested on 26th January, 1997 and have been in custody since that time.

Article 165(3) of the constitution endows the High Court with unlimited jurisdiction in criminal matters. The black's law dictionary (10th edition) defines the word "**unlimited"** as **"without restriction or limitation".** The concise English Dictionary (12th edition) defines the word **"unlimited"** as **"not limited or restriction; infinite."**

The unlimited nature of the criminal jurisdiction given to the High court is not restricted to the hearing and determination of the criminal cases. It also includes the passing of the sentence the High Court deems appropriate given the circumstances of the case. The statutory provisions giving minimum sentences are in effect limiting the jurisdiction of the High court. The court should not be directed to impose a fixed sentence in any given offence. Each offence is committed in a given different and peculiar circumstances. Not all robbery with violence incidents are the same. Defilement of children under the age of 11 years also varies in nature. The manner in which the offence is committed also differs. It is not prudent to impose a specific sentence for such offences. Each Convict has his her own mitigation factors.

It is clear to me that the Petitioners were convicted of the offence of robbery with violence. The death sentence is still provided for as the sentence for such an offence. However, the decision of the Supreme Court in the **Muruatetu case (Supra**) has enabled Courts to impose prison sentences instead of condemning all convicts to death. The Supreme Court's decision is that the mandatory nature of the death sentence is unconstitutional. Once such a decision is made, the lower courts have to comply with that decision instead of waiting for a report from the Attorney General's office.

I do find that the Petitioners have been appropriately punished for the offences they committed. The twenty one years they have served is sufficient punishment. The death sentence has been commuted to life imprisonment.

In the end the Petition herein is merited and is allowed. The death sentence is hereby set aside and replaced with the period already served. The petitioners shall be set at liberty unless otherwise lawfully held.

Dated and Signed and Delivered at Marsabit this 27th day of September, 2018

S. CHITEMBWE

JUDGE