



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

MISC. CRIMINAL APPLICATION NO. 9 OF 2018

IBRAHIM NDWIGA MVUNGU.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

R U L I N G

1. The applicant in his undated application filed on 23/03/2018 seeks for orders a declaration be made that the decisions in **Supreme Court Petition No. 15 & 16 of 2015 MURUATETE VS REPUBLIC** and in that of **JOSEPH KABERIA VS REPUBLIC Petition No. 610 of 2010** are new and compelling evidence under **Article 50(6) of the Constitution**.
2. The grounds supporting the application are that the mandatory nature of death sentence in the offence of robbery with violence no longer holds after the two decisions were rendered.
3. The applicant states that he was convicted of the offence of robbery with violence no longer holds after the two decisions were rendered.
4. The applicant states that he was convicted of the offence of robbery with violence contrary to **Section 296(2) of the Penal Code**. He appealed in the High Court against conviction and sentence and also to the Court of Appeal as the 2nd appeal court.
5. Both appeals were dismissed at the different levels.
6. On the strength of the **Muruatetu** case (supra) the appellant's petition is that this court be inclined to issue him with the orders sought so that he can go to the trial court for resentencing.
7. The applicant seemed to have mixed up tow applications: -
8. The first for retrial on grounds that new and compelling evidence has become available.
9. That he be granted orders for reference to the trial court for hearing on re-sentence in view of the declaration in the **Muratetu** case that the mandatory nature of death sentence violates the right to a fair hearing.
10. The applicant cleared the air in his oral submissions when he stated that what he wanted is to be sent to the trial court for hearing or resentencing.
11. The respondent who had at first opposed the application, appreciated the clarification by the application. The counsel Ms. Mati supported the petition and asked the court to allow it.
12. The **Muruatetu** case (supra) is a milestone in criminal justice for having found that the mandatory nature of Section 204 of the Penal Code is unconstitutional in that it takes away the discretion of the court which results in violation of the right to a fair hearing under **Article 50(2) of the Constitution**.
13. The decision is also applicable in cases where a petitioner was convicted of robbery with violence contrary to **Section 296(2) of the Penal Code** and given the then mandatory death sentence.
14. I find that this petition is therefore within the application of the **Muruatetu** decision.

15. There being no objection, the petition is allowed in the following terms: -

a. That the original file Runyenjes Criminal Case No. 12 of 1999 be forwarded to the Senior Principal Magistrate Runyenjes for hearing and resentencing.

b. That there is no order as to costs.

c. That the petitioner be produced before Senior Principal Magistrate's court on 14/01/2019 for directions.

16. It is hereby so ordered.

DATED, DELIVERED AND SIGNED AT EMBU THIS 28TH DAY OF NOVEMBER, 2018.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mate for the Respondent

Applicant in person