



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CONSTITUTIONAL PETITION NO. 32 OF 2018**

**SALIM SHAURI MWABARI.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The Petitioner, Salim Shauri Mwabari was one of the three accused persons tried and convicted for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code in Mombasa High Court Criminal Case No. 5 of 2011. On appeal to the Court of Appeal in Mombasa Criminal Appeal No. 45 of 2015 their convictions were quashed and the sentences set aside. In lieu thereof, the convictions were substituted with convictions for the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code. The Petitioner and another appellant were each sentenced to twelve years imprisonment. The other appellant who had been detained at the President's pleasure on account of being a child was set free.

2. The Petitioner has now filed this petition under Articles 20(1) and (4), 22(1) and (3)(c) of the Constitution alleging that his rights under Articles 23(1) and (5), 25 (a) and (3)(c), 27(1), (2) and (4), 28, 29(a), (c) and (f), 35(1) and (2), 48, 50(1) and (2)(q) and (6)(a) of the Constitution had been violated. He thus prays for reliefs that can be summarized as follows:

a) Declaratory orders that the Petitioner is entitled to equal benefit of the law as was pronounced by the Supreme Court in the case of **Francis Karioko Muruatetu & another v Republic [2017] eKLR**;

b) A rehearing or review of the sentence imposed by the Court of Appeal as the time spent in custody before the trial to date is sufficient punishment; and

c) An order remitting the case back to the trial court to receive, rehear and record evidence and submissions for purposes of passing an appropriate sentence. Further to this, that the resentencing be in line with Section 46 of the Prisons Act and that the trial court be directed to take into account the age of the Petitioner as at the date of his conviction.

3. The Petitioner relied on the decision in **Francis Karioko Muruatetu** (supra) and urged that the trial court did not exercise its discretion when sentencing him and the sentence imposed on him was thus unconstitutional.

4. The Respondent did not file a response but counsel for the Director of Public Prosecutions submitted on a point of law namely that this court lacks jurisdiction to entertain the petition. It was urged that the Petitioner ought to have filed an appeal at the Supreme Court if dissatisfied with the outcome of his appeal to the Court of Appeal.

5. In his written submissions the Petitioner prays that the period spent in custody be taken into account. Further, that he is remorseful, has reformed and has a young family. He relied on the decision in **Republic v Thomas Patrick Gilbert Cholmondeley [2009] eKLR** where the court noted that a life was lost but nevertheless handed a sentence of eight months imprisonment to the accused person. Also relied on is the decision in **Republic v John Gacheru & another [2018] eKLR** where the respondents were sentenced to fifteen years imprisonment for murder. The Petitioner also cites the finding in **Francis Karioko Muruatetu** (supra) that the mandatory nature of the death sentence is unconstitutional and asserts that the uniform sentence for murder charges deprives the court of its discretion as was held by the Court of Appeal in **Godfrey Ngotho Mutiso v Republic, Criminal Appeal No. 17 of 2008**.

6. The issue of jurisdiction having been raised by the Respondent, this court is called upon to determine this issue first. That this court has jurisdiction to entertain questions on the violation of and/or threats of infringement of one's rights or fundamental freedoms in the Bill of Rights is not in doubt – see Article 165(3)(b) of the Constitution.

7. The Court of Appeal in its decision on the Petitioner's appeal quashed the conviction for murder and substituted the same with a

conviction for manslaughter. The death sentence imposed on the Petitioner was set aside and replaced with a sentence of imprisonment for twelve years. The **Francis Karioko Muruatetu** case is therefore not relevant to the Petitioner's case as that case simply declared that the mandatory nature of the death sentence was unconstitutional.

8. Even if this court were to have supervisory powers over the decisions of the Court of Appeal, which it does not have, it is noted that all the issues raised by the Petitioner herein were considered by the Court of Appeal before the sentence was imposed. Let me reproduce the Court of Appeal judgement, which the Petitioner has availed to this court, for record purposes. It states on sentencing thus:

**“As regards sentence, we would reiterate what the learned Judge stated in her sentencing notes; that the attack on the deceased was vicious and unnecessary. That the abhorrent practice of killing elderly persons on suspicion of being witches which is rampant in this part of the world should be condemned in no uncertain terms and should invite deterrent sentence. In this case, we note though that the appellants are young people now aged 23, 27 and 33 years respectively. That they have been in legal custody since 2010. They are remorseful and were first offenders. Taking all the circumstances into account, we are satisfied that a sentence of twelve (12) years imprisonment effective from the date of conviction and sentence by the High Court will meet the ends of justice. That sentence will apply to 2<sup>nd</sup> and 3<sup>rd</sup> appellants.”**

9. The Petitioner was the 3<sup>rd</sup> Appellant in the appeal. In sentencing the Petitioner, the Court of Appeal therefore took into account the period that he had been in custody prior to his conviction.

10. It is however important to stress to the Petitioner that I have no jurisdiction even under the pretext of exercising constitutional authority to review the sentence imposed by the Court of Appeal.

11. The Petitioner further seeks that this court remits the file to the Judge of this Court who sentenced him for sentence re-hearing. The Petitioner is once again reminded that this court has no such powers as the supervisory powers extended to it by Article 165(6) of the Constitution can only allow the court to oversee the subordinate courts and persons or bodies exercising a judicial or quasi-judicial functions. The power does not extend to the supervision of superior courts. This court cannot don its constitutional regalia and purport to review the sentences of higher courts or courts of coordinate jurisdiction.

12. Lacking jurisdiction as already stated, I would agree with the Respondent that this court cannot act on the Petitioner's prayers.

13. The Petitioner has not placed any evidence before this court that his right to remission of sentence in the terms of Section 46 of the Prisons Act, Cap. 90 has been breached. That is the only issue this court could have considered had evidence been placed before it.

14. The logical conclusion is that this petition is without merit. The same is dismissed in its entirety.

**Dated, signed and delivered at Malindi this 19<sup>th</sup> day of December, 2018.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**