



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**PETITION NO. 2 OF 2015**

**THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF  
FUNDAMENTAL RIGHTS AND FREEDOM OF THE INDIVIDUAL) HIGH COURT  
PRACTICE AND PROCEDURE RULES 2013**

**AND**

**IN THE MATTER OF ARTICLE 22 (1), (3)C AND ARTICLE 23(1) AND (3) OF THE NEW  
CONSTITUTION 2010.**

**AND**

**IN THE MATTER OF ARTICLE 21(1) & (4) AND ARTICLE 20(1)**

**AND**

**IN THE MATTER OF ARTICLE 25(a)(b) AND (c) 26(1),(3) 27(1) (2) AND (4) 28, 29 (a) (c) (d)  
AND (f), 48, 50 (2) (b) (p)(q), (6) (a & b) AND ARTICLE 23(1) & (3)**

**IN THE MATTER OF ARTICLE 165**

**AND**

**IN THE MATTER OF ARTICLE 258 AND 259(1), (3)(a) OF THE GENERAL PROVISION OF  
THE NEW CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ARTICLE 262(19) OF NEW CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF ARTICLE 295 AND 296(2) OF THE PENAL CODE**

**AND**

**IN THE MATTER OF SECTION 324 AND 329 OF THE CRIMINAL PROCEDURE CODE**

**BETWEEN**

**DANIEL MBAE NG'ANG'A KAK/689/2014/LF.....PETITIONER**

AND

RAJAB MALIKI WANJALA KAK/1042/2004/LF.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

**JUDGMENT**

1. The Petitioners herein described themselves as “prisoners serving life imprisonment after the death sentence that was imposed on them was commuted to life by the President”. In this petition they seek the following orders;
  - a. **That the honourable court be pleased to grant a declaration that the constitutional rights of the petitioners have been breached by the respondent by convicting and sentencing the petitioners to serve an unlawful sentence.**
  - b. **That the honourable court be pleased and accord the petitioner the proper sentence.**
  - c. **That the respondent be ordered to release the petitioners who have served over 12 years in custody.**
  - d. **That the section 296(2) of the Penal Code contradict totally article 26(1) and (3) and the benefit be given to the petitioners.**
  - e. **That review the petitioners case in line with the provisions of Article 23(3).**
  - f. **Any other relief the honourable court may deem fit and just to grant in interest of justice considering the circumstances of the case by reviewing the sentence.**
2. Although the Petition does not cite the case numbers, for their trial and Appeals, the Petitioners state that they do not question the findings of the Trial Court, the High Court and the Court of Appeal on conviction. The Petition, in a nutshell, questions;
  - i. the constitutionality of the Death Sentence,
  - ii. Whether the Death sentence is the only sentence for an offence under Section 296(2) of the Penal Code.
3. In seeking review of their sentence, the Petitioners state that they have reformed and have acquired life skills. They urge this court to set aside the Death Sentence and place them on Probation or Community Service Order (CSO). The Petitioners have asked that I be persuaded by the High Court Decision in Kakamega Petition No. 151 of 2013, Sabastian Okwesio Mrefu vs Republic
4. The Petitioners were convicted and sentenced for the offence of Robbery with Violence contrary to section 296(2) of the Penal Code. Section 296(2) provides as follows:-

**(2) if the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.**

The sentence prescribed under this section is Death.
5. As to whether the Death penalty is constitutional and the only sentence available in respect to capital offences was settled, at least for now, by the Court of Appeal in the Decision of **Joseph Njuguna Mwaura & 2 others vs Republic [2013]** eKLR. In this Decision, a Five (5) Judge Bench, after holding that,

**“Death as a penalty has been sanctioned by the Constitution”**

Concluded that the Decision in **Godfrey Mutiso vs R** was *per incuriam*, The Court of Appeal stated,

**We hold that the decision in Godfrey Mutiso V R to be *per incuram* in so far as it purports to grant discretion in sentencing with regard to capital offences. Our reading of the law shows that the offences of murder contrary to Section 203 as read with 204 of the Penal Code, treason contrary to Section 40 of the Penal Code, administering of oaths to commit a capital offence contrary to Section 60 of the Penal Code, robbery with violence contrary to Section 296(2) of the Penal Code and attempted robbery with violence contrary to Section 297(2) of the Penal Code carry the mandatory sentence of death.**

6. That Decision by the Court of Appeal binds this Court, and for that reason there can only be one outcome to the Petition. It is hereby dismissed.

Dated, signed and delivered at Busia this 18<sup>th</sup> of November 2015.

**F. TUIYOTT**

**J U D G E**

In the presence of :-

Oile – C/Assistant

.....for the State

.....for the Petitioners