



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 92 OF 2019

HASSAN JUMA.....PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT

1. The Petitioner was convicted for the offence of Robbery with Violence contrary to Section 295 as read with 296(2) of the Penal Code and sentenced to death in Kwale Cr. Case No. 1669 of 2010. He appealed in Mombasa HCCRA No. 8 of 2012 and his Appeal was dismissed and sentence upheld.

2. The Petitioner has now petitioned this Court for review of sentence in view of the Supreme Court declaration in **Francis Kariokor Muruatetu & Another v Republic SCK Pet. No. 15 of 2015 [2017] eKLR** in which the apex court found the mandatory nature of the death sentence to be unconstitutional.

Brief Circumstance of the offence

3. The particulars are that on 2/11/2010 at Fahamuni village in Kwale County, with another while armed with a dangerous weapon namely a knife, robbed **Sadik Abdi Mwendo** of his motorcycle valued at Kshs. 80,000/=, Kshs. 1500/=, a national identification card, an interim driving license and immediately before or immediately after the robbery wounded their victim.

4. The Petitioner submitted that at the time of his arrest, he was a first offender, and the over 10 years he has been in prison have reformed him. He is now of good behavior and he regrets his actions during the incident. The Petitioner further submitted that he is very remorseful, and he promises not to repeat that crime or any other crime in his lifetime if given an opportunity to rejoin the society. The Petitioner also urged this Court to consider the time spent in remand prior to his conviction and sentence.

5. **Ms. Moke**, the learned prosecutor for the prosecution submitted that taking into account the circumstances of the case, a deterrent sentence of 30 years including time served in prison would be appropriate.

6. I have considered the petition, the submissions by the Petitioner and the prosecution. Sentencing is a discretion of the trial court. In **Ambani v Republic [1990] KLR**, Bosire J. (as he then was) stated that a sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and that the court should look at the facts and the circumstances of the case in its entirety before settling for any given sentence.

7. Section 333 (2) of the Criminal Procedure Code requires a sentencing court to take into account the period spent in custody awaiting trial.

8. I have now considered the mitigating and aggravating circumstances in the case. In my view, the nature of this robbery does not call for invocation of the death penalty. However, in this case there are aggravating circumstances involve the use of a knife, which eventually injured the victim's hand when he tried to save himself from being murdered by the Petitioner and his accomplice. In my view, the mitigating circumstances of the Petitioner being a first offender and being misled do not outweigh the aggravating circumstances.

9. I have also considered the sentences imposed in almost similar circumstances and where convicts of robbery with violence were re-sentenced after the Supreme Court decision in the *Muruatetu case*. In **Wycliffe Wangugi Mafura v Republic Eldoret Criminal Appeal No. 22 of 2016 [2018]** the Court of Appeal imposed a sentence of 20 years' imprisonment where the appellant was involved in robbing an Mpesa shop agent with the use of firearm but no actual injuries were inflicted on the victim.

10. In conclusion, and in consideration of the fact that the victim was injured and lucky to get away with his life, this Court substitutes the

death sentence herein, and hereby sentences the petitioner to serve a jail term of seventeen (17) years from the date of arrest.

That is the Judgment of the court.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 13TH DAY APRIL, OF 2021

E. K. O. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Petitioner in person

Ms. Wanjohi for DPP

Ms. Peris Court Assistant