



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 165 OF 2019

(CONSOLIDATED WITH PETITION NO. 74 OF 2020)

1. DAVID NJAU GAKUO

2. THOMAS SAULO EBOSO.....PETITIONERS

AND

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT

1. The Petitioners were 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 Mombasa Cr. Case No. 185 of 2009. They appealed in Mombasa HCCRA No. 263 of 2008 and their Appeal was dismissed and sentence upheld.

2. The Petitioners have 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 4/01/2009 at Kingorani area with others not before court, while armed with an offensive weapon namely knife, the Petitioners robbed one **Stephen Odhiambo Ogio** of his mobile phone make Nokia 112 and cash Kshs. 4,750/= all valued at Kshs. 8250/=, and immediately before or immediately after the robbery threatened to use actual violence on their victim.

4. The Petitioners submitted that they have been imprisoned for over 11 years, and during that duration, they have been of good behaviour, peaceful, and that they are now reformed. They further stated that they regret the incident, they are very remorseful, and they promise not to repeat that crime or any other crime when given an opportunity to re-join the society. The petitioner also urged this court to consider the time served since their arrest, and the fact that they were first offenders.

5. **Ms. Wanjohi**, the learned prosecutor submitted that taking into account the circumstances of the case, a deterrent sentence of 20 years including time served would be appropriate.

6. I have considered the petition, the submissions by the Petitioners and the D.P.P. 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 this case, the Petitioners were first offenders; they have transformed and are remorseful. The Prosecution counsel pointed out the aggravating factors to be the use of dangerous and offensive weapons in the forma knife. However, the victims herein was not maimed.

9. The Petitioners have already served 11 years in prison. In my consideration of the aggravating factors and the mitigating factors, the Petitioners have spent sufficient time in prison. I therefore sentence the Petitioners to the time served. The petitioners are hereby set at liberty, and forthwith released from prison unless they are otherwise lawfully held.

That is the Judgment of the Court.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 14TH DAY OF JUNE, 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