



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 141 OF 2019

JOHN MUTURI MBERIA.....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 Mombasa Criminal Case No. 970 of 2005. The Petitioner has been in jail for the last 18 years.

2. The Petitioner has now petitioned this Court for review of sentence pursuant to Article 25(c) and 50(2) (q) of the Constitution, and 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.

Circumstance of the Offence

3. The particulars are that on the night of 26/04/2004 and 27/04/2004 at about 1. 00 am at Bombolulu area, in Mombasa District, jointly with others not before court, while armed with dangerous weapons namely iron bars, stones and pangas pretended to be a patient at Ziwa La Ngombe Clinic, in order to gain access to the Clinic. They attacked and killed the security guard, stole one microscope, one radio cassette, one mobile phone make Nokia 3310 all valued at Kshs. 28,000/= and at or immediately before or immediately after such robbery used actual violence to the said Doctor one **Felix Gitonga Mugambi**, thereby causing his death. A patient in the clinic was also attacked and injured.

4. The Petitioner on his part submitted that the life imprisonment meted upon him by the trial magistrate was unconstitutional since the mandatory nature of the sentence fettered the trial court's discretion in passing sentences once it had considered his mitigation. The Petitioner states that he has undergone rehabilitation and that he has been the inmates' secondary school principal and he teaches physics and leads in guiding and counselling to his fellow inmates. He further submitted that he regretted the offence, he is very remorseful, and he is reformed having paid his debt to the society. He prayed to be sentenced for the time served since he was just a first offender and he was suffering from high blood pressure.

5. **Ms. Wanjohi** learned prosecutor submitted that since the Petitioner robbed and because of the robbery two people were killed, a deterrent sentence of 40 years from the time of arrest would be appropriate.

The Determination

6. It is noteworthy that when the Supreme Court made the landmark judgment in the *Muruatetu* case in December 2017, many convicts approached the court for lesser sentences in all cases where the penalty clause prescribed a fixed and mandatory sentence; the argument being that such sentences denied the court discretion in sentencing, and therefore, inconsistent with the Constitution. However, on 6/7/2021, the Supreme Court directed that *Muruatetu* case was to apply to murder convicts only. This means that those convicted of robbery with violence or sexual offences cannot benefit for resentencing under *Muruatetu* case. The Supreme Court rendered itself thus:

“[14] It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the Constitution. It bears restating that it was a decision involving the two Petitioners who approached the Court for specific reliefs. The ultimate determination was confined to the issues presented by the Petitioners, and as framed by the Court.

[15] To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under Section 40 (3), robbery with violence under Section 296 (2), and

attempted robbery with violence under Section 297 (2) of the Penal Code, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases.

7. Accordingly, in as far as this petition is founded on Muruatetu decision this Court is functus *officio*. In the circumstances, the Court cannot assume jurisdiction on this petition for review of sentence.

8. In view of the foregoing, the instant petition is hereby struck out.

That is the Judgment of the Court.

DATED, SIGNED, AND DELIVERED AT MOMBASA THIS 22ND DAY OF SEPTEMBER, 2021.

E. K. O. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Petitioner in person

Ms. Anyumba for DPP

Ms. Peris Court Assistant