



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 175 OF 2018

1. MOHAMED SULEIMAN MWENDO

2. ALFAN HASSAN MWACHIVO.....PETITIONERS

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT

1. The Petitioner/Applicant herein **Alfan Hassan Mwachivo** was charged, tried and convicted of the offence of Robbery with violence contrary to Section 296(2) of the Penal Code; Rape contrary to Section 140 of the penal code; grievous harm contrary to Section 234 of the Penal Code and Assault contrary to Section 251 of the Penal Code vide Mombasa Criminal Case No. 2184 of 1998 and sentenced to death.

2. Aggrieved by the conviction and death sentence imposed, the Petitioners filed an appeal vide Mombasa High Court Criminal Appeal Nos. 162 and 163 of 1999 which appeals were heard and dismissed vide judgment dated 25/7/2003. The Petitioners further filed an appeal over conviction in Mombasa Criminal Appeal No 214 of 2002 and the same was also dismissed by the court. However, the 1st Petitioner **Mohamed Suleiman Mwendo** filed for resentencing as per the High Court's order in Petition No 54 of 2016 where it was ordered that the resentencing to proceed in Mombasa Chief Magistrates Court Criminal Case No 2184 of 1998 where he was released on probation.

3. In his submission before this court in support of the Petition for resentencing the 2nd Petitioner highlighted the unconstitutionality of Section 296(2) of the Penal Code which provides for mandatory death sentence. The Petitioner claims that the Supreme Court of Kenya in **Francis Karioko Muruatetu & Another v Republic** [Petition No. 15 And 16 of 2015] held that mandatory death sentences imposed under section 204 of the constitution were unconstitutional and so were other mandatory sentences. The petitioner further stated that he had already served 21 years in custody and had lived in harmony with the rest of the inmates, that he had reformed as per the various rehabilitation programs offered. reference was made to the case of **Douglas Mthaura Ntoribi v Republic Meru High Court Criminal Case No. 4 of 2015**.

4. The Respondent on the other hand submitted the Petitioners death sentence was commuted to life imprisonment, that the aggravating circumstances of the offences committed were heinous with adverse physical and psychological effects on the victims. They asked for the Petitioner to be resentenced to serve 40 years Imprisonment as was in **Simon Lokwacharia v Republic [2019] eKLR**.

5. Article 26(3) of the Constitution provides that a person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law. The death sentence which was handed down as mandatory sentence having been commuted to life imprisonment is therefore not unconstitutional as stated by the Petitioner. It has been clearly stated by the Constitution that a person can be deprived off life to an extend authorised by the law. Be that as it may, what the Supreme court found in the now infamous **Francis Karioko Muruatetu v Republic [2017] eKLR** decision is that mandatory death sentence is unconstitutional in so far as it deprives the trial court of the judicial discretion in sentencing and further denies the accused person the opportunity to mitigate before sentence is meted out.

6. The Supreme Court has now, through directions given on 6/7/2021 made it clear that the Francis Muruatetu decision is only applicable in Murder cases and inapplicable to other cases where the law provides for mandatory sentences. The Supreme Court stated *inter alia*:

“To clear the confusion in regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason and robbery with violence, that a challenge of those sentences should be properly filed in court”.

7. The court further said that the cases filed should be presented and fully argued before the High Court and escalated to the Court of Appeal if necessary, at which a similar outcome as Muruatetu may be reached. It stated:

“Muruatetu cannot be the authority for stating that all the provisions of the law prescribing mandatory or minimum sentences are inconsistent with the constitution,”

8. From the foregoing, the Petitioner herein is locked out from agitating this petition based on the Muruatetu case on mandatory sentences, considering the fact that his death sentence was commuted to life imprisonment.

9. Following the recent directions given by the Supreme Court in the Francis Muruatetu case, and as the Petitioner herein had his death penalty commuted to life, I find this petition on unconstitutionality of death sentence imposed on him devoid of any merit. The same is hereby declined and dismissed.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 21ST DAY OF SEPTEMBER , 2021.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Petitioners in person

Ms. Anyumba for DPP

Ms. Peris Court Assistant