



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 207 OF 2018

1. ALI NZIIVU

2. RASHID SALIM

3. RAJAB TSOFA.....PETITIONERS

AND

DIRECTOR OF PUBLIC PROSECUTION....RESPONDENT

JUDGMENT

1. The Petitioners were convicted for the offence of Attempted Robbery with Violence contrary to Section 297 (2) of the Penal Code and sentenced to death in Kilifi Cr. Case No. 262 of 1998 and two years imprisonment for assault. They appealed in HCCRA No. 188 of 1999 and the appeals were 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 vs. 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 15th April, 1998 at about 11.30 p.m the Petitioners while armed with Panga attacked and attempted to rob a wife and a husband, victims in the case.

4. The Petitioners have exhausted their right of appeal and have now approached this Court to declare that the death sentence is unconstitutional and contrary to Article 50(1) and Article 25(a) of the constitution, and to impose an appropriate sentence upon them.

5. The Petitioners variously submitted that they are remorseful of the incident and that they are first offenders who have never been accused of breaking the law. They have families they wish to return to and that they have also learnt trade while in prison and this will help them to live in an orderly society.

6. Mr. Fedha, Learned Counsel for the prosecution submitted that the Petitioners have already served 21 years and 9 months in custody and Counsel was not opposed to the Petition.

7. On their part, the 1st Petitioner submitted that he regrets his actions and asked for forgiveness. The 2nd Petitioner submitted that he is a married man with three children and has since reformed and would not repeat his mistakes. The 3rd Petitioner submitted that he is reformed and has learnt a lot of skills in Prison and prays that the time served in custody would be enough for the crime he committed.

8. I have considered the Petition as well submissions of the parties. On the issue of re-sentencing the Petitioners have submitted that they have reformed and this is supported by the Prisoners' Progress Report. This Court notes that the Petitioners were armed with Panga at the time of the offence and actually injured one of the victims and as such sentencing must consider the rights of the victims.

9. In conclusion, and in consideration of the facts here, this court replaces the death sentence herein, and hereby sentences the petitioner to serve a jail term of twenty two (22) years including the time served, with the result, they the Petitioners having already served the said term, are now hereby set free and forthwith released from prison unless lawfully withheld.

That is the Judgment of the court.

Dated, Signed and Delivered at Mombasa this 9th day April, of 2020.

E. K. O. OGOLA

JUDGE

In the presence of:

Petitioner in Person via video link

Ms. Mwangeka for DPP

Mr. Kaunda Court Assistant