



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 101 OF 2019

ANTHONY MBITHI KASYULA..... PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT

1. The Petitioner Anthony Mbithi Kasyula was convicted of the offence of trafficking in narcotic drugs contrary to Section 4 (a) of the Narcotic Drugs and Psychotropic Substance (Control) Act No. 4 of 1994. The Petitioner was sentenced to 7 years in prison and in addition he was fined Kshs. One million.
2. On appeal to the High Court his sentence was enhanced to life in prison in addition to the said Kshs. One million. His appeal to the Court of Appeal was dismissed.
3. The Petitioner is now before this court pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR** in which the apex court found the mandatory death sentence to be unconstitutional.
4. Submitting on this issue Ms. Mutua, learned Counsel for the State submitted that this court can review the sentence and urged the court to jail the Petitioner for 40 years given the gravity of the offence.
5. On his part the Petitioner submitted that he has already reformed; that he has learnt trade profession in the prison; and is a spiritual leader of the Catholic Church in prison and urged the court to jail him to a maximum of 15 years including the time already served.
6. The issue for this court is a determination of whether or not the Petitioner was given a chance to mitigate. There was no evidence that the Petitioner was given a chance to mitigate before sentence. This means that the trial court considered the sentence of life imprisonment under Section 4 (c) of the Narcotic Drugs and Psychotropic Substance (Control) Act as mandatory. While a clear reading of the said section leaves no doubt that the sentence of life imprisonment is not mandatory, the trial court treated it as being mandatory with the result that the Petitioner's constitutional right to mitigation was compromised. In Court of Appeal case of **Omar Mohamed Shebane vs. Republic Criminal Appeal No. 54 of 2016** the Court of Appeal set aside the life imprisonment sentence together with a fine of Kshs. One million. In **Kibibi Kalume Katsui Criminal Appeal No. 90 of 2014** the Court of Appeal reached a similar decision.
7. In this matter the Petitioner has already served 10 years in prison. He has offered mitigation and according to the progress report from prison he has reformed and is a spiritual leader in the prison. In the circumstances this Court is persuaded that a jail sentence of 20 years is adequate punishment for the crime committed by the Petitioner.
8. In the upshot I make the following orders:
 - (i) The sentences of life imprisonment and fine of Kshs. One million are hereby lifted and vacated.
 - (ii) The Petitioner is sentenced to serve a jail term of 20 years from the date of conviction.
9. That is the Judgment of the Court.
10. Right of appeal in 14 days.

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

E. K. O. OGOLA

JUDGE

In the presence of:

Ms. Mwangeka for DPP

Petitioner in person via video link

Mr. Kaunda Court Assistant