



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 79 OF 2019

BERNARD NJERU KAMWARA.....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 Cr. Case No. 533 of 2010. He appealed in HCCRA No. 36 OF 2012 and Criminal Appeal. No. 45 of 2017. The High Court upheld the lower court sentence while the Court of Appeal substituted the sentence to 15 years.

2. The Petitioner has 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 and held that the mandatory nature of the death sentence is unconstitutional.

Brief Circumstance of the offence

3. The particulars are that 12th June, 2010 while Austin Oduor and Benson Baya were on duty supplying cigarettes, the Petitioner together with others not in court stole from the victims mobile phone, cash as well as motor vehicle registration KBK 043E and or immediately after the time of such robbery wounded the victims.

4. The Petitioner submitted that 15 years handed to him is unconstitutional and that the Appellate Court did not consider the time spent by the Petitioner in custody since the time of his arrest. He has now exhausted his right of appeal and approaches court to declare that the sentence is unconstitutional and contrary to Article 50(1) and Article 25(a) of the constitution, and to impose an appropriate sentence upon him.

5. He further submitted that the court did not consider his mitigation as he is a first offender and has never been accused of breaking the law and at the same time he is very remorseful. The Petitioner submitted to having spent one year and 10 months in remand the court of Appeal did not consider, that he is now reformed having undergone rehabilitation within Shimo La Tewa and as such should be released.

6. The prosecution submitted that the Petitioner has spent 8 years in custody and does not oppose application by the Petitioner.

7. I have considered the Petition as well submissions of the parties. On the issue of re-sentencing the Petitioner submitted that he has reformed and that is supported by the Prisoner's Progress Report. The Petitioner is in Court for only one reason: that the time he had spent in remand be considered part of his sentence. Mr. Fedha learned Counsel for the prosecution did not object to that prayer.

8. In **Bethwel Wilson Kibor –vs- Republic Criminal Appeal No. 78 of 2009** the Court of Appeal considered that issue and stated that the time spent in custody and remand before sentence shall be considered as constituting the sentence meted out. In that regard therefore, the Petitioner herein is granted the right to have the time spent in remand to be considered as part of his sentence herein.

9. Petition is allowed.

That is the Judgment of the court.

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

E. K. O. OGOLA

JUDGE

In the presence of:

Petitioner in Person via video link

Ms. Mwangeka for DPP

Mr. Kaunda Court Assistant