

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CONSTITUTIONAL PETITION NO. 17 OF 2019

JOSEPH KOMORA MARO..... PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Mr. Nyoro for the State

JUDGEMENT

The instant petition is premised upon the Supreme Court's decision in **Francis Karioko Muruatetu & Another vs Republic (2017) eKLR**, which declared the mandatory nature of the death sentence and the commutation of that sentence by an administrative fiat to life imprisonment unconstitutional and therefore null and void. The rationale is that the mandatory nature of death sentence as provided for in section 204 of the penal code deprives judges' discretion to take into account aggravating and mitigating circumstances which enable the court to arrive to an appropriate sentence based on the peculiar circumstances of each case. Furthermore, mandatory minimum sentences were considered not to be in tandem with the tenets of fair trial that accrue to the accused person in terms of Article 50(2)(P) of the Constitution of Kenya.

The Petitioner was initially charged with the offence of robbery with violence Contrary to Section 296(2) of the Penal Code (Cap 63) Laws of Kenya in Case No. 1558 of 2004. He was found guilty as charged, convicted and sentenced to suffer in the manner provided by the law. The sentence was later commuted to life imprisonment by the former President of the Republic of Kenya; Honorable Mwai Kibaki.

The grounds of the instant Petition, are that the mandatory death sentence imposed on him was arbitrary and unconstitutional hence the execution of the same amounted to denial of his right to a fair trial under article 50(2) of the constitution, that he has been in custody for approximately 15 years, that he has undergone several rehabilitation programs which will assist him spiritually and commercially if he is given a chance to re-join his family and the society at large. He begs the lenience of this court when considering his sentence.

For purposes of sentencing, I shall briefly consider the facts of the case at the trial court. The petitioner and his colleagues robbed Naureen Alam of her mobile phone make Nokia, a Kodak camera, a video camera make Sony, a battery charger make Sony, a Walkman cassette player make Benson and hedges, a spare battery, a document purse containing cash Kshs. 3, 5000/=, Uganda Shs. 60, 000/=, US dollars 561/=, toilet attires (assorted) and two electric gadgets all valued at Kshs. 143, 380/=. It was also averred that the robbers were armed with dangerous weapons including pangas, arrows and bows and during the perpetration of the offence, the perpetrators threatened to use actually violence.

Sentencing is a notoriously problematic exercise. It is a balancing act. From time to time jurists have espoused brilliant philosophies around it. Guidelines have been developed. The legislature sometimes weighs in with mandatory minimum sentences for certain offences. There are certain basics. The penalty must fit the crime. The interests of the offender must be balanced against those of justice. It is not right that someone who has offended society should go scot free, or escape with a trivial sentence. But at the same time he should not be penalized beyond what his misdeed befits. As a matter of principle, punishment should be less retributive and more rehabilitative.

There are more such philosophies or ideologies. But at the end of the day, after everything else has been considered and said, the judicial officer comes down to the hard facts before him; to the individual circumstances of the people before him – the offender and the victim. He cannot be dogmatic about anything. There is no room for an approach that is purely mathematical. A slavish adherence to precedence is manifestly injudicious. In sentencing, the ages of the accused and the victim are relevant. The younger the victim the harsher the sentence, and the older the accused the harsher the sentence.

It must be said that robbery is a very serious offence which should attract a sufficiently deterrent sentence regard being had to the circumstances of the offence and the offender. I have noted that the incident that transpired in this matter was a very unfortunate one. I have considered that the petitioner and his colleagues were armed with dangerous weapons capable of causing serious or grievous harm. However, no serious injuries were caused by the perpetrators despite having threatened to visit violence on the victims.

I have also noted that the Petitioner appealed to the High Court as well as to the Court of Appeal respectively and due to the seriousness of the offence committed by the Petitioner, the sentence death sentence imposed by the trial Court was upheld. I have also considered the mitigation offered by the Petitioner and the abovementioned aggravating factors.

The Petitioner has been behind bars since on or about December, 2007 till to-date. In that respect, pursuant to section 333(2) of the Criminal Procedure Code, I have taken into account the fact that the Petitioner has been behind bars for approximately 15 years. Following a careful consideration of the petition, the mitigation, the evidence of record as well as the law as regards the offence herein, it is the view of this Court that the aggravating factors presented by the prosecution case outweigh the mitigation offered by the Petitioner herein. On the same

note, the Petitioner has been in the solitary confinement long enough to allow him to be rehabilitated. The punishment he has suffered befits the nature of the offence he committed. And a very strong message has been send to the society that the courts will not take robbery with violence lightly. However, in my view, death sentence was quite excessive in light of the circumstances of this case.

In the premises, I hereby review the death sentence imposed by the trial court in light of the decision in **Muruatetu** with the sentence already served in prison. The Petitioner is hereby set at liberty unless lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 14TH DAY OF APRIL, 2020.

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R. NYAKUNDI

JUDGE