



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 96 OF 2019

MWINYI JUMA KUSHINDA.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT

1. The Petitioner herein Mwinyi Juma Kushinda was charged, tried and convicted of two counts, namely robbery with violence contrary to Section 296 (2) of the Penal Code, and indecent assault on a female, contrary to Section 144 (1) of the same code. He was thereafter sentenced to mandatory death penalty on the first count, and 10 years imprisonment with 3 strokes of the cane in the second count to run consecutively.

2. His first appeal to the High Court was dismissed. His appeal to the Court of Appeal vide Civil Appeal No. 86 of 2001 was dismissed. The Petitioner is therefore before this court for purposes of resentencing pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR** in which the apex court found the mandatory nature of the death sentence to be unconstitutional.

4. Mr. Fedha, learned Counsel for the State submitted that this court has the jurisdiction to resentence the Petitioner pursuant to the aforesaid case of Francis Muruatetu.

5. On sentencing however, counsel submitted that a prison term of 35 years is necessary for punishment of the offence. This is to include sentences in both counts.

6. The Petitioner on his part submitted that he has already reformed; that he is married with two children; that he is now 44 years old and if jailed for 35 years he will serve his entire life in prison. The Petitioner prayed for leniency.

7. The case against the Petitioner before the trial court was that he, in the company of several other persons while armed with pangas, bows and arrows descended on the home of RNN (N) at Tiwi on the night of 11th September, 2997, at 10.00 p.m. N was inside her house with her niece, BW (W), the latter's brother, AN (N), a house maid and one other person. The raiders demanded that a radio and other valuables be handled over to them through the window. But when N and those with her hesitated the raiders broke the door into the house and gained entry. While inside they raped the women before they escaped with several items belonging to N. N testified at the Petitioner's trial that at the time the robbers broke into her house there was a lamp on and using the light from it and other light from a poultry house next to her house she was able to recognize the Petitioner as one of the people who broke into her house. It was further her evidence that she saw the Petitioner raping "her daughter". It was her evidence that the Petitioner is a person she knew well before.

8. I have considered the petition and submissions. The aim of sentencing is to achieve the objectives of retribution, reformation and rehabilitation. The Petitioner herein does not seem to have been rehabilitated, leave alone reformed. I am not satisfied that he should just now join the orderly society, and so I am not able to release him immediately. The offences he committed are very serious offences including indecent assault.

9. The Court of Appeal had indicated that

“The proper order... should have been that the imprisonment term would stay in abeyance and to be executed only if for any lawful reason the sentence of death was set aside.”

10. Now an opportunity has come to set aside the death sentence.

11. In consideration of all the foregoing premises, I make the following orders:

- (i) The death sentence herein is hereby set aside.
- (ii) For count No. 1 in replacement of the death sentence, the Petitioner is hereby jailed for a term of 20 years from the date of conviction.
- (iii) For Count No. 2 being indecent assault, the Petitioner is jailed to 10 years as pronounced by the trial court.
- (iv) The sentences shall run CONSECUTIVELY.
- (v) In total the Petitioner is jailed to 30 years from the date of conviction.

12. Right of appeal in 14 days.

Orders accordingly.

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