



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 64 OF 2019

NDUNE ANDREW MBAJI.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS....RESPONDENT

JUDGMENT

1. The Petitioner herein Ndune Andrew Mbaji was charged and convicted for the offence of robbery with violence and rape in Malindi SPM Criminal Case No. 1613 of 2004. He was jailed to death on the first count, and to 15 years on the second count.
2. His appeals to the High Court and to the Court of Appeal were dismissed. The Court of Appeal dismissed his appeal on 15/3/2012.
3. The Petitioner is now before this court for 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. The Petitioner had been charged in Malindi SPM Criminal Case No. 1613 of 2004 with robbery with violence and rape. In respect of the rape charge, he also faced an alternative charge of indecent assault.
5. In the first count, the Petitioner was charged with robbery with violence contrary to Section 296 (2) of the Penal code. The particulars of the charge were that on 29th day of August, 2004 along the beach at Lawfords Hotel Malindi in Malindi location within Malindi District of Coast Province, jointly with another not before court, while armed with dangerous weapons namely, a panga and a rungu, they robbed Mary Wambui Stanley of two golden rings, one silver ring, one golden chain, one bracelet, one pair of golden earrings and one pair of small earring studs all valued at a total of Kshs. 15,850/= and at or immediately before or immediately after the time of such robbery they used actual violence on the said Mary Wambui Stanley by beating her with a rungu and a panga.
6. The second count was rape contrary to Section 140 of the Penal Code. The particulars of that charge were that on the 29th day of August, 2004 along the beach at Lawfords Hotel Malindi in Malindi location within Malindi District of Coast Province, the Petitioner unlawfully had carnal knowledge of Mary Wambui Stanley without her consent. In the alternative to this count the Petitioner was charged with indecent assault contrary to Section 144 (1) of the Penal Code. The particulars thereof were that on the 29th day of August, 2004 along the beach at Lawfords Hotel Malindi in Malindi location within Malindi District of Coast Province, he unlawfully and indecently assaulted Mary Wambui Stanley by touching her vagina.
7. The prosecution submitted that the Petitioner committed very grave offences and should be given a combined sentence of 40 years.
8. On his part the Petitioner submitted that he is now reformed, has learnt a trade in prison and that he has parents and brothers to take care of and that he should be jailed for no more than 20 years for all the counts.
9. I have considered the petition. The crimes for which the Petitioner were convicted are grave and deserve severe punishment. However, I am able to lift the death penalty. In place thereof I jail the Petitioner to 27 years. For the second count I jail the Petitioner for the 15 years which the trial court jailed him for. The sentences shall run concurrently.
10. In the upshot I make the following orders:
 - (i) In count number one, I lift the death sentence and in place thereof I jail the Petitioner to a term in prison for 27 years from the

date of arrest.

(ii) For count No. 2, I confirm the trial court's sentence of 15 years.

(iii) the sentences above shall run concurrently.

11. 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:

Ms. Mwangeka for DPP

Petitioner in person via video link

Mr. Kaunda Court Assistant