

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

PETITION NO. 53 OF 2018

PETER OOKO OTIENOPETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT

1. The Petitioner was convicted for the offence of Robbery with Violence contrary to Section 296(2) of the Penal Code and sentenced to death in Kwale Cr. Case No. 240 of 2008. He appealed in HCCRA No. 34 of 2010 and Criminal Appeal. No. 26 of 2013. Both appeals were dismissed and sentence upheld.

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 the mandatory nature of the death sentence to be unconstitutional.

Brief Circumstance of the offence

3. The particulars are that on 16th February 2008 at 11.30 p.m. the Petitioner together with others robbed Esther Wangui Wairimu of her Samsung mobile phone valued at Ksh. 20,000 but was acquitted on a second count in which it was alleged that he robbed one Anne Njeri.

4. The Petitioner submitted that the death sentence, which was commuted to life imprisonment is unconstitutional. He has now exhausted his right of appeal and approaches this Court to declare the death sentence 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. He has now spent 10 years in custody. The Petitioner apologized for the offence he committed and submitted that he has reformed having learnt a lot in custody, that he is unwell as he suffers from HIV/ AIDS, and that he should be released to go home and access good treatment.

6. Mr. Fedha, Learned Counsel for the prosecution submitted that the Petitioner was armed at the time of the offence, and that even though no one was injured, his accomplices at the time of the offence are still at large. Counsel further submitted that the Petitioner has been in custody for 12 years and prayed that he be jailed for 15 years including time served.

7. I have considered the Petition as well submissions of the parties. I have also considered the appearance and demeanor of the Petitioner in Court and have taken into account his sickness of HIV. I have also considered that the Petitioner has served 12 years in custody. Upon these premises, I herewith set aside the death sentence herein and in the place thereof I jail the Petitioner to the term equivalent with that already served, and hereby set the Petitioner free unless lawfully held.

That is the Judgment of the court.

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

E. K. O. OGOLA

JUDGE

In the presence of:

Petitioner in person via video link

Ms. Mwangeka for DPP

Mr. Kaunda Court Assistant