



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**PETITION NO. 50 OF 2019**

**SAMUEL MWANGI KIBARIO.....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. 1553 of 2005. He appealed in HCCRA No. 135 of 2008 and Criminal Appeal. No. 316 of 2009. 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 29<sup>th</sup> April, 2005 at Multiple Hauliers Yard at Mikindani Mombasa within Coast Province jointly with others and while armed with dangerous weapons namely Pistols robbed ROTICH BOIT one mobile phone and Kshs. 135,000 and immediately before or after the time of the robbery injured the victim.

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 and has spent 14 years and 6 months in custody. The Petitioner apologized for the offence he committed and submitted that he has reformed having learnt a lot in custody, that he never benefited from the Robbery and his accomplices are all dead as a result of crime; that he is now born again and a Preacher with SDA Church, and that he has also learnt certain skills in Prison that he can apply in the community outside prison.

6. The prosecution submitted that the Petitioner is not remorseful and ought to be sentenced to 20 years as his accomplices at the time of the offence are still at large.

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 this is supported by the Prisoner's Progress Report. This Court notes that the Petitioner and his accomplices were actually armed with a pistol at the time of the offence and as such sentencing must consider the rights of the victims. However, there is a good Prison Progress report on the Petitioner; that he is reformed, is born again, is a teacher, and has learnt skills that may help him to be integrated into the orderly society.

8. In consideration of the premises herein I make Judgment as under:-

i) The death sentence herein is set aside and vacated.

ii) The Petitioner is sentenced to a total of seventeen (17) years in prison, three (3) of which are hereby suspended.

iii) The Petitioner is hereby forthwith released from prison unless lawfully held.

iv) The Petitioner shall spend half of the suspended sentence doing community service at Changamwe Police Station, and he shall report to the OCS Changamwe within 48 hours of his release.

That is the Judgment of the court.

**Dated, Signed and Delivered at Mombasa this 9<sup>th</sup> day April, of 2020.**

**E. K. O. OGOLA**

**JUDGE**

In the presence of:

Ms. Mwangeka for DPP

Petitioner in person via video link

Mr. Kaunda Court Assistant