

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CONSTITUTIONAL PETITIONS NOS. 38 OF 2018 & 32 OF 2019

LAWRENCE CHAMWADA.....APPLICANT

VERSUS

REPUBLIC.....DIRECTOR OF PUBLIC PROSECUTIONS

RULING

1. The petitioner herein was convicted, on 31st January 2014, in Vihiga SPMCCRC No. of 726 of 2013, on one count of robbery with violence, contrary to section 296(2) of the Penal Code, Cap 63, Laws of Kenya, and on one count of gang rape, contrary to section 10 of the Sexual Offences Act, No. 3 of 2006, and was sentenced to suffer death on the robbery with violence count, and was not sentenced on the gang rape charge, as the same was held in abeyance. The applicant filed an appeal at the High Court, Kakamega HCCRA No. 53 of 2015, which was dismissed on 26th September 2016.

2. He initiated the instant petitions, one dated 10th September 2018 and the other undated, but filed in court on 5th March 2019, seeking a rehearing of the matter with respect to the sentences imposed on him.

3. The issue of reconsideration of the sentence is within the jurisdiction of the court, going by *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR. On the death sentence, there are recent developments in the Kenyan jurisprudence, particularly regarding mandatory sentences. The Court of Appeal and the Supreme Court have led the way with regard. See *Francis Karioko Muruatetu & another vs. Republic* (supra) and *Dismas Wafula Kilwake vs. R.* [2018] eKLR.

4. The trial record reflects that the complainant, an elderly woman, was attacked at her residence, where she lived alone, by a gang of men, whose number she put at three. They smashed her door with a huge stone, and attacked her with cutlasses and hammers, hitting her on various parts of her body. They eventually raped her in turns. They also left, taking from her house assorted items. The P3 form put in evidence, showed that she had a six centimeter long cut wound on her forehead, two other cuts on the forehead, whip marks and bruises on her left thigh. She was swollen on the injured spots, and had difficulty walking. It was opined that the weapon used was sharp, and the degree of injury was described as harm. She was admitted in hospital. It was opined that she had been raped in turns.

5. The petitioner put in written submissions, for the purpose of the re-sentencing, which dwelt mainly on the proceedings before the trial court. The tenor of the submissions is that the case against him was not proved. That is not for consideration here, since the he had filed an appeal, which was heard and dismissed. That is, therefore, water under the bridge. I am only concerned with the sentence. He has not expressed any remorse in the submissions. Instead, he avers that he has undertaken several courses while in prison to better himself. He further submits that he has reformed.

6. I have taken into account the circumstances of the commission of the offences in respect of which they were convicted. The petitioner and his accomplices attacked a defenceless elderly women in the dead of the night, broke down her door with a huge stone, assaulted her mercilessly with cutlasses and a hammer, and thereafter sexually assaulted her in turns, after which they stole from her. She sustained injuries from the vicious attack, and had to be admitted in hospital. The petitioner expressed no remorse at the sentencing hearing before the trial court, and even at the re-sentencing hearing before me he has not been remorseful for what happened. Even as he pleads having reformed I will take that lack of remorse into account. I note that the petitioner says that has tried to better his life, by undertaking studies in prison, but I have not seen any reports from prison with regard to whether there have been any such studies, nor reports on his rehabilitation or reformation. It must be emphasized that grievous crimes that he committed must be paid for.

7. In the spirit of *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR, I shall quash the sentence of death that was imposed on the petitioner by the trial court, and confirmed by the High Court. I shall substitute that sentence with one of thirty (30) years imprisonment, to run from the date of conviction on 31st January 2014. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 2nd DAY OF July, 2020

W MUSYOKA

JUDGE