



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL PETITION NO. 4 OF 2018

KENNEDY WESONGA KWOKA.....PETITIONER

VERSUS

REPUBLIC..... RESPONDENT

RULING

1. **Kennedy Wesonga Kwoba**, the petitioner herein, was convicted for the offence of robbery with violence contrary to section 296(2) of the Penal Code in Busia Chief Magistrate's Court criminal case 1061 of 2002. He was sentenced to death. He appealed to the High court and to the Court of Appeal where his appeals were dismissed. He now petitions to this court for an order for resentencing. His petition is premised on the following grounds:

a) That petitioner was not accorded a fair trial in sentencing which contravened Article 50 (2) (q) of the Constitution.

b) That the decision of the Supreme Court declared death sentence unconstitutional.

2. The petition was opposed by the respondent who was represented by m/s. Ngari learned counsel.

3. Article 50 (2) (q) of the Constitution of Kenya provides as follows:

Every accused person has the right to a fair trial, which includes the right—

(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

The appellant exercised his right up to the Court of Appeal. He cannot therefore claim that Article 50 (2) (q) was contravened.

4. the petitioner said he was relying on the decision of the Supreme Court in the case of **Francis Karioko Muruatetu & another vs. Republic [2017] eKLR**.

This decision is not only good law but very progressive one. However, courts have a duty to ensure that it is not misused. Briefly the facts in the **Muruatetu** case were that the petitioners were arraigned before the High Court for the offence of murder. Upon their conviction, they were sentenced to death as decreed by Section 204 of the Penal Code. Their appeal to the Court of Appeal against both conviction and sentence was dismissed. Aggrieved by that decision the moved to the Supreme Court. The court made the following orders:

a) **The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of the Constitution.**

b) **This matter is hereby remitted to the High Court for re- hearing on sentence only, on a priority basis, and in conformity with this judgment.**

c) **The Attorney General, the Director of Public Prosecutions and other relevant agencies shall prepare a detailed professional review in the context of this Judgment and Order made with a view to setting up a framework to deal with sentence re-hearing cases similar to that of the petitioners herein. The Attorney General is hereby granted twelve (12) months from the date of this Judgment to give a progress report to this Court on the same.**

d) **We direct that this Judgment be placed before the Speakers of the National Assembly and the Senate, the Attorney-General, and the Kenya Law Reform Commission, attended with a signal of the utmost urgency, for any necessary**

amendments, formulation and enactment of statute law, to give effect to this judgment on the mandatory nature of the death sentence and the parameters of what ought to constitute life imprisonment.

5. The decision in **Muruatetu** case addressed itself to section 204 of the Penal Code. Even if we assume that robbery cases were contemplated in the decision, I am not aware whether the order directed to the Attorney General, the Director of Public Prosecutions and other relevant agencies has been complied with. The Court was alive to the dangers of acting without a framework which ought to inform courts from what period this decision is to be effected. This will clarify the scope of that application and address the issue of retroactivity.

6. The Constitution of Kenya 2010 was not envisaged to be applied retroactively. Unless there is legislation which is put in place, the likes of the petitioner cannot benefit from the **Muruatetu** decision. Allowing the petition would be tantamount to overstretching the decision beyond what the Supreme Court envisaged. This would be an abuse of the due process.

7. I therefore find that the petition herein lacks merit and the same is dismissed.

DELIVERED and SIGNED at BUSIA this 4th day of March, 2019

KIARIE WAWERU KIARIE

JUDGE