



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CONSTITUTIONAL PETITION NO. 10 OF 2017**

**MARIO MANGWENI ..... 1<sup>ST</sup> PETITIONER**

**ZADOCK WERE .....2<sup>ND</sup> PETITIONER**

**DICKSON CHIRANDE .....3<sup>RD</sup> PETITIONER**

**GEOFFREY MACHONI.....4<sup>TH</sup> PETITIONER**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**SENTENCE**

1. The 4 petitioners have filed a constitutional application dated 15<sup>th</sup> April, 2019 seeking orders that:-

1. The death sentence imposed against the petitioners be set aside.
2. The petitioners' case be reviewed and mitigation taken.
3. The court orders for the re-sentencing of the appellants.
4. The court reduces the sentence to the time served.
5. The death penalty imposed on the petitioners was unconstitutional and infringed the petitioners' rights enshrined in Article 20 (3), 22, 50 (2), 159 (2) a, b & d.
6. The petitioners did not receive a fair trial as enshrined in Article 50 (2) and 25 (c).

2. The petitioners were on the 9<sup>th</sup> December, 2011 convicted by a Magistrate's court of the offence of robbery with violence and sentenced to death. Their appeals to the High Court and the Court of Appeal were unsuccessful. They have now approached this court for re-sentencing after the Supreme Court in **Petition No. 150 of 2015 in Francis Karioko Muruatetu & Another –Vs- Republic 2017 eKLR** declared the mandatory death sentence in murder cases to be constitutional, following which, as a corollary, the Court of Appeal in **William Okungu Kittiny –Vs- Republic (2018) eKLR** held that the mandatory sentence of death provided in 296 (2) and 297 (2) of the Penal Code is inconsistent with the constitution. The learned Judges as a result held that the sentence in the two sections is a discretionary maximum sentence. This means that a person convicted under the two sections can be sentenced to any period of imprisonment with death sentence as the maximum sentence.

3. The petitioners were represented by **Mr. Malala advocate**. He submitted that the applicants were arrested in 2009 and have been in custody for a period of 9 years. He mitigated that the petitioners were first offenders. That the 1<sup>st</sup> and 4<sup>th</sup> petitioners were students at the time of their arrest. That their education was disrupted by the conviction. That at the time they were sentenced their ages were placed at 18-19 years. The advocate pleaded with the court to give them a second chance to correct their lives.

4. The advocate mitigated that the 2<sup>nd</sup> petitioner is a Pastor and married with grown up children. That he was the sole breadwinner of the family.

5. The advocate urged the court to use its discretion in sentencing and reduce the sentence to the period served as the petitioners were young and naive when they committed the offence. The advocate cited the following cases where sentences for robbery with violence convicts were reduced:-

- **Sabastian Okwero Mrefu –Vs- Republic Petition No. 151 of 2012 (2012) eKLR** where Chitembwe J. reduced a sentence of life imprisonment to the period served of 11 years in a case where the robbers while armed with a rifle had robbed complainants of two vehicles and cash Ksh. 800/=.
- **Boniface Juma Khisa –Vs- Republic (Eldoret Criminal Appeal No. 268 of 2009** where the Court of Appeal substituted the death sentence with 5 years imprisonment.
- **Protus Bulisa Shikuku, High Court Constitutional Reference No. 3 of 2011 (CA)** where the Court of Appeal substituted the sentence of death to a period of 8 years.
- **Paul Otuoma Otieno –Vs- Republic (2018) eKLR** in which the accused while armed with a rifle and a kitchen knife had robbed the complainant of Ksh. 450,000/= and 3 mobile phones. Majanja J. substituted the death sentence with 20 years imprisonment commencing from the date of sentence by the trial court.
- **Benjamin Kemboi Kipkone –Vs- Republic (2018) eKLR** where 3 robbers while armed with an AK 47 rifle robbed the complainant of Ksh. 250,000/= and a mobile phone and Chemitei J. substituted the death sentence with 20 years imprisonment with effect from the date of conviction by the lower court.

6. The evidence adduced against the Petitioners in the lower court is that the complainant was a shopkeeper. That the petitioners attacked the complainant at his shop while armed with a pistol, pangas and an object that had a nail embedded on it. They shot at the complainant and the bullet grazed his head. The complainant was hit with a panga on the head and then hit on the head and shoulder with the object that had a nail embedded on it. They robbed him of cash Ksh. 12,000/= and scratch cards valued at Ksh. 26,000/=.

7. The Court called for pre-sentencing reports that were prepared by probation officers. The reports are favourable to the petitioners being released to the community. The reports indicated that they have been of good character while in prison.

8. Sentencing is a discretion of the trial court. When exercising its duty of sentencing the court is called upon to consider the set down principles of sentencing and the circumstances of the case.

9. In **Ambani Vs Republic**, the High Court stated that a sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and that the court should look at the facts and the circumstances of the case in its entirety before settling for any given sentence.

10. The Court of Appeal in **Thomas Mwambu Wenyi Vs Republic (2017) eKLR** cited the decision of the Supreme Court of India in **Alister Anthony Pereira Vs State of Maharashtra** at paragraph 70-71 where the court held the following on sentencing:-

**“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.**

11. Section 333(2) of the Criminal Procedure Code requires a sentencing court to take into account the period a convicted person has spent in custody prior to the sentence.

12. I have considered the mitigation presented on behalf of the petitioners by their advocate. I have also considered that the 1<sup>st</sup> and 4<sup>th</sup> petitioners were teenagers at the time of their arrest. The petitioners have been in custody for a period of 9 years since the time of their arrest. Their pre-sentence reports are favourable.

13. On the other hand the petitioners were armed with a pistol when they robbed the complainant. They shot at the complainant and the bullet grazed his head. It is therefore by sheer lack that the complainant, by a whisker, escaped death. This portrays the petitioners as people who were ready to kill for money.

14. I have considered the authorities cited above where life sentences for convicts of robbery with violence were reduced after the *Muruatetu Case*. Other guiding cases that are appropriate to the sentence are **Michael Kathewa Laichena Vs Republic (2018) eKRL** where Mabeya J. considered that the petitioner had been in custody for a period of 5 years pending trial and re-sentenced him to a prison term of 15 years and **Robert Achapa Okelo Vs Republic, Kisumu High Court petition No. 63 of 2018** Cherere J considered that the petitioner had been in custody for 14 ½ years and re-sentenced the convict to the period already served. In **Wycliffe Wangusi Mafura Vs Republic (2018) eKLR** the Court of Appeal imposed a sentence of 20 years where the appellant was involved in robbing an M-pesa shop agent.

15. Though the appellants committed a serious offence the facts of the case do not warrant a death sentence. A prison sentence would serve the interests of justice. The death sentence imposed on them is hereby set aside. Considering that the petitioners almost killed the deceased during the robbery, I re-sentence each of them to serve eighteen years imprisonment commencing from the date of their arrest on 18<sup>th</sup>

October, 2009.

**Delivered, dated and signed in open court at Kakamega this 16<sup>th</sup> day of May, 2019.**

**J. NJAGI**

**JUDGE**

In the presence of:

Mr. Malala for Petitioners

Mr. Ngetich for State

Petitioners - present

Court Assistant - George

14 days right of appeal.