



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 75 OF 2018

IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010 (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF AN INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES 2013

AND

IN THE MATTER OF: ARTICLE 22(1) OF THE CONSTITUTION

AND

IN THE MATTER OF: ARTICLE 23(1) OF THE CONSTITUTION

AND

IN THE MATTER OF: ARTICLES 19, 20, 21, 22, 23, 24, 25, 27, 28, 48, 50, 258 AND 259 OF THE CONSTITUTION

BETWEEN

DOMINIC MUSILA ETIMBO.....PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT

1. The matter before the Court is a petition by the Petitioner for resentencing.
2. The Petitioner herein was charged with Attempted Robbery with violence contrary to Section 296 (2) in Criminal Case No. 72 of 2003 and was sentenced to death.
3. The Petitioner is now before this Court pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR** in which the Court declared mandatory death sentence to be unconstitutional.
4. Mr. Fedha learned counsel for the Director of Public Prosecution has submitted that the Petitioner was convicted with offence of Attempted Robbery and used axe, pangas, runigus, stones, bows and arrows to attack the victim to rob him of cash Kshs. 549,475/=. The Petitioner has served 16 years and has reformed.
5. The Petitioner avers that he was charged with attempted robbery with violence whose punishment under Section 389 of the Penal Code is seven (7) years and that he ought to have been given the lesser sentence under Section 389 of the Penal Code rather than the harsher sentence of death under Section 297 (2) of the Penal Code. The Petitioner, having now served sixteen (16) years in prison, submitted that he should be released forthwith under Section 389 aforesaid.
6. Mr. Fedha for the prosecution on his part did not respond to the Petitioner's submissions on Section 389 of the Penal Code, but submitted that attempted robbery with violence is a serious offence and in this case should be punished with a jail term of twenty two (22) years.

The Determination

7. I have considered the submissions of the DPP and the circumstances of the case. The Petitioner were convicted for Attempted Robbery with violence and has served 16 years in prison. It is also clear that the Petitioner's constitutional right to fair trial was violated when he was sentenced under Section 297(2) instead of Section 389 of the penal code under which he was entitled to benefit under a lesser sentence of 7 years. That notwithstanding the Petitioner has now spent 16 years in jail. The issue for determination is whether or not the Petitioner is entitled to a lesser sentence under Section 389 of the Penal Code.

8. The Constitution at Article 50 (2) (p) states: -

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

(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.”

9. The Penal Code at Section 297 (2) states: -

“If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

10. Penal Code at Section 389 states: -

“Any person who attempts to commit a felony or a misdemeanour is guilty of an offence and is liable, if no other punishment is provided, to one-half of such punishment as may be provided for the offence attempted, but so that if that offence is one punishable by death or life imprisonment he shall not be liable to imprisonment for a term exceeding seven years.”

11. Issue therefore is whether an attempted robbery with violence is a felony under the said law, and if it is whether the same applies herein.

12. It is not in doubt that an attempted robbery with violence is a felony which under Section 389 of the Penal Code is punishable by a sentence of seven (7) years.

13. That being so it is the finding of this Court that the Petitioner ought to have been given the benefit of a lesser sentence under Article 50 (1) (p).

Accordingly, therefore the appropriate sentence upon conviction was seven (7) years.

14. For the foregoing reason, the death sentence imposed upon the Petitioner herein is reversed and the same is replaced by a sentence of seven (7) years from the date of conviction. The Petitioner having served thirteen (16) years, is now pursuant to this Judgment forthwith set free and released from prison unless held for valid reasons.

Right of appeal within 14 days.

That is the Judgment of the Court.

Dated, Signed and Delivered at Mombasa this 15th day of October, 2019.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Fedha for DPP

Petitioner in person

Mr. Kaunda Court Assistant