



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**PETITION NO. 85 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) AND 27 (2) AND 4 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**

**AND**

**IN THE MATTER OF: SECTION 297 (2) OF THE PENAL CODE**

**AND**

**IN THE MATTER OF: SECTION 389 OF THE PENAL CODE**

**BETWEEN**

**WILLIAM MBITHI.....PETITIONER**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT**

**JUDGMENT**

1. The Accused William Mbiti was convicted of offence of attempted robbery with violence contrary to Section 297 (2) of the Penal Code. He was sentenced to death. He has exhausted his appellate processes and has been in jail for 13 years.
2. The current petition is for resentencing pursuant to the decision of the Supreme Court in *Francis Kariokor Muruatetu & Another –Vs- Republic SCK Pet. No. 15 of 2015 (2017) eKLR*.
3. The Petitioner avers that he was charged with attempted robbery with violence whose punishment under S. 389 of the Penal Code is seven (7) years and that he ought to have been given the lesser sentence under S. 389 of the Penal Code rather than the harsher sentence of death under S. 297 (2) of the Penal Code. The Petitioner, having now served thirteen (13) years in prison, submitted that he should be released forthwith under S. 389 aforesaid.
4. Mr. Fedha for the prosecution on his part did not respond to the Petitioner's submissions on S. 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**

5. I have carefully considered the Petition and the submissions. The issue for determination is whether or not the Petitioner is entitled to a lesser sentence under S. 389 of the Penal Code.

6. 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.”**

7. The Penal Code at S. 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.”**

8. Penal Code at S. 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.”**

9. 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.

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

11. That being so 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.

12. 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 (13) years, is now pursuant to this judgment forthwith set free and released from prison unless held for valid reasons.

That is the Judgment of the court.

Right of appeal within 14 days.

**Dated, Signed and Delivered at Mombasa this 15<sup>th</sup> day of October, 2019.**

**E. K. O. OGOLA**

**JUDGE**

In the presence of:

Mr. Fedha for DPP

Petitioner in person

Mr. Kaunda Court Assistant