



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 92 OF 2018**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010 (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOM 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: ARTICLES 19, 20, 21, 22, 23, 24, 25, 27, 28, 48, 50, 258 AND 259 OF THE CONSTITUTION**

**BETWEEN**

**BENDE DAMAU.....PETITIONER**

**VERSUS**

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

**JUDGMENT**

1. The Petitioner herein seeks a resentencing pursuant to the Supreme Court decision in **Francis Karioko Muruatetu vs. Republic [2017] eKLR**.
2. The Petitioner was tried and convicted of robbery with violence in the Mombasa Chief Magistrate Court Criminal Case No. 457 of 1996. He was sentenced to death and has been in jail for 23 years. The Petitioner was involved in robbery with violence where the victim was robbed of his bicycle, radio cassette and other valuable and thereafter assaulted.
3. **Mr. Fedha** for the prosecution submitted that the petitioner is very remorseful and prayed that a definite sentence of 25 years including years served due to circumstances surrounding his charge.
4. The Petitioner submits that he is very remorseful of the offence he committed and he has been living in regret and he vows never to repeat the same again. He further submits that the 23 years he has done in jail is enough punishment and that he has reformed through the rehabilitation programmes initiated by the prison department. He also has acquired both spiritual and vocational skills that can help him earn a livelihood once set free.
5. I have carefully considered the issue at hand. Under the proviso to **section 333(2)** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**, the court is entitled to take into account the period the petitioner has spent in custody in determining the sentence. I have noted that the Petitioner has been in custody for approximately 23 years. The aim of punishment is community protection, deterrence, retribution, rehabilitation, restorative Justice and reformation. It is noteworthy that the prosecution admits that the Petitioner is very remorseful and he ought to benefit from remission of his sentence. Though actual bodily harm was inflicted to the victim, the same was not grievous as he was treated and discharged. He states that he has reformed and this has been backed up by a prisoner's progress report dated 14<sup>th</sup> January 2019 that states that he is well behaved, disciplined, has attained the level (trustee) within the prison ranks and has achieved the highest level in his welding skills.
6. After considering all the mitigating and aggravating factors, the fact that the petitioner has undertaken courses as a way of reformation, having considered the foregoing, I am satisfied that the period already served is enough punishment for the petitioner. In view of the

foregoing, the Petitioner is sentenced to the term already served, and is herewith forthwith released and set free unless otherwise lawfully held for valid reasons.

That is the Judgment of the Court.

**Dated, Signed and Delivered at Mombasa this 7<sup>th</sup> day of November 2019.**

**E. K. OGOLA**

**JUDGE**

In the presence of:

Mr. Fedha for DPP

Petitioner in person

Mr. Kaunda Court Assistant