



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 240 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

COSMAS AKEYA DON ALIAS MOGAKA.....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 with 4 counts of robbery with violence in Kwale Chief Magistrate Court Criminal Case No. 1111 of 2007 and sentenced to death. He had been in jail for 12 years after exhausting his Appeal processes. The Petitioner together with his accomplice engaged in a spate of violent robberies within the then Coast province while armed with a panga and a firearm. It was only following police intervention that the Petitioner and his accomplice were arrested.

3. **Mr. Fedha** for the prosecution prays for a deterrent sentence of 20 years including the 12 years served due to circumstances surrounding his charge.

4. The Petitioner submits that he is a first offender who has a young family to take care of and that the 12 years served are sufficient in paying the debt owed to the society and he is ready to be re-integrated back to the society

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)**, this 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 12 years since his arrest. The aim of punishment is **community protection, deterrence, retribution, rehabilitation, restorative Justice and reformation**.

6. His Prison's Progress Report indicates that he has undergone basic guidance and counselling and that he is of good conduct and ought to be given a second opportunity to be a good citizen.

7. I have considered judgments of Superior Courts that are intended to ensure consistency and fairness. In the case of **Robert Mutashi Auda vs. Republic, Nairobi Criminal Appeal No. 247 of 2014**, the Court of Appeal held as follows...

“We also appreciate the fact that the appellant has already served 13 years in prison which in our view is sufficient retribution on his part. Taking all these issues into account, we are persuaded to interfere with the death sentence imposed on the appellant and reduce the same to the term already served. The appellant’s appeal therefore succeeds in part only as far as the sentence is concerned as the conviction remains undisturbed. We order that the appellant be set at liberty unless he is otherwise lawfully held.”

8. I have carefully considered the Petition, submissions by parties and relevant judicial authorities on resentencing for similar offences. I have also considered mitigating and aggravating factors. I note that the Court of Appeal in its judgment suspend the death sentence pertaining to the three counts of robbery with violence pending the execution of the sentence in count 1 of robbery with violence.

9. In the premises, I hereby set aside the death sentence imposed on the Petitioner and in place thereof I impose a jail term of seventeen (17) years from the date of arrest on count 1.

10. On counts 2, 3, 4, I hereby sentence the Petitioner to 10 years imprisonment on each count. The sentences shall run concurrently. Right of Appeal in 14 days.

That is the Judgment of the Court.

Dated, Signed and Delivered at Mombasa this 20th day of November 2019.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Fedha for DPP

Petitioner in person

Mr. Kaunda Court Assistant