



**THE REPUBLIC OF KENYA**

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

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 101 OF 2018**

**CKT.....PETITIONER**

**VERSUS**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT**

**JUDGMENT**

1. The Petitioner herein was charged and convicted with two counts of Robbery with Violence contrary to Section 296 (2) of the Penal Code in Chief Magistrate's Court Criminal Case No. 1764 of 1998 and sentenced to death on each count by the Chief Magistrate's court. The Petitioner subsequently lodged a first appeal before the High Court and a second appeal in the Court of Appeal. Both appeals were dismissed and as it stands the Petitioner is serving two life sentences.

2. Brief facts of the case are that on 18<sup>th</sup> October, 1998 at Watamu Village within Malindi District of the Coast Province while armed with knives and iron bar, the Petitioner jointly with others not before court robbed Michael Thoya of two golden chains, one bracelet, a wrist watch make Seiko Quartz and cash Kshs. 67,000 all valued at Kshs. 100,000 and at or immediately before or after the time of such robbery wounded the said Michael Thoya. On Count 2, on the same day within the same locality, while armed with knives and iron bar jointly with others not before court robbed Peninah Wanjiru Macharia of cash of Kshs. 410 and at or immediately before or after the time of such robbery wounded the said Peninah Wanjiru Macharia.

3. The Petitioner now claims that the sentencing to death by the trial court as well as the two appellate courts was an infringement of his fundamental rights. The Petitioner avers that the said courts interpreted the provisions of Section 296(2) of the Penal Code to mean that death sentence was the only sentence available to the Petitioner and that the said courts held the view that the death sentence under the said provisions was mandatory and no other sentence was tenable.

4. The Petitioner further claims that the said courts did not consider the Petitioner's mitigation and as such the sentence is an infringement of the Petitioner's rights under Articles 25(c) and 50(2) of the Constitution.

**Hearing and Submissions**

5. Both the Petitioner and the Respondent filed their submissions which they relied on.

6. It was the Petitioner's submissions that following the celebrated decision in **Francis Karioko Muruatetu & Another –vs- Republic SC PET NO. 15 & 16 of 2015** (consolidated) the mandatory aspect of the death sentence in Section 296(2) of the Penal Code is unconstitutional and that a court can impose a lesser sentence other than a death sentence.

7. The Petitioner further submitted that the death sentence violates his rights and offends the provisions of Article 25(c) & (50)(2) of the Constitution .

8. The Petitioner submitted that it was improper for the trial court to have disregarded his mitigation to give him a maximum death sentence and that the same is contrary to Section 216 and 329 of the CPC as was held in the **Kakamega Petition No. 15 of 2012 Sabastian Okwero Mrefu –Vs- R** . The Petitioner further submits that he has reformed as a consequence of the time served in custody. Further, his health has also deteriorated and as such the Petitioner prays to be released.

9. The Respondent opposed the Petition, but Submitted that the Petitioner be jailed for 23 Years

**The Determination**

10. The Petitioner herein contends that his rights as expressed under Article 25(c) and 50(2) have been infringed.

11. The Petitioner clearly submitted that his criminal case had run its course. The Petitioner comes to this court seeking redress for alleged violation of his rights under the Bill of Rights. He claims that the High Court and Court of Appeal did not find it necessary to consider his mitigation that he was a first offender and the circumstances under which the offence was committed were also not considered.

12. On the issue of sentence, this court agrees with the Petitioner that the Supreme Court case in the case of **Francis Karioko Muruatetu & Another -vs- Republic [2017] Eklr declared** the mandatory nature of the death sentence as provided for under Section 204 of the Penal Code to be unconstitutional. The Petitioner was sentenced to two life sentences by the trial court this was also upheld by the two Appellate Courts as the courts were convinced that all circumstances taken into consideration, the sentence is appropriate. The Petitioner has thus exhausted all his modes of Appeal prompting this Petition.

13. The Court on 6<sup>th</sup> of June, 2019 ordered for a Probation Report which was filed in court on 13<sup>th</sup> September, 2019. The Court having perused the same is satisfied that indeed the Petitioner has reformed. He is also unwell and is HIV Positive. It is important to note that a result of the trial courts sentencing on 10<sup>th</sup> March, 1999, the Petitioner has already served 21 years in custody. In the circumstances, I do hereby set aside the death sentence imposed upon the Petitioner in both counts and in substitution I jail him for both counts to the term already served in prison with the result that the Petitioner is forthwith released unless otherwise lawfully held.

**Dated, Signed and Delivered in Mombasa this 4<sup>th</sup> day of November, 2019.**

**E. K. O. OGOLA**

**JUDGE**

In the Presence of:

Mr. Fedho for DPP

Petitioner in person

Mr. Kaunda- Court Assistant