



**THE REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 51 OF 2018**

**DUNCAN MWEMA.....PETITIONER**

**VERSUS**

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

**JUDGMENT**

1. The Petitioner herein was charged and convicted with the offence of Robbery with Violence contrary to Section 296(2) of the Penal Code in Mombasa Chief Magistrate Criminal Case No. 2687 of 2004 and sentenced to death. The Petitioner subsequently lodged two appeals and the appeals were dismissed.

2. Brief facts of the case are that on 31<sup>st</sup> day of August, 2004 the Petitioner together with others robbed Daniel Muturia of a mobile phone. The Petitioner who was armed with a panga assaulted the complainant by cutting him several times with the panga.

**Hearing and Submissions**

3. The parties filed their submissions and the Petition came up for hearing on 13<sup>th</sup> June, 2019.

4. It was the Petitioner's submissions that he regrets his action and should be jailed for 20 years.

5. The Respondent opposed the Petition, submitting that taking into account the circumstances of the case a deterrent sentence of 20 years including the 15 years served would be sufficient.

**The Determination**

6. On the issue of sentence, this court relies on the Supreme Court case in **Francis Karioko Muruatetu & Another -vs- Republic [2017] eKLR declared** where the mandatory nature of the death sentence as provided for under Section 204 of the Penal Code was found to be unconstitutional. To that extent this court can now resentence the Petitioner.

7. The Petitioner committed a serious crime. I have heard his mitigation that he has a young family and that he has been of good character in prison.

8. However, the offence he committed was grave and shall be adequately punished.

9. I set aside the death sentence and in place thereof I impose jail term of twenty (20) years from the date of arrest.

10. Right of Appeal in 14 days.

**Dated, Signed and Delivered in Mombasa this 5<sup>th</sup> day of November, 2019.**

**E. K. O. OGOLA**

**JUDGE**

In the presence of:

Mr. Fedha for DPP

Petitioner in person

Mr. Kaunda Court Assistant