



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 235 OF 2018

FANUEL OTIENO OMIDO.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT

1. The Petitioner herein was charged and convicted with Robbery with Violence contrary to Section 296 (2); burglary contrary to Section 304(2); stealing contrary to Section 251 of the Penal Code in Chief Magistrate's Court Criminal Case No. 397 of 2003 and sentenced to death. The Petitioner subsequently lodged a first appeal before the High Court and a second appeal in the Court of Appeal.
2. Brief facts of the case are that on 15th and 16th February, 2003 at Mazeras Trading area, Kasemeni Location in Kwale District the Petitioner jointly with others not in court being armed with dangerous weapons namely, pangas, stones, iron bars, bows and arrows robbed of William Mwangi remote control and Kshs. 4,000 all valued at Kshs. 20,000 and at or immediately before or after the time of such robbery wounded the said William Mwangi.
3. The particular of the second count robbery was on 15th and 16th February, 2003 the Petitioner jointly with others not before court being armed with dangerous weapons namely, pangas, stones, iron bars, bows and arrows robbed off Abdi Mohamed one wrist watch make Seiko and at or immediately before or after the time of such robbery threatened to use actual violence to the said Abdi Mohamed.
4. The particular of the third count burglary and stealing charge on 15th and 16th February, 2003 the Petitioner jointly with others not before court broke and entered a dwelling house of Nganasa Mona Bewingo with intent to steal from thereon and did steal cash Kshs. 66,715 the property of Nganasa Mona Bewingo.
5. 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 (as the main charge arose from the robbery) 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.
6. 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 23(1) and Article 165 of the Constitution.

Hearing and Submissions

7. The Respondent filed its submissions on 26.8.19.
8. It was the Petitioner's case that 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. That since his incarceration for the last 15 years he has been affected psychologically and has suffered ill health in breach of his rights. The Petitioner states that for the 15 years he has been in a good relationship with fellow inmates and prison authorities and prays court to allow this Petition and revise his mitigation and sentencing.
9. The Respondent conceded that under the new constitution the mandatory death penalty is untenable, but submitted that the Petitioner be jailed for 25 years including the time served.

The Determination

10. On the issue of sentence, this court agrees with the Petitioner that the Supreme Court case in **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 remaining issue is therefore to re-sentence the Petitioner.

11. The Court on 11.3.19 ordered for a Probation Report. The Court having perused the same is satisfied that indeed the Petitioner has reformed. It is important to note that a result of the trial courts sentencing on 10.12.04 the Petitioner has already served 16 years in custody. In the circumstances, I do hereby set aside the death sentence imposed upon the Petitioner and in substitution the Petitioner is hereby jailed to a term of nineteen (19) years from the date of arrest.

Dated, Signed and Delivered in Mombasa this 13th day of November, 2019.

E. K. O. OGOLA

JUDGE

In the Presence of:

Mr. Fedha for DPP

Petitioner in person

Mr. Kaunda Court Assistant