



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL PETITION NO. 23 OF 2018**

**JUMA ABDALLA MACHIADHA .....PETITIONER**

**VESRSUS**

**REPUBLIC.....RESPONDENT**

*(From the Original Conviction and Sentence in Criminal Case No. 579 of 2004 of the Senior Resident Magistrate, C. Obulutsa at Kilifi)*

**CORAM: Hon. Justice R. Nyakundi**

**Ms. Sombo for the State**

**RULING**

The petitioner was charged and convicted of robbery with violence contrary to Section 296 (2) of the Penal Code. Besides the offence of robbery, the petitioner also was tried for being in possession of a firearm and ammunitions without a firearm certificates contrary to Section 4 (1) (2) of the firearms Act Cap 114 of the Laws of Kenya. In both counts the petitioner was found guilty but the sentence suspended in view of the death penalty.

Being aggrieved with the conviction and sentence for the main charge of robbery the petitioner did file an appeal to the High Court. The High Court then having heard the appeal dismissed the appeal against conviction and sentence. What followed was a petition to this court for re-sentencing.

The only significant event in this matter is the Supreme Court in **Muruatetu 2017 eKLR** which dealt with the unconstitutionality of the mandatory death sentence. One of the key elements was for the consideration by a trial Judge to exercise discretion to decide whether a particular set of facts could be appropriate for the death penalty or any other sentence. The present case is not an appeal against conviction it is for resentencing against the death penalty.

According to the framework in the **Francis Muratetu case** a number of factors were set out to guide the courts in a broader sense to determine the appropriate of a proportionate sentence. Such factors include but not limited to the following:

- a). Age of the offender;***
- b). Being a first offender;***
- c). Whether the offender pleaded guilty;***
- d). Character and record of the offender;***
- e). Commission of the offence in response to gender-based violence;***
- f). Remorsefulness of the offender;***
- g). The possibility of reform and social re-adaptation of the offender;***
- h). Any other factor that the court considers relevant.***

The gravity of the alleged offence under reviewed is plainly a factor of consideration we give for the sentencing court to balance when deciding the appropriateness of sentence.

In relation to the petitioner he submitted that he has been in custody since 2001 when he was convicted but on appeal a retrial was ordered because the prosecutor was not designated and competent under the law to prosecute his case. On account of the retrial a fresh hearing was scheduled before **Hon. Obulutsa** who eventually found him guilty and sentenced him to suffer death on 1<sup>st</sup> April, 2005.

It is the submissions of the petitioner that cumulatively he has been in custody for the last 21 years.

On her part **Ms. Sombo** learned prosecution counsel did not file any submissions on re-sentencing. However, from the mitigation undertaken during the trial sentencing it shows that the petitioner was treated as a first offender. The baseline tendencies of prosecution are to protect society from the offender and deter the offender from reoffending. The rehabilitation and reform of the offender is also another factor to be taken into account. After discussing different approaches to sentencing its emphasized that courts of law tinker within the principles in **Muruatetu decision** to arrive at a just and fair sentence for the offence.

So there are two main approaches to the question of punishment. One is to inquire whether the sentence will fit the crime by punishing the offender. The emphasis here is usually navigating on the rehabilitation, and reform of the offender, while the second approach is to meet the demands of society.

In the persuasive authority of **R v Lutepo Criminal Case No. 2 of 2014 UNC Malawi** the court held:

*“The interest of society demand that those who commit crimes be punished and, in deserving cases, that they be punished severely. As counsel for the defence correctly submitted, we ought to differentiate between what the public interest is and what society wants. Members of society always get what they want as courts do not exist to win popularity contest. In the South African case of Sawule v the State 2014 2 AG PPHC. The court stated:*

*“The art of applying the proper guideline in imposing a sentence is achieved by consideration and an appropriate balancing of what the well-known case of S v Zinn 1969 EA described as a triad consisting of the crime, the offender and the interest of society. Although these interests may be conflicting in nature, it is expected of a sentencing court to keep a fine balance between them, and it must endeavor not to over or under emphasis any one of them.”*

In the instant petition I have considered the aggravating factors as can be deduced from the facts of the offence which occurred while the petitioner was arrested with dangerous weapons. The offence for which the petitioner was convicted has high stakes within the community and a legitimate expectation exist to protect society from such violent crimes.

It is a case with residual psychological trauma to the victims and their nature of justice is long custodial sentences for such offenders or including death penalty. There is no doubt robbery with violence manifest itself as a serious crime with threats of actual violence against the victims.

In determining the sentence to pass against the petitioner I bear in mind that he is a first offender. The petitioner has mitigated that during the period in prison custody he has reformed and ready to integrate back to the community as a law abiding citizen. Further Section 333 (2) of the CPC obligates the court to consider the period in remand custody awaiting trial to be discounted in the event of a prison sentence. From the record, this criteria is favorable to the petitioner. I have also taken into consideration the overall period of 21 years the petitioner has been in custody either in remand or serving sentence. Going by the principles in the **Muruatetu case** I consider this petition as appropriate under the resentence regime and having regard to the mitigation, the character of the petitioner, age, he has no previous record, the time spent in custody as of today they outweigh the aggravating factors of the offence. I am satisfied that 21 years be considered as appropriate and proportionate sentence for both to the petitioner and society in the interest of justice of this case.

Accordingly, the petitioner conviction of the offence of robbery with violence and being in possession of a firearm remains affirmed as per the judgments of the courts. The death penalty is varied, set aside and substituted with a sentence of 21 years which is deemed to be appropriate. The petitioner is therefore set free forthwith to be at liberty unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 11<sup>TH</sup> DAY OF NOVEMBER 2019.**

**R. NYAKUNDI**

**JUDGE**