

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 97 OF 2019

1. JUMA NYAMAI WAMBUA

2. MAXWEL KARANJA.....PETITIONERS

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT

1. The Petitioners herein were charged and convicted with Robbery with Violence contrary to Section 296 (2) of the Penal Code in Chief Magistrate's Court Criminal Case No. 1839 of 2000 and sentenced to death. The Petitioners subsequently lodged a first appeal before the High Court and a second appeal in the Court of Appeal. Both appeals were dismissed.

2. Brief facts of the case are that on the 30th day of June, 2003 at Mathare Village Changamwe, in Mombasa District within the Coast Province, while armed with offensive weapons namely: knives, an iron bar, and a rungu, jointly robbed Linet Lumumba Minayo of one (1) handbag containing assorted clothes, one radio cassette make Sony, personal documents, and cash Kshs. 300/= all valued at Kshs. 18,700/= and immediately before or immediately after the time of such robbery, threatened to use actual violence to the said Linet Lumumba Minayo.

3. The Petitioners are now in this court pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another –vs- Republic SC PET NO. 15 & 16 of 2015** (consolidated) where the mandatory aspect of the death sentence in Section 296(2) of the Penal Code was held to be unconstitutional and that a court can impose a lesser sentence other than a death sentence.

4. Mr. Fedha for the prosecution agreed that the mandatory nature of the death sentence is now unconstitutional but averred that the Petitioners committed a heinous offence but did not injure anybody and should be jailed for 16 years they have been in jail.

The Determination

5. On the issue of sentence, this court agrees with the Petitioners that the Supreme Court 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. Therefore, this Court has the mandate to resentence the Petitioners.

6. The Petitioners have already served 16 years in custody. They are remorseful. Nobody was seriously injured during the robbery. There is also a good report from prison about the Petitioners. This court is satisfied that the Petitioners deserve a second chance and hereby sentences them to 16 years. Having already served the said time, the Petitioners are hereby released and set free unless lawfully held.

Dated, Signed and Delivered in Mombasa this 5th day of November, 2019.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Fedha for DPP

Petitioner in person

Mr. Kaunda Court Assistant