



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

PETITION NO. 40 OF 2018

JOHN MUSYIMI KAMAILI.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

(From the Judgment of the Court of Appeal in Malindi C.A No. 190 of 2010, Bosire, Waki and Visram, JJJA, on 6th October 2011 Mombasa)

CORAM: Hon. Justice R. Nyakundi

Appellant in person

Ms. Mathangani for the state

RULING

John Musyimi Kamaili hereinafter referred as the petitioner has moved this court by way of a petition seeking leave of this court to apply for re-sentencing on the following grounds:

- 1. That the petitioner was charged, tried, convicted and sentenced to suffer death for the offence of Robbery with Violence contrary to Section 296 (2) of the Penal Code.***
- 2. That the Judgment of the Magistrate Court in Criminal case No. 599 of 2008 was delivered on 29.6.2009 when he was found guilty convicted and sentenced to mandatory sentence of death.***

Being aggrieved with the entire Judgment of the trial court he preferred an appeal to the High Court and later to Court of Appeal, both appeals were heard and finally dismissed confirming the Judgment of the trial court that the petitioner has been on death row since the initial conviction by the Learned trial Magistrate. The petitioner has since served a period of 10 years in prison custody.

Brief background

The petitioner was charged with the offence of robbery contrary to Section 296 (2) of the Penal Code. The particulars of the charge were that on the night of the 14.6.2008 at Kilifi plantation area within Kilifi County, Coast province, jointly with others not before court were armed with dangerous weapons namely a pistol and other crude weapons robbed **ELIAKIM KILONZO** of his mobile phone, make Motorola valued at Kshs.4,000/= and cash Kshs.4,000/= and or immediately before and after the time of such robbery used actual violence on the said Kilonzo.

The prosecution summoned seven witnesses who through the evidence discharged the burden of proof beyond reasonable doubt on behalf of the state under Section 107 (1) of the Evidence Act. Having considered the evidence the Learned Magistrate found the petitioner guilty convicted him of the offence. The applicable sentence under Section 296 (2) the petitioner was sentenced to suffer a mandatory death penalty.

As earlier stated both appeals to the High Court and Court of Appeal were all dismissed for lack of merit and the Judgment of the trial Court affirmed.

Determination

The main issue of determination is to consider the principles in the case of **Francis Muratetu [2017] eKLR** in which the Supreme Court

declared the mandatory death penalty unconstitutional. This has formed the anchor for resentencing hearings on all appropriate cases under Section 296 (2) and Section 204 of the Penal Code.

The petitioner therefore, approached this court to reconsider his sentence pursuant to the dicta in **Murutetu case**. The petitioner has explained in his affidavit that over the period he has reformed and ready to be re-integrated back to the society. That while in prison he has gained practical skills both spiritual and practical knowledge which will come in handy in the event this court exercises discretion to release him from prison custody.

According to the submissions by senior prosecution counsel **Ms. Mathangani**, the petitioner has no previous record though she submitted that this court do take note of the aggravating factors based on the nature of the violence meted out against the victims of robbery.

The social inquiry report conducted by the probation officer **Dickens Ngebe** on 30.8.2019 provides a detailed report on the personal circumstances of the petitioner. That, prior to his conviction he was married and blessed with five children. The petitioner is stated to be 49 years old. His past reveals a man who had migrated from his home district to Mombasa in search of green pastures. It was while in the far flung district of Kilifi that he was arrested, charged and convicted with the aforesaid offence.

That given the long incarceration, the prison authorities has not been able to expose him to any of the vocational trainings within the facility in view of the fact that he was on death row. His time in prison has therefore been to mark time awaiting any order of execution of sentence from the executive. In his submissions that order may or may not be issued by the executive during his lifetime.

The jurisdiction of this court is based on the **Francis Muratetu case** where the Supreme Court held clearly that the petitioners were entitled to a re-sentencing hearing and evaluation based on the framework in the said Judgment.

The court decision affected the prisoners who were on death row subject to the provisions of Section 204 and Section 296 (2) of the Penal Code. The right to re-sentencing by various courts is therefore drawn from that fundamental principle.

I have considered the dispositions by the petitioner in his affidavits, the state submissions and a further social inquiry report by the probation officer.

It is accordingly clear that the petitioner is invoking the discretion of this court based on the Muratetu principles. The record of the court shows that the despite the petitioner charged of robbery with violence, there was no life lost nor aggravated factors of grievous harm were present against the victims of the crime. Therefore, from the mitigation factors, the specifics of the crime as deduced from the record and social inquiry report there is every indication that the petitioner can easily be reintegrated into the community to confine rehabilitation and reform programme.

The family which the petitioner had deserted is also ready to partner with the rest of society to have him supported to lead a normal life away from crime.

I am therefore satisfied that the petitioner has demonstrated sufficient grounds to bring his case for review of sentence.

The sentencing guidelines also provides a pathway and factors to take into account in considering any sentence against an offender or convict on review, and or on appeal of sentence.

Accordingly, in this case the mandatory sentence imposed against the petitioner is reviewed and substituted with a sentence of 13 years. The petitioner has already served 10 years in prison custody. In view of the aggravating and mitigating factors and post-conviction pre-sentence report by the probation officer the petitioner is hereby released to serve the balance of 3 years non-custodial sentence on probation to be served at his home district in Mwingi.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 1ST DAY OF NOVEMBER 2019.

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R. NYAKUNDI

JUDGE