



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 178 OF 2018

MOHAMED JUMA MWANDILO.....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) of the Penal Code in Chief Magistrate's Court Criminal Case No. 1934 of 2002 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 11th June, 2002 at about 0900 a.m at Mtongwe in Mombasa, jointly with others not in court and while armed with knives robbed William Maina Kariuki of Kshs. 4,050 in cash and two bottles of soda all valued at Kshs, 4,100 and immediately after the time of the robbery threatened to use actual violence to the said William Maina Kariuki.

3. 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 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.

4. 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 25(c) and Article 50(2) of the Constitution.

Hearing and Submissions

5. Parties filed written submissions.

6. It was the Petitioner's submissions that following the celebrated decision in **Francis Karioko Muruatetu & Another –vs- Republic SC PET NO. 15 & 16 of 2015** (consolidated) 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.

7. Mr. Fedha for the prosecution agreed that the mandatory nature of the death sentence is now unconstitutional but averred that the Petitioner committed a heinous offence which should be punished by a jail term of 20 years.

The Determination

8. On the issue of sentence, this court agrees with the Petitioner 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 Petitioner. To that extent this court only has resentence the Petitioner.

13. The Petitioner has already served 17 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 the term already served in prison with the result that the Petitioner is forthwith released unless otherwise lawfully held.

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