



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 176 OF 2018

SALIM HAMISI MWAHADI.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT

1. The Petitioner herein was charged and convicted with the offences of Robbery with Violence contrary to Section 296(2) of the Penal Code, rape contrary to Section 140 (now repealed) of the Penal Code, burglary contrary to Section 279(b) of the Penal Code and stealing and an alternative charge of handling stolen goods contrary to Section 322(2) of the Penal Code. The Petitioner subsequently lodged two appeals and his appeal was dismissed.
2. Brief facts of the case are that on 25th day of October, 2003 at about 2.30 a.m. at Kisimani area Mombasa while armed with dangerous weapons namely pangas, rungas, and iron bars robbed Tabu Katana Moni of cash in sum of Kshs. 145/= and at or immediately before or after the time of such robbery used actual violence to the said Tabu Katana Moni. On the same date at about 2.30 a.m. at Kisimani area in Mombasa District within Coast Province the Petitioner had carnal knowledge of Fatuma Kalama without her consent. On the same day at 5.00 a.m. at Kisimani area Mombasa District within Coast Province, dishonestly received and retained one mattress knowing or having reasons to believe it to have been stolen.

Hearing and Submissions

3. The parties filed their submissions and the Petition came up for hearing on 25th September, 2019.
4. It was the Petitioner's submissions that he has reformed and should be jailed for 20 years.
5. The Respondent opposed the Petition, submitting that taking into account the circumstances of the case a deterrent sentence of 35 years including the 16 years served would be sufficient.

The Determination

6. On the issue of sentence, this court relies on the Supreme Court case in **Francis Karioko Muruatetu & Another -vs- Republic [2017] eKLR declared** where the mandatory nature of the death sentence as provided for under Section 204 of the Penal Code was found to be unconstitutional. To that extent this court can now resentence the Petitioner.
7. The Petitioner committed serious crimes. He did not come across as remorseful or having reformed, although the prison progress report says that he is a good person in prison.
8. I have considered the Petitioner's mitigation. I herewith set aside the death sentence and in place thereof impose a jail term of thirty (30) years from the date of arrest. Right of Appeal in 14 days.

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