



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 47 OF 2018**

**STEPHEN ASANGA KAZUNGU.....PETITIONER**

**VERSUS**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT**

**JUDGMENT**

1. The Petitioner herein was charged and convicted with the offence of Robbery with Violence contrary to Section 296(2) of the Penal Code. The Petitioner 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 13/5/1997 at Changamwe within Coast province while armed with dangerous weapons violently robbed the complaints of Kshs. 75,000 and package of cigarettes. Being aggrieved by the sentence the Petitioner appealed to the Court of Appeal at Mombasa which issued Judgment on 19<sup>th</sup> January 2001 dismissing the Appeal and enhanced the sentence to Mandatory Sentence of death.
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 death sentence issued by the Court of Appeal was cruel, inhuman and degrading.
4. The Petitioner further claims that the said courts did not consider his mitigation and as such the sentence is an infringement of the Petitioner's rights under Articles 25 and Article 29 of the Constitution.

**Hearing and Submissions**

5. The parties filed their submissions and the Petition came up for hearing on 25<sup>th</sup> September, 2019.
6. It was the Petitioner's submissions that he has reformed, is now a teacher in prison and makes clothes and uniforms worn in prison. He is also the head boy of the Shimo La Tewa prison. The Petitioner submitted that he should be sentenced to the 21 years he has served. The prosecution, on the other hand noted that although nobody was seriously injured in the robbery, the offence is grave and should be punished heavily with a sentence of 28 years.

**The Determination**

7. 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.
8. The Petitioner has already served 21 years in custody. He is remorseful. Further he serves as a Trustee in the prison and is currently the Head Boy. This shows that he has reformed and is in a position of responsibility which this court should consider.
9. Under the circumstances this court is satisfied that the 21 years behind the bars is sufficient punishment for the Petitioner.
10. The upshot is that the Petitioner is hereby sentenced to 21 years served, with the result that the Petitioner is hereby released and set free unless lawfully held.

**Dated, Signed and Delivered at Mombasa this 5<sup>th</sup> day of November, 2019.**

**E. K. O. OGOLA**

**JUDGE**

In the presence of:

Mr. Fedha for DPP

Petitioner in person

Mr. Kaunda Court Assistant