



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 40 OF 2018

STEPHEN TWANZEPETITIONER

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. 4296 of 1994 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 September, 1994 at about 0300 a.m. at Nyali Estate, Mombasa jointly with others not before court robbed Cyril Ondat of household goods valued at 500,000 and at or immediately before or after the time of such robbery wounded the said Peninah Wanjiru Macharia.

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 28 and Article 50(2) (q) of the Constitution.

Hearing and Submissions

5. The Petitioner filed his submissions but the Respondent chose to orally submit.

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. The Petitioner further submitted that the death sentence violates his rights and offends the provisions of Article 28 and Article 50(2) (q) of the Constitution.

8. The Petitioner submitted that it was improper for the Court of Appeal to give him a death sentence, and that the trial court disregarded his mitigation and gave him a maximum death sentence. The Petitioner further submits that he has reformed as a consequence of the time served in custody. He has acquired Grade 1 Welder (Electric) Endorsements, Grade 2 Motor Vehicle Mechanic Endorsements, Bible Course Certificate and Alternative to Violence Training Certificate and as such prays to be released as the skills acquired would be more beneficial to the community. That he was 37 years when he committed the offence. He is now 61 years old and has already served 25 years in prison. That he promises to be a good man in the society as he has grandchildren.

9. The Respondent opposed the Petition, submitting that the Petitioner be jailed for 35 Years.

The Determination

10. On the issue of sentence, this court agrees with the Petitioner that the Supreme Court case in the case of **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. To that extent this court only has to resentence the Petitioner.

11. The Court on 6th of June, 2019 ordered for a Probation Report which was filed in court on 27th August, 2019. The Court having perused the same is satisfied that indeed the Petitioner has reformed. It is important to note that a result of the trial courts sentencing on 6th February, 1996 the Petitioner has already served 25 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 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