



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 142 OF 2018

**IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010 (SUPERVISORY
JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOM
OF AN INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES 2013**

AND

IN THE MATTER: OF: ARTICLE 22(1) OF THE CONSTITUTION

AND

**IN THE MATTER OF: ARTICLES 19, 20, 21, 22, 23, 24, 25,
27, 28, 48,50, 258 AND 259 OF THE CONSTITUTION**

BETWEEN

THOMAS MORARA NYAMBEGA.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT

1. The Petitioner herein seeks a resentencing pursuant to the Supreme Court decision in **Francis Karioko Muruatetu vs. Republic [2017] eKLR**.

2. The Petitioner was tried and convicted of the offence of robbery with violence in the Mombasa Chief Magistrate Court Criminal Case No. 2177 of 2007. He was sentenced to death and has been in jail for 12 years and thereby exhausted his Appeal process. The Petitioner was involved in two counts of robbery with violence where he jointly with others armed with pistols robbed their victims of their foreign currency and mobile phones all valued at Kshs. 14,590,330/= and at or immediately after the time of robbery threatened to use actual force to the said victim.

3. **Mr. Fedha** for the prosecution prays for a deterrent sentence of 23 years since there is no evidence that he has reformed.

4. The Petitioner submits that nobody was injured during the robbery and he did not benefit from the crime as all the money was recovered from him. He also submitted that he was a first offender and that he is very remorseful, repentant and greatly regrets committing the offence. He further submits that the 12 years he has done in jail is enough punishment and that he has reformed through the rehabilitation programmes initiated by the prison department, he has studied religious teachings and obtained a certificate and has also studied a paralegal course and acquired skills which can help him earn a living for himself and his family and provide school fees for his children once set free.

5. I have carefully considered the issue at hand. Under the proviso to **section 333(2)** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**, the court is entitled to take into account the period the petitioner has spent in custody in determining the sentence. I have

noted that the Petitioner has been in custody for approximately 12 years. The aim of punishment is community protection, deterrence, retribution, rehabilitation, restorative Justice and reformation.

6. The Probation Report dated 21st August 2019 about the Petitioner indicates that the Petitioner is God fearing and that he is positive for release.

7. His Prison's Progress Report indicates that he is of good conduct as he has been baptized, has undergone two theological biblical training, he is an educator within Shimo la Tewa Prison to new inmates on legal matters and he is remorseful.

8. I have considered judgments of Superior Courts that are intended to ensure consistency and fairness. In the case of **Wycliffe Wangusi Mafura v Republic ELD CA Criminal Appeal No. 22 of 2016 [2018] eKLR**, the Court of Appeal imposed a sentence of 20 years where the appellant was involved in robbing an Mpesa shop with the use of a firearm with which he threatened the attendant but was caught before he inflicted any violence on her.

9. I have carefully considered the petition and submissions of parties, and relevant judicial authorities on resentencing for similar offences. I have also considered mitigating and aggravating factors, the fact that the Petitioner has undertaken courses as a way of reformation. I have also considered the prison Progress Report on the prisoner which has lauded his counselling and para-legal skills and services to the prisoners. I have also over the time seen his demeanour in court and his demonstrated willingness to help his fellow inmates. I am satisfied that he Petitioner is indeed reformed, and if his services to fellow prisoners were the only factor to count, I would altogether release the petitioner. However, the Petitioner must still adequately pay for his crime. It is indeed in the consideration of above premises that I now set aside the death sentence imposed on the Petitioner and substitute there for a term of sixteen (16) years imprisonment.

10. The Petitioner is also entitled to benefit from remission of sentence as provided under Section 46 of the Prisons Act **if he meets the conditions.**

That is the Judgment of the Court.

Dated, Signed and Delivered at Mombasa this 7th day of November 2019.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Fedha for DPP

Petitioner in person

Mr. Kaunda Court Assistant