

THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 179 OF 2018

THEOPHILUS MUTHAMI.....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 in Criminal Case No. 1839 of 2003 and sentenced to death on 20/11/2003. His appeal failed and he has now filed this petition for resentencing pursuant to the Supreme Court's decision in **Francis Karioko Muruatetu & Another –vs- Republic SC PET NO. 15 & 16 of 2015** (consolidated) which decided that 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.

2. Parties filed submissions on the resentencing. Mr. Fedha learned counsel for the prosecution agreed that the mandatory nature of the death sentence is now unconstitutional but averred that the Petitioner committed a heinous offence and should be jailed for the time he has already served. The Petitioner agreed with the prosecutor on the length of sentence.

The Determination

3. This court agrees with the Petitioner and with the prosecution that it has the mandate to resentence the Petitioner.

4. The court also agrees with the prosecution that the Petitioner be sentenced to the period of 16 years already served. The Petitioner is remorseful. He robbed using a knife but nobody was injured in the robbery.

5. The upshot is that the Petitioner is sentenced for the period already served with the result that he is hereby released and set free 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