



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 116 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

VINCENT OPOLOI ONGALA.....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 Bungoma Chief Magistrate Court Criminal Case No. 1385 of 2006. He was sentenced to death and has been in jail for 13 years and thereby exhausted his Appeal process. The Petitioner was involved in robbery with violence jointly with others armed with a firearm. He threatened his then employer, robbed him, gagged him, tied him up and locked him in his bathroom.

3. **Mr. Fedha** for the prosecution prays for a deterrent sentence of 20 years since there is evidence that the Petitioner has reformed.

4. The Petitioner submits that he is a first offender, he is very remorseful, repentant and greatly regrets committing the offence and apologizes before this Court. He further submits that the 13 years he has done in jail is enough punishment and that he has reformed through the rehabilitation programs initiated by the prison department. He has studied religious teachings and obtained Certificates and three (3) Diplomas in Biblical studies. Also, the Petitioner has acquired grade three carpentering and a tailoring skills which can help him earn a living 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)**, this 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 13 years. The aim of punishment is community protection, deterrence, retribution, rehabilitation, restorative Justice and reformation.

6. The Probation Report dated 6th May 2019 from the State Department for Correctional indicates that the Petitioner is humble, God fearing and well disciplined.

7. His Prison's Progress Report indicates that he has undergone two theological biblical training, has a certificate in psychological studies, he is an educator within Shimo la Tewa Prison to inmates on Cristian Religious Education and biology and he is remorseful.

8. I have considered judgments of Superior Courts that are intended to ensure consistency and fairness. In the case of **Robert Mutashi Auda vs. Republic, Nairobi Criminal Appeal No. 247 of 2014**, the Court of Appeal held as follows...

“We also appreciate the fact that the appellant has already served 13 years in prison which in our view is sufficient retribution on his part. Taking all these issues into account, we are persuaded to interfere with the death sentence imposed on the appellant and reduce the same to the term already served. The appellant's appeal therefore succeeds in part only as far as the sentence is concerned as the conviction remains undisturbed. We order that the appellant be set at liberty unless he is otherwise lawfully held.”

9. I have carefully considered the Petition, submissions by 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 various courses as a way of reformation. I have also considered the prison Progress Report on the prisoner which has lauded his teaching skills to the prisoners and guidance and counselling.

10. In the premises, I hereby set aside the death sentence imposed on the Petitioner and in place thereof I impose a jail term of twenty (20) years from the date of arrest.

That is the Judgment of the Court.

Dated, Signed and Delivered at Mombasa this 13th day of November 2019.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Fedha for DPP

Petitioner in person

Mr. Kaunda Court Assistant