



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 66 OF 2017

WILSON GITHINJI MWANGI.....PETITIONER

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 Nyeri Chief Magistrate's Court Criminal Case No. 1404 of 1999 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 15th July, 1999 at about 6 p.m the accused together with 3 others way laid Josephine Wanjiru Muriuki as she was climbing stairs to her home, they intercepted her and robbed her of her kiondo which contained jacket, a table cloth, a handkerchief, a packet of matches, a kilogram of sugar and a packet of omo washing powder. According to her the Appellant had a pistol which he pointed at her ear, fired but missed her as she ducked to avoid it

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 25 and Article 22(1) of the Constitution.

Hearing and Submissions

5. The matter came up for hearing on 18th June, 2019.

6. It was the Petitioner's submissions that he was sentenced to death in 1999, has been in prison for 20 years. That he is 44 years and that for the 20 years he has been in custody he has reformed and has learnt carpentry and that he would wish to be released so that he goes back to his family.

7. The Respondent (DPP) through its Counsel Mr. Fedha submitted that the Petitioner at the time of committing the offence was handling a gun. Nobody was injured but he used force during the robbery. That he should be jailed for 25 fine of which should be suspended and put on probation

The Determination

8. On the issue of sentence, 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.

9. The Court on 31st, July, 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 in 1999 the

Petitioner has already served 20 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 7th day of November, 2019.

E. K. O. OGOLA

JUDGE

In the Presence of:

Mr. Fedha for DPP

Petitioner in Person

Mr. Kaunda Court Assistant