



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

PETITION NO. 67 OF 2017

AMANI SAID KIBAO.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONRESPONDENT

JUDGMENT

1. The Petitioner was charged and convicted with robbery with violence contrary to Section 296 (2) of the Penal Code in Criminal Case No. 1786 of 2009 and sentenced to death by the Principal Magistrate's court. The Petitioner subsequently lodged a first appeal before the High Court and a second appeal in the Court of Appeal. Both appeals were dismissed and as it stands the Petitioner is serving a life sentence after the death sentence was commuted.

2. The petitioner sought and was granted leave to amend his petition to include a prayer challenging the sentencing. Subsequently he filed undated Petition on 9. 11. 2018. The petitioner is seeking to have the sentence of death imposed against him set aside because it violates his constitutional rights. The petitioner is also seeking to have his case reviewed and mitigation taken as he was not allowed to mitigate before the trial magistrate. His petition is premised on inter alia grounds that; his right to fair hearing was violated by reason that he was not supplied with the prosecution evidence prior to his trial to choose the course of his defence and that his conviction is a null and void because one of the High Court Judges failed to sign the Judgment.

3. The brief facts of the case are that on 9.12.2009 at Timboni village in Malindi, the Petitioner jointly with others and while armed with offensive weapons namely an iron bar, robbed Alex Katana Jackson of a motorcycle valued at Kshs. 80,000/= and immediately after the time of such robbery killed the said Alex Katana Jackson.

4. The petitioner submitted that he was charged with the offence of robbery with violence and was convicted and sentenced to death. The petition questioned the guilt or innocence of the petitioner on the grounds that he was not supplied with evidence of the prosecution prior to the trial and that one of the High Court Judges failed to sign the judgment. He also submitted that the sentence meted out by the court violates his Constitutional rights. He submitted that the death sentence is arbitrary and disproportionate. It denies the petitioner the right to life. The petitioner alleges that he was not allowed to mitigate.

5. It was his further submission that this Court has the jurisdiction to re-hear his case and to consider that he is a first time offender and determine an appropriate sentence rather than sentencing the Petitioner to death. To buttress his argument, the petitioner relied on the cases of **Douglas Muthaura Ntoribi Misc. Application Appeal No. 4 of 2015 at Meru Court** and **Daniel Chege Magotho Criminal Appeal No. 361 of 2009 at Nairobi High Court**.

6. The Petitioner admitted that he did wrong but was misled by the people he associated with. Having served 10 years he pleads with this Court to release him. In the alternative if the worst has to happen he seeks the court to consider a jail term of 20 years including the years already served, as appropriate.

7. Mr. Fedha, State Counsel, opposed the application and submitted that the petitioner was armed with iron bar and killed the Complainant before stealing the motor cycle. On arrest he directed the police to the bush where he had dumped the deceased body which was already decomposing. The learned Counsel further submitted that the Petitioner did not provide any prisoners report. Based on the circumstance of the charge Mr. Fedha submitted that the Petitioner be subjected to a jail term of 60 years including the 10 years already served in prison.

8. I have considered the submissions. The principle in sentencing is that the Court should take into account the mitigation offered by the Petitioner, the facts of retribution, rehabilitation and reformation. The court should ask itself whether the Petitioner is remorseful, and has sufficiently been rehabilitated and reformed to reasonably be expected to assume life in a free and orderly society. In this case it has been submitted that no prison report has been provided by the Petitioner. This court must also look at the nature of the offence the Petitioner was convicted for, and how it has affected the victims.

9. In the instant case the Complainant was killed in the cause of the robbery.

The Determination

10. On the issue of sentence, this court agrees with the Petitioner that the Supreme Court 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 extend this court has to resentence the Petitioner.

11. On sentencing it is the finding of this court that the crimes committed by the Petitioner were so grave and caused death to an innocent person. That crime must be met with adequate punishment to send a clear message that crime does not pay, and shall be heavily punished once established. For the foregoing reasons I hereby set aside the death sentence imposed on the Petitioner by the trial court. Instead thereof I jail the Petitioner for a term of 40 years from the date of arrest.

3. Right to Appeal in 14 days.

Dated, Signed and Delivered at Mombasa this 11th day of December, 2019.

E. K. OGOLA

JUDGE

In the presence of:

Ms. Ngina for DPP

Petitioner in person

Mr. Kaunda Court Assistant