



IN THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 126 OF 2018

DZOMBO NGOKA JUMA.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECTIONS.....RESPONDENT

JUDGMENT

1. The petitioner herein was charged and convicted with Robbery with Violence contrary to Section 296 (2) of the Penal Code in Principal Magistrate's Court Criminal Case No. **2919 of 2005** and sentenced to death. The Petitioner subsequently lodged a first appeal before the High Court and second appeal in the Court of Appeal.

2. Brief facts of the case are that on 12th August, 2005 at about 0100 a.m at Gandini Village of Kwale County, jointly with others not in Court and armed with Pangas and rungas broke open the door and intruded into the house of Luvuno Charles Ruwa and robbed the following items valued at Kshs.50,00/= from her house. The items stolen were: 2 bed covers, books, A radio cassette, television set, solar panels and a bag containing Kshs.2000/=.

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. He now seeks resentencing pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another vs. Republic [2017]eKLR** which decided that the mandatory death sentence is unconstitutional.

4. The Petitioner has been in custody for 14 years. He submitted that the said period of 14 years is enough punishment for the crime he was convicted for; and that he has reformed while in prison custody and remorseful of his actions therefore he should be released to seek further medication since he is a sick person.

5. Mr. Fedha for the prosecution submitted that the Petitioner together with others broke into the complainant's house and robbed goods worthy Kshs.50,000/=. He urged the court to impose a definite sentence of 25years including years served.

6. 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. This court must also look at the nature of the offence the Petitioner was convicted for, and how it has affected the victims.

7. In the instant case the Complainant was not injured in the cause of the robbery. Some of the items stolen were recovered, that is, the Radio, Television set and the Solar panel were found.

The Determination

8. 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. Therefore this Court has the mandate to resentence the Petitioner. The Petitioner has served 14 years in custody. This court is cognizant to the fact that the pain done to the complainant cannot be atoned for by any imprisonment. Also the Complainant recovered part of her stolen items. When all the factors are considered, I am persuaded that a sentence of eighteen (18) years serves the objectives of punishment. In the circumstances, I do hereby set aside the death sentence imposed upon the Petitioner and in substitution the Petitioner is hereby jailed to a term of 18 years from the date of arrest.

That is the Judgment of this Court.

A right of appeal within 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