



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: A.K NDUNG'U J.

CONSTITUTIONAL PETITION NO. 103 OF 2019

JAPHETH MORARA.....PETITIONER

VERSUS

REPUBLIC THROUGH ODPP.....RESPONDENT

RULING

1. The Notice of Motion before Court is undated but filed in court on 13/11/2019. The prayers sought are;

1. THAT, this petition be certified as urgent and be heard on priority basis.

2. THAT, this honourable court be pleased to declare that my rights under Article 22, 27(1)(2), 28, 50(2)(p) and 165 of the Constitution were breached hence need for ordering a remission and a reduction of the sentence imposed against me the petitioner herein.

3. THAT, further grounds are as per the petition, affidavit and oral.

4. THAT, the cost of or in this petition be waived as the petitioner is a convict and be treated as a first offender and as a pauper.

2. In the supporting affidavit the applicant depones that he was sentenced to suffer death after a trial at the High Court. On appeal, the conviction was upheld but the sentence was set aside and substituted with a sentence of 20 years imprisonment to take effect from the date of the judgment of the High Court.

3. In the petition filed at paragraph 5, the applicant asks the court to consider his mitigation factors and the sentence be counted from the date of his arrest. At paragraph 8 he asks the court to consider placing him on probation.

4. I have considered the petition. The facts and prayers are somewhat jumbled up and I suppose this arises from the fact that the petition is drawn by the applicant in person and I appreciate his ignorance in matters law and procedure.

5. What emerges for determination is whether the sentence of 20 years imposed by the Court of Appeal should be set aside and substituted with a sentence to run from the date of the applicant's arrest or with one placing the applicant on probation.

6. From the Judgement of the Court of Appeal, the unconstitutionality of the death sentence imposed by the High Court is addressed. The Court of Appeal citing the Supreme Court decision in **Francis Muruatetu & Others –Vs- Republic and Others** stated;

“In sentencing the appellant to death, the learned judge did not exercise any discretion as he considered the sentence of death to be the only sentence prescribed by law. In accordance with the Supreme Court decision in **Francis Muruatetu & Others –Vs- Republic and Others, Petition No. 4 of 2015**, the mandatory nature of the death sentence as provided for under section 204 of the Penal Code was declared unconstitutional. Thus, taking into account the circumstances of the case, the court has the discretion to impose a sentence other than death. The appellant was given an opportunity to mitigate but did not say anything other than reiterating that he did not murder the deceased. Given the circumstances of this case, we believe that had the learned judge exercised his discretion in sentencing, a sentence of twenty (20) years would have been appropriate.”

7. To that extent, the applicant's constitutional right which had been taken away by the High Court at sentencing was restored.

8. Under paragraph 20 of the judgment of the Court of Appeal, the court was clear that the sentence was to run from the date of the judgment of the High Court.

9. In light of the above, the petitioner's prayers are tantamount to asking the court to sit on appeal on the judgement of the Court of Appeal. The Court of Appeal has in its judgment, enforced the applicant's rights on discretion of the court in sentencing. There is absolutely no basis upon which to interfere with the sentence imposed by the Court of Appeal and in any event I lack the requisite jurisdiction so to do.

10. On the issue of ordering a remission on reduction of the sentence, that is a matter better left to prison authorities to consider within the provisions of **S 46(i)(ii)** of the **Prisons Act**. I cite with approval the words of Odunga J in **Sammy Musembi Mbugua and Others –Vs- Attorney General and Kenya Prison Service** where he stated;

“However, as appreciated by the Petitioners, the power to grant remission should not be confused with the right to remission. While there is a right to remission, the power to exercise it and the circumstances under which it is to be exercised must remain as provided for under **section 46** of the **Prisons Act**. Just like my learned brother in the above case, I find that the only part of **section 46(1)** of the **Prisons Act** that is unconstitutional is that which denies remission to persons sentenced to imprisonment for an offence under **section 296(2)** of the **Penal Code**.”

11. The upshot is that I find the Notice of Motion and Petition herein without merit and dismiss the same.

Dated, Signed and delivered at Kisii this 11th day of December, 2019

A.K NDUNG’U

JUDGE