



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTION AND JUDICIAL REVIEW DIVISION

PETITION NO. 135 OF 2018

JUMA BAYA.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT

1. **Juma Baya**, the petitioner herein, was convicted for the offence of robbery with violence contrary to section 296(2) of the Penal Code in Mombasa Chief Magistrate's Court criminal case 4113 of 2001. He was sentenced to death. His appeals to the High Court and the Court of appeal were unsuccessful. He filed an application on 2nd May, 2018 before this court seeking for re-hearing of his sentence following the Supreme Court decision in **Francis Karioko Muruatetu & Another – Vs- Republic (2007) eKLR** where the said court declared the mandatory nature of death sentence for murder to be unconstitutional. It is on this basic ground that the petitioner has filed his petition for re-sentencing.

2. The brief facts of the case against the petitioner were that the petitioner together with others attacked the complainant on the material night at about 9.45pm at a building where he lived with his family and operated a shop at the rear part of that building. They stuffed the complainant's mouth with a piece of clothing and cut the complainant at the neck and chin while demanding money. They pushed the complainant into his bedroom and robbed him Kshs. 18,000/=, a wristwatch, beads, a bracelet of gold and golden bangles. The commotion at the bedroom attracted the complainant's son who went to rescue his father. His attempts were futile since the Petitioner got hold of him, cut his chin and pushed him under the bed. The complainant and his son screamed and when the neighbours came to the scene, they locked the shop from outside. The Petitioner and his co-attackers were trapped and could not escape; they climbed into the ceiling and hid themselves. Police came and ordered the Petitioner out of the ceiling. From them the police recovered all the property forcibly taken from the complainant together with the pangas and knives used to injure the complainants. The Petitioner was arrested and charged, convicted and sentenced to death.

3. The Petitioner mitigated that he was imprisoned sometime in the year 2001 while he was 19 years old and it would be unfair to expect him to serve the rest of his life in prison. That the period that he has served in prison custody is sufficient punishment. He relied on the case of **Douglas Muthaura Ntoribi, Meru High Court Misc. App. No. 4 of 2015**. He also submits that he was a first time offender. That he has had no criminal record while serving time in prison. That there is no evidence that he cannot be a reformed man.

4. Mr. Fedha for the Prosecution submitted that the petitioner injured the complainant and his son by cutting the two at their neck and chin. He prays the court to issue a definite sentence of 30 years including years served due to circumstances surrounding the Petitioner's charge.

5. I have carefully considered the rival arguments made by the Petitioner and the Respondent. I have also considered the principle in sentencing. 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.

6. In the cause of the robbery the complaint was injured using a sharp instrument.

The Determination

7. 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 was aged 19 years when he

committed the offence.

8. In **Francis Karioko Muruatetu & Another –Vs- Republic (2007) KLR** the Supreme Court stated the following guidelines as mitigating factors in a re-hearing sentence for the conviction of a murder charge:-

- (a) age of the offender;*
- (b) being a first offender;*
- (c) whether the offender pleaded guilty;*
- (d) character and record of the offender;*
- (e) commission of the offence in response to gender-based violence;*
- (f) remorsefulness of the offender;*
- (g) the possibility of reform and social re-adaptation of the offender and*
- (h) any other factor that the court considers relevant.*

9. Having considered the mitigating factors and aggravating factors as laid out in the preceding paragraph, I note that the petitioner was a young person in his teens when he committed the offence. Taking all the above into consideration I am of the view that a jail term of twenty (20) years is sufficient punishment for the offence committed by the petitioner. The death sentence is therefore set aside and in place thereof I impose a jail term of twenty (20) years from the date of arrest.

That is the judgment of this Court.

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