



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

PETITION NO. 192 OF 2018

JUMA OMAR MWALEWA.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT

1. The Petitioner was charged and convicted with robbery with violence contrary to Section 296 (2) of the Penal Code in Mombasa Criminal Case No. 2083 of 2009 and sentenced to death by the Chief 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 his death sentence was commuted.
2. The brief facts of the case are that on 5.6.2009 at Mlima Estate, Likoni location in Mombasa, the Petitioner jointly with others while armed with pangas and knives robbed Victor Matele Keli of One motor cycle valued at 75,000/= and cash Kshs.700 and used actual violence at the time of robbery. The Complainant was a bodaboda operator and was on the Material day approached by the Petitioner who he knew before, to take him to Mlima Estate. On the way and upon reaching Nairobi area, the Petitioner told the Complainant to stop, since the Petitioner said he wanted to wake up some people who were sleeping in a building which was under construction. The Petitioner whistled and two people emerged while armed with pangas and used actual violence at the time of robbery to the Complainant. When the Complainant managed to escape, the Petitioner took the Motorbike to Likoni Police Station and claimed that he found it lying on the road. He was later arrested and charged with the offence.
3. The Petitioner submitted that the sentencing to death by the trial court as well as the two appellate courts was unconstitutional as decided in the Supreme Court decision in **Francis Karioko Muruatetu & Another vs. Republic [2017]eKLR**.
4. The Petitioner has been in custody for 11 years. He submitted that he has reformed while in prison custody and that he is remorseful of his actions therefore he should be released to seek further medication since he is a sick person.
5. Mr. Fedha, State Counsel, opposed the petition and submitted that the petitioner was armed with panga and cut the head of the Complainant meaning that he intended to kill the Complainant. Based on the circumstance of the charge Mr. Fedha submitted that the Petitioner be jailed for a term of 30 years including the years already served in prison.
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 injured using a sharp object in the cause of the robbery. This Court cannot tell the condition of the Victim by now.

The Determination

8. On the issue of sentence, this court agrees with the Petitioner that the Supreme Court in **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.

9. The Petitioner has served 11 years in custody. I have considered his mitigation, and herewith set aside the death sentence imposed on the Petitioner, and instead thereof I jail the Petitioner to a term of eighteen (18) years from date of arrest. Right of appeal in 14 days.

That is the Judgment of the Court.

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

E. K. OGOLA

JUDGE

In the presence of:

Ms. Mutua for DPP

Petitioner in person

Mr. Kaunda Court Assistant