



**IN THE REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 100 OF 2019**

**MZUNGU RUWA KUTA.....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 12<sup>th</sup> 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.50,000/= 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 integrate with the society. He invites the Court to consider cases with similar circumstances as his to wit, the case of **John Kathia Mitobi –vs- Republic Petition No. 49 of 2018** at Meru Court, **Simon Ndungu Kinuthia-vs- Republic Petition No. 1 of 2017** and in **Moses Odongo Odinga –vs- Republic Petition No. 4 of 2017**.

5. Mr. Fedha for the prosecution relied on the submissions he made on Petition No. 126 of 2018 since the two matters are related. The respective Petitioners were co-accused. He 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 25 years 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.

**The Determination**

8. On the issue of sentence, this court agrees with the Petitioner that the Supreme Court in 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. However, an offence of robbery with violence is a serious offence which must be properly punished. In the circumstances I hereby set aside the death penalty and sentence the Petitioner to serve a term of 18 years from the date of arrest. That is the Judgment of the Court.

Right of appeal in 14 days.

**Dated, Signed and Delivered at Mombasa this 11<sup>th</sup> day of December, 2019**

**E. K. OGOLA**

**JUDGE**

In the presence of:

Ms. Ngina for DPP

Petitioner in person

Mr. Kaunda Court Assistant