



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**CONST. CRIMINAL PETITION. NO. 11 OF 2015**

***(Consolidated with Petition No. 1 of 2018 and Petition No. 11 of 2018)***

**JUSTUS MUGANDA MACHIRA.....PETITIONER**

**-versus-**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The Petitioner herein, **Justus Muganda Machira**, was charged, tried and convicted of the offence of Robbery with Violence contrary to **Section 296(2)** of the **Penal Code Cap. 63** of the Laws of Kenya. He was subsequently sentenced to suffer death. That was in **Migori Senior Principal Magistrate's Court Criminal Case No. 891 of 2006** (hereinafter referred to as '**the criminal case**').

2. The Petitioner then lodged an appeal before the High Court at Kisii. It was Criminal Appeal No. 186 of 2007. The appeal was heard and dismissed by **Makhandia & Sitati, JJ.** on 24/02/2011. The Petitioner then lodged a second appeal to the Court of Appeal at Kisumu which appeal is still pending since 2011.

3. The Petitioner then opted to separately exercise his rights under **Article 50(6)** of the **Constitution** in seeking for a retrial of the criminal case in **Petition No. 11** of **2015**. He further filed **Petition No. 1** of **2018** challenging the death sentence as unconstitutional. He then filed **Petition No. 11** of **2018** challenging the mandatory nature of the death sentence.

4. All the three Petitions were heard by way of oral submissions 09/07/2018. At the hearing of the Petitions the Petitioner appeared in person and **Miss Atieno** Learned Prosecution Counsel appeared for the State. The Petitioner challenged the way the criminal case was investigated and that the case was not proved in law given that the defence was not even properly considered. He further contended that since the officer who tried him had been rendered out of service of the Judiciary then he ought to benefit from such officer's exit and be freed. He also contended that even if the retrial is not granted then he ought to benefit from a sentence re-hearing. The State did not oppose the Petitions.

5. I will take the following position in this matter. Since the Petitioner has a pending appeal before the Court of Appeal then all the issues raised in the three Petitions can be competently considered by the appellate court. It is for this reason that the Petitions cannot stand. Given that the Petitioner's appeal has been pending before the Court of Appeal since 2011 the Petitioner may formally bring that to the attention of the Deputy Registrar of the Court of Appeal for further guidance.

6. Consequently, all the three Petitions herein are hereby dismissed as a result of the pending appeal before the Court of Appeal.

It is so ordered.

**DELIVERED, DATED and SIGNED at MIGORI this 11<sup>th</sup> day of October 2018.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open court and in the presence of: -**

**Justus Muganda Machira**, the Petitioner.

**Mr. Kimanathi**, Senior Principal Prosecution Counsel instructed by the Office of Public Prosecutions for the Respondent.

**Evelyne Nyauke** – Court Assistant