



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 15 OF 2018

AND

IN THE MATTER OF SECTION 296 (2) AND 203 AS READ WITH 204 OF THE PENAL CODE CAP 63

BETWEEN

JULIUS KWIRIA M'IBAYA.....PETITIONER

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

RULING

1. This is a Petition by which **Julius Kwiria M'ibaya** (“the petitioner”) has sought for an order that the court do call for and review orders made under *Section 296(2) of the Penal Code, Cap 63, Laws of Kenya* which is being served by him on the alleged contention the court has found the said section to be unconstitutional in *Joseph Kaberia and 11 others vs. Attorney General [2016] eKLR*.

2. What I understood the petitioner to say is that, in view of the decision which declared the mandatory death sentence under *section 296(2)* to be unconstitutional, his death sentence that was metted out on him should be reviewed.

3. The petitioner stated that he was convicted of the offence of robbery with violence in the **Maua Chief Magistrates Criminal Case No. 2064 of 2000**. This was upheld by the High Court in **HCCr Case No. 153 of 2002**, Meru and the **Court of Appeal at Nyeri CA CRA No. 180 of 2005**. That in view of the holding of the Supreme Court’s decision declaring the death sentence in capital offences unconstitutional in the case of *Francis Kariuki Muruatetu & another v Republic & 5 others [2016] Eklr*, his sentence should be reviewed.

4. When the matter came up for hearing, Mr. Gitonga, learned prosecutor conceded to the application and urged that the petitioner should be referred back to the trial court for re-sentencing.

5. Reading the petition and the Motion, it is clear that what the petitioner is seeking is the declaration that the sentence under *section*

296 (2) of the Penal Code CAP 63 Laws of Kenya is unconstitutional. However, that may not be the case. All that he seeks is that, in view of the decision of the Supreme Court in the *Francis Kariuki Muruatetu Case*, his sentence should be reviewed.

6. I have considered the record. On receipt of the petition and application, the Deputy Registrar of this court called for and obtained the record of the petitioner. It is clear that the petitioner was convicted of the offence of robbery with violence under *section 296(2)* and sentenced to suffer death in the **Principal Magistrate's Court Maua Cr. Case No. 2064 of 2000**. His appeal against both conviction and sentence to both the High Court and Court of Appeal, in **Meru HCCr Appeal No. 251 OF 2001** and **Nyeri CA Cr App. No. 193 of 2003**, were dismissed.

7. What was declared to be unconstitutional is not the death sentence under *section 296(2) and 203 of the Penal Code*, but its mandatory nature of that sentence since it robs the trial court the necessary discretion to mete out the appropriate sentence. The net effect is that a convicted person is entitled to give his mitigation, which the trial court is bound to consider before meting out the appropriate sentence.

8. In this regard, I agree with Mr. Gitonga as to the course to be taken. I allow the application and direct that the petitioner be presented before the trial court, Maua Chief Magistrate's Court for mitigation and re-sentencing.

SIGNED at Meru

A. MABEYA

JUDGE

DATED and **DELIVERED** at Meru this 28th day of February, 2019.

A. ONG'INJO

JUDGE



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