



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 109 OF 2018**

**JASON MLAMBA SEVENI.....PETITIONER**

**VERSUS**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT**

**JUDGMENT**

1. The Petitioner herein was charged and convicted with Robbery with violence contrary to Section 296(2) of the Penal Code in Voi Senior Resident Magistrate's Court Criminal Case No. 1286 of 2005 and sentenced to death. The Petitioner subsequently lodged a first appeal before the High Court and a second appeal in the Court of Appeal which were both dismissed.

2. Brief facts of the case are that on 15<sup>th</sup> December, 2005 the Petitioner together with others robbed PIUS NGANDA a Radio Cassette make Sonny, Video Deck make LG, mobile phone make Nokia, one brown trouser and cash Shs, 5,500. They were armed with bow, arrows, pangas and rungus.

3. The Petitioner now claims that the sentencing to death by the trial court as well as the appellate court was an infringement of his fundamental rights. The Petitioner avers that the said courts interpreted the provisions of Section 296(2) of the Penal Code to mean that death sentence was the only sentence available to the Petitioner and that the said courts held the view that the death sentence under the said provisions was mandatory and no other sentence was tenable.

**Hearing and Submissions**

4. The matter came up for hearing on 7<sup>th</sup> October, 2019.

5. It was the Petitioner's submissions that he is now reformed and a born again Christian, that he teaches and preaches the word of God as he is a pastor; that the 14 years he has served in custody is enough and wishes to be released and in the alternative be given a non custodial sentence of 20 years.

6. The Respondent (DPP) through its Counsel Mr. Fedha submitted that the Petitioner has served 14 years and prayed for a total of 30 as the sole intention by the Petitioner and the others was to kill.

**The Determination**

7. On the issue of sentence, 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 296(2) of the Penal Code to be unconstitutional. To that extent this court only has to resentence the Petitioner.

8. I have perused the Petitioner's Progress Report. I have also considered Petitioner's mitigation. It is evident that the Petitioner has reformed going by the positive remarks issued by the Prison Officers. It is important to note that a result of the trial courts sentencing on 14<sup>th</sup> September, 2007 the Petitioner has already served 14 years in custody. In the circumstances, I do hereby set aside the death sentence imposed upon the Petitioner and in substitution the Petitioner is hereby jailed to the term of eighteen (18) years from the date of arrest.

Right of appeal in 14 days.

**Dated, Signed and Delivered at Mombasa this 18<sup>th</sup> day of December, 2019.**

**E. K. O. OGOLA**

**JUDGE**

In the Presence of:

Ms. Mutua for DPP

Petitioner in person

Mr. Kaunda Court Assistant



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