REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

PETITION NO.E013 OF 2021

JOSEPH BASHIR OKUMU ……. PETITIONER

VERSUS

REPUBLIC ……...RESPONDENT

R U L I N G

[1] It was in the year 2016, when the applicant, **Joseph Bashir Okumu**, appeared before the magistrate's court at Busia facing a charge of attempted robbery with violence, contrary to **S.297** (**2**). It was alleged that on 11th July 2016 while armed with a dangerous weapon i.e a knife. The applicant violently attempted to rob Wandera Kenneth Ouma of his motor cycle valued at ksh.100,000/=.

Upon his plea of not guilty, the applicant was tried, convicted and sentenced to suffer death.

The record availed herein is incomplete in indicating whether or not the applicant appealed the conviction and sentence. However, in the applicant's written submissions there is indication that the applicant indeed preferred a first appeal to the High Court, but without success. Thereafter, he proceeded to the Court of Appeal for a second appeal which he says he withdrew in favour of the present application.

[2] Be that as it may, the application is improperly brought before this court by way of a supporting affidavit meant to support the prayers in a notice of motion or summons.

Considering that the application is self-made by the applicant and is essentially a re-hearing on sentence it would be fair for it to be determined without undue regard to mattesr of technicalities.

The substance of the application is that the death sentence imposed on the applicant by the trial court has since been declared unconstitutional by the Supreme Court in the now more than famous case of **Francis Karioko Muruatetu & Another Vs. Rep** (**2018**) **eKLR**.

Therefore, there is need to review the death sentence imposed on the applicant by the trial court in favour of a reasonable term of imprisonment or a non-custodial sentence.

[3] Indeed, the **Murvatetu case** (**supra**) opened a flood gate of application such as the present one. However, the Supreme Court did not outlaw the death sentence but its mandatory nature which "**wrestled**" the sentencing discretion from the courts and "**pinned**" it down. Otherwise, the death sentence was found to be Constitutionally, compliant and retained in the statutes.

It would therefore follow that the death sentence imposed on the applicant was lawful and may only be reviewed if an applicant gives good and satisfactory grounds to enable the court exercise discretion in his favour.

The trial court's record shows that the applicant was given opportunity to mitigate despite the mandatory nature of the sentence at the time. He did indeed mitigate and prayed for leniency but the court's hands were tied such that it could not impose a sentence other than the death sentence.

[4] The mitigating factors have been revisited herein and coupled with the new factors contained in the applicant's submissions and the circumstances of the offence which clearly indicate that the victim was not subjected to any physical injury apart from being scared and threatened by the applicant who was in possession of a knife, this court finds the present application meritable on the basis that the sentence imposed on the applicant by the trial court was too harsh and oppressive that it requires to be altered, varied or substituted for a lesser sentence which must nonetheless have a deterrent effect. In that regard, the death sentence imposed by the trial court is hereby set aside and replaced with a term of fifteen (**15**) years imprisonment from the date of the sentence i.e. **17th August 2016**.

Ordered accordingly.

J.R. KARANJAH

J U D G E

[Dated & Delivered this **24TH** day of **FEBRUARY 2022**]