



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CRIMINAL PETITION NO. E021 OF 2021**

**SAMWEL KAHIGA GATHIRE.....PETITIONER**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

By a Ruling dated 7<sup>th</sup> July 2021 this Court held that the sentence which had been handed down by the learned trial magistrate was unconstitutional.

1. It bears repeating here, that it was so declared, not because the death sentence is unconstitutional: but because the said sentence was passed on the grounds that it was deemed mandatory.
2. In effect, it would not have made any difference to the trial court whether or not the accused person had put forward mitigating factors.
3. This Court held the view that it could only determine the appropriate sentence after the parties had provided more information to the Court.
4. The Petitioner told this Court that he was now a transformed person. Whilst he has been in prison custody, the Petitioner learnt many things. He therefore believes that if the Court granted him a second chance in life, he would not only use the skills he had acquired, but he would also educate other people.
5. One of the things which the Petitioner said that he would teach people about, is the fact that crime does not pay.
6. He therefore requested the Court to have mercy on him, and to enable him have the opportunity to rejoin the community, in order to be able to rebuild his life.
7. In answer to the submissions of the Petitioner, Ms M. Odumba learned State Counsel, submitted that the Petitioner had not given any sound reasons that would justify a review of the sentence.
8. The Respondent pointed out the Complainant was robbed of his vehicle together with other items, when he had just come out from the mosque.
9. The record of the proceedings shows that the Petitioner was in a group of four (4) other persons when they robbed the Complainant.
10. The robbers were armed with a gun, Somali swords, pangas and rungus.
11. They accosted the Complainant when he was arriving at the house; having come from the mosque. The robbers ransacked the house and carted away a Television Set; Video; Cassette; Clothes and Shoes.
12. After loading the items into the Complainant's vehicle, they forced the Complainant and his wife, into the vehicle, and then they drove off with them.
13. Once they were outside the town, the robbers forced out the couple and then tied them up.
14. The robbers were arrested when in possession of some of the stolen items.

15. Having given due consideration to the circumstances in which the offence was committed, I find that the Complainant and his wife must have been seriously traumatized.
16. The fact that subsequent to the conviction, the Petitioner had undertaken several training courses, would not have been a relevant factor for consideration at the time when the trial court had just convicted him.
17. However, I note that the Petitioner has been in custody since the date when he was arrested, on 25<sup>th</sup> August 1991.
18. The conviction was on 9<sup>th</sup> March 1992; which was six (6) months and twelve (12) days from the date of arrest.
19. Pursuant to the provisions of **Section 333 (2)** of the **Criminal Procedure Code**, the period which the Appellant spent in custody, whilst he was still on trial, must be taken into account when computing the duration of the sentence he was to serve in prison.
20. By my calculations, the Petitioner has already served 30 years imprisonment.
21. I find and hold that that was sufficient punishment for the offence he had committed.
22. Accordingly, I order that the Petitioner be set at liberty forthwith unless he was otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 16TH DAY OF FEBRUARY 2022**

**FRED A. OCHIENG**

**JUDGE**