



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL PETITION NO. 41 OF 2019

BOB OGOLLA MISANGO.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Petitioner, **BOB OGOLLA MISANGO**, has sought the review of the death sentence which was handed down to him by the trial court, following his conviction for the offence of **Robbery with Violence**.

1. He has informed the court that the sentence was commuted to Life Imprisonment, by His Excellency the President of the Republic of Kenya, in the year 2009.
2. It is common ground that the Petitioner had appealed to the High Court, to challenge the judgment of the learned trial magistrate. The said appeal was dismissed.
3. Thereafter, the Petitioner did not prefer an appeal to the Court of Appeal.
4. The petition is premised upon the Supreme Court's judgment in **FRANCIS KARIOKO MURUATETU Vs REPUBLIC, PETITION NO. 15 OF 2015**; which declared unconstitutional, the mandatory nature of the death sentence, for persons who had been convicted for the offence of **Murder**.
5. As the trial court had sentenced the Petitioner to suffer death as by law prescribed, and because the said sentence was handed down due to the fact that it was mandatory, the Petitioner is entitled to have his sentence reviewed.
6. When canvassing the petition, he pointed out that he was a first offender.
7. He also said that he had been rehabilitated and reformed, consequent upon the efforts made by the Prison authorities.
8. The Petitioner exhibited certificates in Correspondence Bible Studies, which have been awarded to him.
9. He also said that he had been accorded recognition as a Coach, and he was therefore responsible for nurturing talents in football and other sporting activities.
10. I note that whilst the Petitioner appears to possess some positive attributes, he also said that imprisonment had made his life miserable. Indeed, he made reference to the deterioration of his health and his psychological status.
11. One of the objectives of sentencing is retribution. An offender is therefore supposed to be punished for the offence he committed. And punishment cannot be pleasant, although it must be carried out in a just manner.
12. Another objective of sentencing is deterrence. In my considered view, the only way to discourage the offender from committing crimes after being set free is by making his experience in custody be un-attractive so that he does not harbor an urge to be incarcerated again.
13. The experience of an inmate should also serve as a deterrence to other persons, when they learn that imprisonment is not a walk in the park.
14. On the other hand, it is not an objective of the penal justice system to damage either the physical or the psychological health of the inmate. It is for that reason that prisons make available to inmates, appropriate medical facilities.

15. Therefore, when the Petitioner talks about the down-side of his physical and psychological wellbeing, that, of itself, would not be a sufficient reason to warrant the review of the sentence he was serving.
16. In this case the Petitioner has already been in prison custody for 17 years. That fact is not sufficient to justify re-sentencing.
17. He has not provided the court with the record of the proceedings from the trial court, so as to enable the court ascertain the period he spent in custody whilst he was still on trial.
18. Secondly, in the absence of the proceedings, this court would be unable to verify the circumstances in which the offences were committed.
19. Thirdly, the absence of the record of proceedings deprives this court of an opportunity to ascertain whether or not the Petitioner was given the chance to put forward his mitigation.
20. If the Petitioner did place his mitigation before the trial court, it would be necessary for this court to verify whether or not the learned trial magistrate gave consideration to the mitigating factors, if any.
21. Finally, the Petitioner has failed to provide the court with documents which can prove that he had undertaken various training programmes whilst he was in custody.
22. The importance of the training is that they may help to persuade the court that the inmate had acquired appropriate life-skills, which could prove useful to him and to the society, if his sentence was reviewed and if such review resulted in the release of the inmate at some date subsequent to the review.
23. Rehabilitation of an inmate might be verifiable from his conduct whilst he was in prison. And the possible re-integration back into the community, could be influenced by the evidence of the inmate's rehabilitation.
24. Another factor that could inform the court's decision when conducting the task of re-sentencing was the attitude of the community, and the community of the victim's family. I so hold because there might arise situations in which the inmate has been rehabilitated, but his family, the victim (or the victim's family) or the community still harboured deep-seated emotions against the inmate. In such situations, the court had a duty to carry out the requisite balancing act, so that the process of re-sentencing does not result in an injustice.
25. The courts do not act in total disregard of the prevailing reality, because justice is not an abstract.
26. In conclusion, although the Petitioner would be entitled to re-sentencing, if he could demonstrate that the trial court had given him the mandatory sentence, I find that I cannot undertake that task now, as the Petitioner has starved the court of the requisite material that would enable me take appropriate action.
27. In the result, the Petition is rejected.

DATED, SIGNED and DELIVERED at KISUMU This 27th day of May 2021

FRED A. OCHIENG

JUDGE