



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CRIMINAL PETITION NO. 48 OF 2019**

**COO.....PETITIONER**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**RULING**

The Petitioner, **COO**, is 43 years old. He has been in prison since 1993 when he was convicted for the offence of **Robbery with Violence** contrary to **Section 296 (2)** of the **Penal Code**.

1. The learned trial magistrate sentenced the Petitioner to suffer Death as by law prescribed.
2. His appeal to the High Court was dismissed, prompting him to appeal to the Court of Appeal.
3. The said Court of Appeal dismissed the appeal against conviction. However, after giving consideration to a Medical Report which it called for, the Court of Appeal set aside the death sentence and substituted it with a sentence that the Petitioner be detained at the President's pleasure, at such place under such conditions as the President may direct.
4. The reason why the Court of Appeal set aside the death sentence was that at the time when the offence was committed, the Petitioner was still a minor; he was 16 years old.
5. Having now 27 years behind the bars, the Petitioner has asked the Court to give him a second chance in life.
6. Whilst conceding that the Petitioner had spent his youth behind bars, the Respondent submitted that the Petitioner does not deserve a revision of the sentence.
7. From the record of the proceedings, it is evident that the Petitioner was in a group of 8 persons who went to the house of the Petitioner's grandmother, where they robbed her.
8. During the robbery, the gang inflicted injuries upon the victim, which led to her death.
9. It was a most callous act, of robbing his own grandmother, and participating in actions which precipitated her death.
10. For his role in the said offence, the Petitioner was sentenced to death, in accordance with the provisions of **Section 296 (2)** of the **Penal Code**.
11. In effect, the trial court imposed the sentence prescribed by statute.
12. The Supreme Court of Kenya has declared that the imposition of the mandatory death sentence was unconstitutional.
13. As the trial court had handed down the mandatory prescribed sentence, the Petitioner is entitled to have the court have a second look at the sentence.
14. In the exercise of the discretion bestowed upon this court, pursuant to the Judgment in **FRANCIS KARIOKO MURUATETU & ANOTHER Vs REPUBLIC PETITION NO. 15 OF 2015**, I do now proceed to take into account the guidelines applicable in sentencing.
15. The Petitioner was a first offender, and he was a minor.

16. There is no evidence that prior to the commission of the offence, the Petitioner had a history of a bad character.
17. Nonetheless, the offence committed was heinous.
18. Having spent 27 years in jail, I find that the Petitioner has received punishment. I am not saying that the said punishment is necessarily sufficient, but he has been punished.
19. In my considered view, the time spent in prison is likely to be a deterrence to the Petitioner from committing any similar offence.
20. It is also likely to be a deterrence to any other persons from committing such offences.
21. In the course of his stay in prison, the Petitioner had undertaken several professional training courses in tailoring, dress-making, and sewing machine technician.
22. He has also attained Higher Diploma in Theology and Psychological Counselling.
23. The attainment of the said qualifications, of themselves, is not reason enough to warrant re-sentencing. However, the fact that the Petitioner had no idea if he would ever be released from prison, yet he emersed himself in professional and theological advancement is a sign of positive change in him. In effect, the qualifications attained, provide proof of the Petitioner's rehabilitation.
24. Having taken into account the impact on the family of the victim; the length of time which the Petitioner has been in custody, including the period prior to being sentenced, I find that the Petitioner deserves to be given a second chance in life.
25. I do therefore set aside the sentence that had been handed down by the trial court, and as amended by the Court of Appeal, and I order that the Petitioner will spend the period of five (5) more years in prison.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 25<sup>TH</sup> DAY OF MAY 2021**

**FRED A. OCHIENG**

**JUDGE**