



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISC. CR. APPLICATION NO. E029 OF 2021

JOSEPH MUSOTSI OPANDA.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

The Applicant, **JOSEPH OPANDA MUSOTSI**, was convicted for the offence of **Robbery with Violence**, contrary to **Section 296 (2)** of the **Penal Code**.

1. He was then sentenced to suffer Death as by law prescribed.
2. When he challenged the conviction and the sentence, the appellate court dismissed his appeal.
3. The Applicant has now lodged an application in which he agonized over the constitutionality of the mandatory nature of the sentence.
4. His submission was that the mandatory sentence was unconstitutional, as was pronounced by the Supreme Court in the Muruatetu case.
5. The Applicant addressed the court thus;

***“..... after being tried and the above-mentioned petitioner had their cases commuted from DEATH to LIFE sentences. I therefore humbly wish to plead to the High Court to grant me an order for re-sentencing, given the fact that I have terminated all the appeal avenues*”**

6. When the application came up before the Court on 12th May 2021, the learned prosecuting counsel, Ms M. Odumba, drew the Court’s attention to the fact that the Applicant had already been re-sentenced on 19th February 2019.
7. In the light of that information, the Applicant admitted that he had already benefitted from the court’s orders on re-sentencing.
8. I have carefully perused the documents which the Applicant lodged before this Court. I noted that in his application he stated thus;

“1. THAT, I was convicted and sentenced to serve 30 years imprisonment for the offence of robbery with violence c/sec 296(2) PC which was ordered to be calculated from the date of conviction.

2. THAT the period I spent in custody was not considered by the trial court.”

9. A perusal of the record of proceedings before the trial court, as well as before the first appellate court reveals that the Applicant was not sentenced to 30 years imprisonment.
10. He was sentenced to suffer Death, as by law prescribed.
11. It therefore struck me that the Applicant was trying to mislead this Court when he stated that the trial court had sentenced him to 30 years imprisonment.
12. Secondly, as the Applicant had already been re-sentenced by the High Court, it would be wrong to urge the said Court to again give

consideration to same mitigating factors which informed the said Court's decision during re-sentencing.

13. Therefore, the issues concerning the Applicant's age, health and social status cannot be the basis for a further review of the sentence.

14. The Applicant's remorse and the reformation which he had undergone, can also not be the basis for a further review of the sentence.

15. However, I note that the Applicant remained behind bars throughout his trial. He was arrested on 10th October 2001, and he remained in custody until 3rd September 2004 when he was convicted and sentenced.

16. By my calculations, the period is just under one month shy of 3 years.

17. Pursuant to the provisions of **Section 333 (2)** of the **Criminal Procedure Code**, I direct that when calculating the actual duration which the Applicant ought to serve the sentence of 30 Years imprisonment, the prison authorities shall give credit for the period which the Applicant spent in custody whilst he was still on trial.

18. It is so ordered.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 23RD DAY OF SEPTEMBER 2021

FRED A. OCHIENG

JUDGE