



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 121 OF 2018

MICHAEL OTIENO *alias* JAYARO.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT

1. At 5.45 a.m. on 17/5/2004 as Charles Otieno Okuna (the complainant) was cycling to work, he was ambushed and attacked by a group of four robbers. Apart from inflicting on him injuries which the doctor classified as harm, the robbers stole his bicycle, valued at Kshs. 3,000/=. When they hit him on the head with a metal bar, he raised an alarm. As three of the robbers fled from the scene as a result of the alarm, the complainant got an opportunity to draw a knife he had in his possession and stabbed the last robber on the upper left arm.
2. The first person to arrive at the scene following the alarm raised by the complainant was the complainant's workmate, Wilson Odhiambo Agina, PW2, who witnessed the struggle between the complainant and the last member of the gang. The witness noticed, as he approached the two, that the gang member was bleeding from the left arm. Following this interruption, the last gang member also fled and disappeared. Two weeks after this incident PC Reuben Mutua received information that led to the arrest of the Petitioner herein Michael Otieno *alias* Jayalo, and recovery of a bicycle belonging to the complainant and a rain coat answering to the description of that worn by the robbers during the attack.
3. An identification parade was mounted at which the complainant and PW2 picked out the appellant. The appellant was then charged with the offence of robbery with violence contrary to Section 296(2) of the Penal code and also with attempting to escape from lawful custody contrary to Section 123 as read with Section 389 of the Penal Code. No evidence was called in support of this last count.
4. After the prosecution closed its case, having called five witnesses, the appellant elected not to present evidence in his defence. Upon conviction on the evidence available at the trial, the court sentenced the appellant to death in accordance with the law. The conviction and sentence imposed by the trial court were confirmed on first appeal by the High Court. The Court of Appeal also dismissed his appeal.
5. The Petitioner is now in this court for resentencing pursuant to the decision of the Supreme Court in **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR** in which the court found that the mandatory nature of the death sentence is unconstitutional.
6. The Petitioner submitted that the 15 years he has served in jail is adequate punishment for the crime he committed. He submitted that he was 32 years when the offence was committed and now he is 47 years. He has never married. He has brothers and sisters who visit him in prison.
7. Mr. Fedha, for the prosecution submitted that the Petitioner should be jailed for 30 years.
8. I have carefully considered the petition. This matter is in this court for resentencing. The Petitioner committed robbery in which nobody was fatally wounded. He appeared to this court to be quite remorseful. A Social Inquiry Report filed herein on 11/11/2019 speaks well of the Petitioner. He has already served 15 years in jail. I am persuaded to release the Petitioner to serve a probation period of two (2) years for the remaining period of his jail term stated hereunder.
9. In the upshot I hereby set aside the death sentence imposed upon the Petitioner by the trial court, and in place thereof I jail the Petitioner to a term of eighteen (18) years from the date of arrest, with the result that the remaining jail term shall be served on probation. The Petitioner shall report to the Likoni Police Station twice every year on 1/6/2020 and 31/12/2020 and on equivalent dates until the probation period of 2 years is fully served. Should the Petitioner be engaged in any unlawful activity during the probation period he shall be arrested

and taken to prison to serve the entire sentence of 18 years.

10. From the foregoing, the Petitioner is herewith released from prison unless otherwise lawfully withheld.

11. Right of appeal in 14 days.

Dated, Signed and Delivered at Mombasa this 30th day of March, 2020.

E. K. O. OGOLA

JUDGE

In the presence of:

Ms. Mwangeka for DPP

Petitioner in person via video link

Mr. Kaunda Court Assistant