



**REPUBLIC OF KENYA**

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

**PETITION NO. 21 OF 2018**

**FREDRICK OKOTH ARWA.....PETITIONER**

**VERSUS**

**STATE.....RESPONDENT**

**JUDGMENT**

1. The Petitioner herein **FREDRICK OKOTH ARWA** by his petition dated 12.10.2018 claims that he is a convict for the offence of **Robbery with Violence contrary to Section 296 (2) of the Penal Code vide Siaya P.M. Cr. Case No. 69 of 2009** wherein he was convicted and sentenced to death.

2. He appealed against conviction and sentence vide **Kisumu H.C.R.A No. 156 of 2009** which appeal was dismissed. He later appealed to the **Court of Appeal vide C.A. 310 of 2009 at Kisumu** which second appeal was also dismissed.

3. The death sentence was later commuted to life imprisonment by H.E. the President in the year 2009. His fate was therefore sealed.

4. However, on 14.12.2017, the Supreme Court vide the **S.C. Appl. Nos. 15, 16 of 2017** delivered a judgment wherein it held that death sentence was not the only sentence available for capital convicts and that the mandatoriness of death sentence in Robbery with Violence Convictions was unconstitutional as it deprives the trial Court of the discretion to mete out appropriate sentence after hearing mitigations from the convict and taking into account circumstances of each case.

5. The Petitioner herein therefore seeks that this Court do consider revising the sentence meted out on him, considering the period already spent in custody since the time of his arrest and that the Petitioner be given an opportunity to mitigate to enable this Court arrive at proper sentence.

6. The said Petition is also accompanied by a Notice of Motion seeking similar orders save that the Notice of Motion seeks among others grounds that the Petitioner's right under **Article 27 (1) (2) and (5) of the Constitution of Kenya 2010**, was violated and that the Court do uphold, respect and protect the Petitioner's right.

7. The Petition which is brought under **Articles 22(1) of the Constitution of Kenya 2010**, was supported by an affidavit sworn on 12.10.2018 by the Petitioner setting out the background of the case leading to the conviction and sentencing of the Petitioner.

8. At the hearing of the Petition on 27.11.2018 the Petitioner who acted *Pro se* submitted in support of the Petition and mitigated stating that he committed the offence of Robbery with violence and he was sentenced in 2008 which death was commuted to life imprisonment in 2009. He urged this Court to review the life sentence and give him a custodial sentence. He sought for the Mercy of the Court stating that he had served ten (10) years in prison, that he wants to be with his family and that while in prison he had learnt carpentry.

9. That he was 21 years old when he was jailed and that he is now 32 years.

10. That he had not benefitted from the crime as he had suffered in jail.

11. That they were 5 people when they committed the crime, 2 were acquitted and 3 were convicted. That he can do carpentry work.

12. Opposing the application for resentencing, Mr. Okachi the Senior Principal Prosecution Counsel urged the Court not to resentence the Petitioner to a term as the offence committed was serious and its effect has physical and physical effect on the victims.

13. Further that the offence is heinous and very prevalent in the region. He urged the Court to dismiss the Petition and uphold the life sentence to serve as a lesson to others who intend to commit such offences.

14. In a rejoinder, the Petitioner submitted that he was young at the time that he committed the offence and that he was misled by his co-accused who were older than him.

15. That the victim of the crime was his Aunt and that he had sought for her forgiveness and that she even visited him in prison in 2010 after he sent for her through his mother and she (his Aunt told him that she had forgiven the Petitioner).

**DETERMINATION:**

16. I have carefully considered the Petition herein for resentencing of the Appellant who has exhausted all appeal avenues in his case where he was convicted for the offence of Robbery with Violence and sentenced to death, which death sentence was commuted to life imprisonment in 2009 by H.E. the President.

17. It is not in dispute that at the time of sentencing the Petitioner in 2008, death sentence was the only sentence available for capital offences (Robbery with Violence as a mandatory sentence and therefore all convictions ended up in death sentences.

18. However, by the pronouncement in the supreme Court case of **Francis Karioko Muruatetu and Another V. R. 92017) eKLR**, State Counsel Petition Nos. **15 and 16 of 2017**, the Supreme Court rightly so found and held that the Mandatory nature of the death sentence in Capital offences is unconstitutional since mitigation is an important congruent element of fair trial.

19. Having restated what the apex Court decreed, and as this Court is bound by the said decision, I find and hold that this Court has jurisdiction to rehear the Petitioner in resentencing and having received appropriate submissions in mitigation and on the strength of the **Francis Karioko Muriatetu V. R.** (Supra case), I proceed to consider the said mitigation).

20. The Petitioner states that he is remorseful for committing the offence against his own Aunt who has since visited him in prison on his invitation and after begging her for forgiveness, she forgave him.

21. That he was 21 years at the material time, young and naïve, following peer pressure.

22. That he has since learnt that crime does not pay and that he has learnt masonry and carpentry while in prison. He produced copies of certificates in Biblical Studies and upholstery, Trade Test Grade 1 test which he learnt while in prison. He says he can serve a custodial sentence and get back into the community and be of a good example to those intending to commit such offence.

23. The Prosecution did not offer any Contrary evidence to the above submission.

24. In the premises, it is in the discretion of this Court to determine what appropriate sentence to mete out, considering the mitigations given by the Petitioner and having regard to the circumstances of each case.

25. In exercising such discretion, the Court must be guided by principles of sentencing and the Objectives of punishment.

26. In **Fatuma Hassan Sato V. R (2006) eKLR**, Makhadia – J (as he then was) observed:

***“Sentencing is a matter for the discretion of the trial Court. The discretion must however be exercised judiciously. The trial Court must be guided by evidence and sound legal principle. It must take into account all relevant factors and exclude all extraneous factors ...”***

27. The Sentencing Policy Guidelines for the Judiciary stipulate that:

***“... The sentencing process, which entails the exercises of judicial discretion, must be in accord with the Constitution, as embodied in the Judiciary’s overall Mandate of ensuring access to Justice for all. These guidelines are in recognition of the fact that while judicial discretion remains sacrosanct, and a necessary tool, it needs to be guided and applied in alignment with recognized principles, particularly fairness, non-arbitrariness in decision making, clarity and certainty of decisions. The guidelines are (therefore an important reference tool for Judges and Magistrates that will enable them to be more accountable for their sentencing decision.”***

28. In the **Michael Kathewa Laichena & Another v Republic (2018) eKLR**, a case expounding on the sentencing Guidelines it was stated:

***“The sentencing policy guidelines, 2016 (“The Guidelines”) published by the Kenya judiciary provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. Since the Guidelines did not take into account the fact the death penalty would be declared unconstitutional, the Court in the Muruatetu Case (Supra, para. 71), held considered mitigating factors that would be applicable in re-sentencing in a case of murder as follows; (a) age of the offender;(b) being a first offender;(c) whether the offender pleaded guilty;(d) character and record of the offender;(e) commission of the offence in response to gender-based violence;(f) remorsefulness of the offender;(g) the possibility of reform and social re-adaptation of the offender;(h) any other factor that the Court considers relevant.”***

29. The Sentencing Guidelines thus provide a framework within which the Courts can exercise their discretion in a manner that is objective

impartial, accountable, transparent and intended to enhance the delivery of Justice and Public confidence in the Judiciary.

30. In the **Francis Muruatetu Case (supra)**, the Supreme Court citing **Spence V. The Queen, Hughes V. The Queen** (*Spence & Hughes* case) **UR 2 April 2001** it was stated, citing Byron – C.J.

***“In Order to be exercised in a rational and non-arbitrary manner, the sentencing discretion should be guided by legislature or judicially prescribed principles and standards, and should be subject to effective Judicial Review, all with a view to ensuring that the death Penalty is imposed in only the most exceptional an appropriate circumstances. There should be a requirement for individualized sentencing in implementing the Death Penalty. Sections 216 and 329 of the Criminal Procedure Code makes mitigation part of the trial process.”***

31. Under **Section 216 of the Criminal Procedure Code**, the Court may before passing sentence or making an Order against an Accused Person under **Section 215** receive such evidence as it thinks fit in Order to inform itself as to the sentence or Order to be passed or made.

32. Under **Section 329 of the Criminal Procedure Code**:

***“The Court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence.”***

33. The Objective of sentencing as per the Judiciary of Kenya sentencing Policy Guideline No. 41 are:

- 1. Retribution: to punish the Offender for his/her Criminal conduct in a just manner.**
- 2. Deterrence: to deter the Offender from Committing a similar Offence subsequently as well as to discourage other people from Committing similar Offences;**
- 3. Rehabilitation: to enable the Offender reform from his/her Criminal disposition and become a Law abiding Person;**
- 4. Restorative Justice; to address the needs arising from the Criminal conduct such as loss and damages,**
- 5. Community Protection: to protect the Community by incapacitating the Offender;**
- 6. Denunciation: to Communicate the Community’s’ condemnation of the criminal conduct.**

34. In the instant case, there is no contrary view to that given by the Petitioner that the victim of the offence was his Aunt who had visited him in prison on his request and that she had forgiven him. In other words, no life was lost. That the Petitioner was a 21 year old then and that he has been in prison for nearly 10 years with a potential of being a good citizen of this County is not disputed.

35. The Petitioner has received trainings and acquired life’s skills in Biblical studies and upholstery. He can employ himself and others. In my view, the Petitioner is suitable for rehabilitation while in custody and therefore I have come to the conclusion that life imprisonment as commuted from death sentence is not appropriate sentence for him.

36. Accordingly, I hereby set aside the death sentence imposed on the Petitioner Fredrick Okoth Arwa as commuted to life imprisonment and substitute it with a prison term to be determined by this court upon receipt of a probation officer’s report

37. In the end, the Petition for resentencing is allowed, I call for Probation Officers’ report to be filed on or before the 19<sup>th</sup> March 2019.

**Dated, Signed and Delivered in open court at Siaya This 28<sup>th</sup> day of January, 2019.**

**R. E. ABURILI**

**JUDGE**

**In the presence of:**

The petitioner in person

Mr Okachi Senior Principal Prosecution Counsel

Brenda and Modestar: Court Assistants