



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE- J.)

PETITION NO. 06 OF 2019

BETWEEN

STEPHEN OCHIENG RASTA.....PETITIONER

AND

REPUBLIC.....RESPONDENT

JUDGMENT

Introduction

1. **STEPHEN OCHIENG RASTA**, (hereinafter referred to as the petitioner) and another were sentenced to death in **KISUMU CRIMINAL CASE NO. 743 OF 2004** on 19th January, 2005. The conviction and sentence were confirmed in **KISUMU CRIMINAL APPEAL NOS. 12 and 13 OF 2005** and also by the Court of Appeal in **CRIMINAL APPEAL 405 OF 2007**.

2. By a petition filed on 19th November, 2018, the petitioner has petitioned this court for resentencing. He filed certificates to demonstrate that he had reformed and had undertaken studies and trained as a tailor.

3. Ms. Gathu, learned counsel for the state conceded that the Petitioner was entitled to resentence, that he was a young man sentenced at the age of 19 years and had demonstrated that he had reformed. The state proposed that the Petitioner be resented to 20 years from date of sentence on account of the fact that the petitioner and another committed the offence while armed with a knife with which they assaulted the complainant.

Analysis and Determination

4. At the time of the petitioner's conviction, death was the only available sentence for robbery with violence.

5. The Supreme Court decision in **Francis Kariuki Muruatetu & Another v Republic & 5 others [2016] eKLR** declaring the mandatory death sentence unconstitutional has necessitated resentencing of all persons previously sentenced to the mandatory death sentence. In the case of **William Okungu Kittiny v Republic KSM CA Criminal Appeal No. 56 of 2013 [2018] eKLR**, the Court of Appeal applied the **Muruatetu Case (Supra) mutatis mutandis** to the provisions of **section 296(2)** of the **Penal Code (Chapter 63 of the Laws of Kenya)** which imposes the mandatory death penalty for the offence of robbery with violence and held that death was a discretionary maximum sentence.

6. I have considered **The Sentencing Policy Guidelines, 2016** and its application which is intended to promote transparency, consistency and fairness in sentencing (See **Michael Kathewa Laichena & another v Republic [2018] eKLR**).

7. The maximum sentence for simple robbery is 14 years' imprisonment. The mitigating circumstances in this case are that the petitioner could be considered a first offender. The facts from the record show the complainant was not injured and the stolen goods were recovered except for Kshs. 5,000/-.

8. Under the proviso to **section 333(2)** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**, the court is entitled to take into account the period the petitioner has spent in custody in determining the sentence. The court record shows that the petitioner has served about 14 years since conviction.

9. I have considered judgments of Superior Courts that are intended to ensure consistency and fairness. In the case of **Wycliffe Wangusi Mafura v Republic ELD CA Criminal Appeal No. 22 of 2016 [2018] eKLR**, the Court of Appeal imposed a sentence of 20 years where the appellant was involved in robbing an Mpesa shop with the use of a firearm with which he threatened the attendant but was caught before he

inflicted any violence on her. In **Robert Achapa Okello v Republic [2018] eKLR**, this court resented the Petitioner who had been in custody for 15 years to period served on account of the fact that no violence was meted on the complainants.

10. After considering all the mitigating and aggravating factors, the fact that the petitioner has undertaken courses as a way of reformation, I re-sentence him to **15 years** imprisonment from date of conviction.

11. For avoidance of doubt, the Petitioner's sentence having been commuted to a definite imprisonment term is also entitled to benefit from remission of sentence **if he meets the conditions**. It is so ordered.

DATED AND SIGNED IN KISUMU THIS 30th DAY OF May 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Petitioner - Present in person

For the State - Ms Gathu