



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE- J.)

PETITION NO. 85 OF 2018

BETWEEN

WILLIS OCHIENG ODERO.....PETITIONER

AND

REPUBLIC.....RESPONDENT

JUDGMENT

1. **WILLIS OCHIENG ODERO**, (hereinafter referred to as the petitioner) was convicted and sentenced to death for the offence of robbery with violence contrary to section 296(2) of the Penal Code in Maseno Criminal Case No. 72 of 2001. He lodged an appeal in Kisumu High Court Criminal Case No.209 of 2002 which was dismissed and the conviction and sentence were upheld.

2. By a petition filed on 29th November, 2018, the petitioner has petitioned this court for resentencing. He filed certificates to demonstrate that he had reformed and had undertaken studies including a diploma in law.

3. Ms. Gathu, learned counsel for the state while conceding that the Petitioner was entitled to resentence submitted that the offence that he was involved in was committed in the night by the Petitioner and others who were armed with pangas and that the complainant had been injured. The state urged the court to direct that the petitioner served 25 from date of sentence.

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 shows that the offences took place at night and the robbers although armed with pangas used actual violence on the complainant.

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 17 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 **20 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 23rd 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