



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
CONSTITUTIONAL PETITION NO. 23 OF 2018

(CORAM: R.E. ABURILI – J.)

MALCOLM ODHIAMBO OWINOAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against sentence and conviction dated 5.9.2007 in PM Criminal Case No. 43 of 2007 in Siaya Law Court before Hon. G.K. Mwaura – P.M.)

JUDGMENT

1. The Petitioner herein **Malcolm Odhiambo Owino** Petitioned this Court on 2.4.2018 seeking for resentencing from death row to a reasonable and fair sentence.
2. The Petition is premised on the ground that the Supreme Court in the **Francis Muruatetu case vide judgment delivered on 14.12.2017** arising from Supreme Court Petition Nos. 15 and 16 of 2015 held that death sentence is unconstitutional.
3. In addition, the Petitioner claims that he has exhausted all Court appeals ending in prison custody to date and therefore he wishes to benefit from the said Supreme Court decision. He prays that in the resentencing, this Court do take into account the period that the Petitioner has served in prison since his arrest.
4. The genesis of this Petition is that the Petitioner/Convict Malcolm Odhiambo was initially charged, tried and convicted for the offence of **Robbery with Violence contrary to Section 206(2) of the Penal Code** and sentenced to death. This was vide **Siaya Principal Magistrate Criminal Case No. 43 of 2007**. He appealed vide Kisumu **HC. CR. A. No. 137 of 2017** which appeal was dismissed by a two Judge Bench of Hon. J.W. Mwera – J. (as he then was) and Hon. J.R. Karanja – J. (as he then was) on 18.11.2008.
5. The Petitioner filed a second and final appeal to the Court of Appeal vide **Kisumu Court of Appeal Criminal Appeal No. 250 of 2009** which appeal was also dismissed by a 3 Bench of S. Gatembu Kairu, A.K. Murgor and D.K. Musinga J.J.A on 9.10.2015.
6. He then petitioned this Court vide High Court Criminal Application No. 27 of 2016 seeking to be heard under **Article 50(6) of the Constitution** on account that he had discovered new and compelling evidence to adduce. He asked for the Occurrence Book of Ugunja Police Patrol Base to be availed in Court.

7. On 2nd June 2016, Hon. J.A. Makau – J. after hearing his Petition under **Article 50(6) of the Constitution** found it devoid of merit and dismissed it.
8. The Petitioner has now sought to benefit from the Supreme Court decision in **Francis Karioko Muruatetu and Others v Republic** wherein the Supreme Court held that death sentence is not a mandatory or only sentence available in a conviction for Murder and by extension, robbery with violence.
9. The Petitioner was jointly charged with 6 others. Three of his co-accused were acquitted at the trial stage while the Petitioner and the 1st and 3rd Accused were convicted for the offence of Robbery with Violence, and sentenced to suffer death as prescribed by law, by Hon. G.K. Mwaura - Principal Magistrate.
10. The charge facing the Appellant and his co-accused was that on the 15th day of December 2006 at Got-Osimbo Sub-Location of Siaya District within Nyanza Province, jointly with others not before Court, while armed with dangerous weapons, namely, pangas and rungus robbed Captain James Odhiambo Ouda of one Laptop computer make Dell Inspiron 6400 Model PP 20L, one digital camera make Sony cyber shot, one radio cassette, make Sony, One Leatherman tool kit, assorted clothes, one military jacket, Two mobile phones make Nokia 1100 and Sendo, ATM card and cash KShs.10,000 all valued at KShs.166,000 and at or immediately before or immediately after the time of such robbery used actual violence to the said Captain James Odhiambo Ouda.
11. The Petitioner was arrested on 23.12.2006 and held in custody until after his conviction and sentencing on 5.9.2007 as robbery with violence was not bailable then. What that means is that the Petitioner has been in custody for a period of 12 ½ years to date awaiting execution of death sentence imposed on him as he fights to exonerate himself without success. In the intervening period, the Petitioner's death sentence was commuted to life imprisonment by His Excellency the President in 2009.
12. In support of this petition, the Petitioner pleads that he has since reformed and is rehabilitated as he has learnt life's skills while in prison which include Certificate in Behavior Change, Home Based Care and Counselling passed all Prisoners Progressive Stages and is currently is at stage 4 and added responsibilities of training, Supervising and guiding other inmates in the general discipline as per the Officer-in-Charge Kisumu Maximum Prison Letter of commendation dated 28.4.2019.
13. The State represented by Ms. Odumba submitted that death sentence as commuted to life imprisonment is lawful hence it should be upheld.
14. In considering whether or not to resentence the Petitioner, regard must be had to the circumstances of the case.
15. The evidence before the trial Court was that on the material night the Complainant was escorting a child to his mother's home when he met robbers who chased him, caught up with him, beat him up and took him to his house where they forcefully demanded for money from him, tied his hands as they beat him and stole items listed in the charge sheet from his house. The following day he went to Sigomere Health Centre where he was treated, obtained P3 form after reporting to the Police.
16. He sustained injuries on his neck, face and chest. He fractured left ulna and suffered bruises on the legs. The degree of injuries were assessed as maim.
17. The robbers were a gang of many people. That is as far as the nature of evidence in the lower Court was that led to the conviction and sentencing of the Petitioner. The Petitioner maintained his innocence throughout the appeals and even in **Misc. Cr. Appl. No. 27 of 2016** he sought additional compelling evidence to exonerate himself.
18. In this Petition, the Petitioner only sought to demonstrate that he has learnt some life's skills and trade. He did not attempt to mitigate to show any remorse.

19. In other words, the Petitioner still believes that his conviction was not sound even after all the superior Courts have found him guilty. It is doubtful that such a person has learnt to respect the lives and property of others as he is likely to revenge against innocent people given a chance to get back into society before he has learnt his lessons in prison and also learnt to say ***“I regret the offence, I will, given a chance to get out of prison, never commit any offence. I have learnt my lessons.”*** Albeit there is a letter from Officer-in-charge Prisons Kisumu Maximum Prison, I find that it is upon the Petitioner to show remorse and to mitigate to enable this Court exercise discretion in resentencing.

20. He claims that death sentence is unconstitutional. It is not. The Supreme Court in the **Francis Muruatetu** only held that it was the Mandatoriness of death sentence that was unconstitutional as it took away the discretion of the trial Courts in sentencing.

21. The Supreme Court in the above case made it clear that in appropriate cases, the trial Court, taking into account all the circumstances of the case and mitigation, would not hesitate to mete out death sentence.

22. Furthermore, **Article 26 of the Constitution** is clear that death sentence, where it is prescribed by law, is not unconstitutional. For the above reasons, I find and hold that death sentence imposed on the Petitioner was lawful and not unconstitutional.

23. The Complainant victim suffered serious injuries involving a fracture, amounting to maim. He never committed any offence to deserve such beating and maiming by the ruthless robbers. Live and let live is the principle that applies across the board. One must learn to work hard and eke a living and not seek to forcefully take away other peoples’ hard earned resources. During robbery, many victims succumb to injuries. Those who survive are left with scars and trauma.

24. No one deserves to be killed and/or threatened with death whenever they acquire any property. Respect for life and property of others should never be compromised. I do not find the Petitioner to be a remorseful person. He does not appear, from his demeanor, to have learnt his lesson in prison where he has been for nearly 13 years.

25. In my humble view, thereafter the Petitioner deserves to live away from society for some time because he still poses a great risk. He still believes it is fashionable to rob others and simply seek to return to the society just because one has learnt some trades and life’s skills The Petitioner did not tell this Court what he intends to engage in after leaving prison. To my mind, he still poses a great risk to the society.

26. The Petitioner and his gang knew the Complainant who was a military officer. They beat him thoroughly demanding for money and a gun. They threatened to kill him because he was struggling and they took almost an hour terrorizing him.

27. In my humble view, and in the absence of any touching or compelling mitigation, I find no reason to interfere with the death sentence meted out on the Petitioner which was commuted to life imprisonment. However, as life imprisonment is so uncertain, I hereby resentence the convict petitioner Malcom Odhiambo Owino to serve thirty (30) years in prison to be calculated from the date of his arrest on 23/12/2006.

Dated, Signed and Delivered at Siaya this 26th Day of June 2019

R. E. ABURILI

JUDGE

In the presence of:

Petitioner in person

Mr Okachi SPPC for the state

CA: Brenda and Modestar