



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CONSTITUTIONAL PETITION NO. 24 OF 2018

(CORAM: R.E. ABURILI - J)

NICHOLAS ONYANGO OMONDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an petition for resentencing following the conviction and sentence dated 5/9/2007 in Criminal Case No. 43 of 2007 in Siaya Law Court before Hon. G.K. Mwaura - PM)

JUDGMENT

1. The Petitioner herein **Nicholas Onyango Omondi** petitioned this court on 2.11.2018 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 10 year prison term served by the petitioner since his arrest.
4. The genesis of this Petition is that the Petitioner/Convict Nicholas Onyango Omondi was initially charged, tried and convicted for the offence of **Robbery with Violence contrary to Section 296(2) of the Penal Code** and sentenced to death. This was vide **Siaya Principal Magistrate Criminal Case No. 43 of 2007**. He was jointly charged with six others. He appealed vide **Kisumu HC.CR. Appeals No. 135, 136 and 137 of 2007 (consolidated)** which appeals were 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 Judge bench of S. Gatembu Kairu, A.K. Murgor and D.K. Musinga J.J.A on 9.10.2015.
6. The Petitioner has now sought to benefit from the Supreme Court decision in **Francis Karioko Muruatetu and Others Vs Republic** wherein the Supreme Court held that death sentence is not a mandatory or the only sentence available in a conviction for Murder and by extension, robbery with violence.
7. The Petitioner was jointly charged with 6 others. Three of his co-accused were acquitted at the trial 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. This petition is related to **Constitution Petition No. 23 of 2018. Malcom Odhiambo Owino Vs Republic**.
8. 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 runguis robbed Captain James Odhiambo Ouda of one laptop Computer Make DELL Inspiron 6400 Model PP 20L, one digital camera Make Sony Cybershot, 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.
9. 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.

10. What that means is that the Petitioner has been in custody for a period of 12½ years to date awaiting execution of death sentence imposed on him as he fought to exonerate himself without success.

11. In the intervening period, the Petitioner's death sentence was commuted to life imprisonment by His Excellent, the President in the year 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 Behaviour 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.

18. In this Petition, the Petitioner sought to demonstrate that he has learnt some life's skills and trade. He pleads for leniency claiming that he was misled by bad company and that he has reformed. In addition, he claims that he has learnt to respect people and their property and that he can now live well in society with others. He is now 33 years old and that at the material time when he committed the offence he was 21 years. He went to school up to class three and that after his parents separated, he remained with his mother who could hardly fend for him so he ended up in bad company.

19. While in prison, he has acquired training in biblical studies and he availed certificates to that effect. He is also gifted in drawing as per the samples he supplied to the court at the hearing of his petition. He submitted that given a chance he will tell the youths never to engage in crime and instead work hard to eke a living.

20. In response to the Petition, Mr. Okachi, Senior Principal Prosecution Counsel submitted that the Petitioner has learnt several life skills which can help him in society but he has not made any effort to apologize to the victim of the offence.

21. In a rejoinder, the petitioner stated that he wished to meet the complainant and apologize to him and added that his going to jail has taught him to know life.

22. A letter which is undated, signed by Chaplain Kisumu Maximum Security Prison shows that the Petitioner is born again and reformed, with an exemplary character. He promises to maintain good behavior.

23. I have considered the petition and the mitigations given by the Petitioner. I have also considered the seriousness of the offence committed and the injuries sustained by the complainant who never recovered his property and was left with a fractured arm.

24. The Supreme Court in the **Francis Muruatetu** case only held that it was the mandatoriness of death sentence that was unconstitutional as it took away the discretion of the trial court in sentencing.

25. The Supreme Court 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.

26. 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. 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.

27. 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 however, find the Petitioner who was young at the material time of the offence to have been influenced by bad characters and he has now learnt his lessons in prison. This is evidence from his demeanor in court when arguing this petition.

28. For the above reasons, the petition for resentencing is hereby allowed. I hereby resentence the Petitioner to serve a definite prison term, as the Petitioner has served about 12 years in prison, I hereby resentence him to serve twenty (20) years in prison, to be calculated from the date of his arrest on 23rd December, 2006.

29. Orders accordingly.

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 state

CA: Brenda and Modestar