



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CONSTITUTIONAL PETITION NO. 2 OF 2018

(CORAM: R.E. ABURILI – J.)

ERICK OMONDI OKELLO.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT ON RESENTENCING

1. The Petitioner Eric Omondi Okello with another who escaped from lawful custody were jointly charged with the **offence of robbery with violence contrary to Section 296 (2) of the Penal Code.**

2. Particulars of the charge were that on the 22nd day of November, 2010 at Umala Sub-Location, Ugenya District within Nyanza Province being armed with dangerous weapons namely, panga and rungus jointly robbed Wilson Omondi Oloo of his Motor cycle make TVS Star, red in colour, registration No. KMCM 387F valued at KShs.80,000 and mobile phone make Nokia 1200 valued at KShs.2,500 all totaling KShs.82,000 and at or immediately after the time of such robbery used actual violence to the said Wilson Omondi Oloo.

3. After a full trial, the Petitioner was convicted and sentenced to suffer death by Ukwala Principal Magistrate's Court in Criminal Case No. 484 of 2010 by Hon. E.K. Mwaita on 21.2.2012.

4. Being dissatisfied with the judgment and sentence imposed by the trial Court, the Petitioner lodged an appeal to the High Court vide Kisumu HCCRA No. 22 of 2012 and the 2 Judge Bench comprising Chemitei and Muchelule –JJ, after hearing the appeal, found no merit in it and proceeded to dismiss it on 10.12.2013. The Petitioner was not satisfied with the decision of the first Appellate Court. He appealed to the Court of Appeal at Kisumu vide CR. A. No. 12 of 2014 and on 12th February 2016, the Court of Appeal D.K. Maraga (as he then was), D.K. Musinga and A.K. Murgor, JJA dismissed the appeal for want of merit, upholding the conviction and sentence meted out by the trial Court as confirmed by the High Court.

5. Motivated by the Supreme Court's decision in **Francis Karioko Muruatetu and Another V. R [2017] eKLR** where the Supreme Court declared that death sentence for the offence of Murder and by extension, capital robbery was not mandatory, the Petitioner lodged this Petition seeking for orders:

a) A declaration that death sentence imposed by the trial Court, confirmed by the High Court and the Court of Appeal and later commuted to life imprisonment by the President, is in contravention of Article 50 (2) (h) (p) of the Constitution of Kenya, 2010;

b) A declaration that ambiguity and disparity exhibited in the application of Section 296 (2) of the Penal Code is in grave contravention of right to fair trial under Articles 50 (2) (b) and 27 of the Constitution of Kenya, 2010.

c) A declaration that the Constitutional rights of the Petitioner have been violated;

d) An order to have sentence of death imposed against the Petitioner be set aside;

e) An order, in the alternative to have the case be reviewed in the interest of justice and mitigation be taken afresh for determination of proportionate sentence in line with Article 50 (2) (p) of the Constitution of Kenya, 2010;

f) Costs of this petition;

g) Any other or further relief that this Honourable Court considers appropriate and just to grant;

6. The Petition is supported by the annexed Affidavit of ERICK OMONDI OKELLO
7. reiterating the facts as set out above.
8. In the written submissions filed on 13.9.2018 by the Petitioner's Advocate Odumbe Okello and Associates, the Petitioner urges the Court to consider the period served by the Petitioner in prison, the fact that the Court in the cited cases of **Michael Kathewa Lachena and Another V. R [2018] eKLR John Kathia M'tobu V. R [2018] eKLR and Francis Kamithu V. R. [2018] eKLR** resented the Petitioners to 15 years imprisonment to run from the date of conviction by the trial Court.
9. It was submitted that this Court should also consider the fact that during the robbery, only one motor cycle which was recovered and a Nokia Mobile phone were stolen.
10. That the Petitioner has since been rehabilitated. The Petitioner availed to Court copies of a Diploma Certificate in Bible Studies obtained in 2017, National Trade Test Certificate Grade 1 in Welding (electric), August 2017, a Certificate in soap, yoghurt fruit juice and cordial juice, bleach and hair shampoo and conditioner making, 2014 and a Certificate in Drug and Substance abuse prevention training, 2013.
11. This Court, after hearing the Petition, in a judgment delivered on 18.12.2018, I allowed the Petition for resentencing only and declined the declaration orders sought seeking to find the death sentence unconstitutional.
12. The Petitioner was then allowed to mitigate for resentencing. The Court nonetheless ordered for a pre-resentencing report from the Siaya County Probation Officer, which report was filed on 29.2.2019 dated 1st March 2019(sic) and signed by Rhoda Wanyonyi, a Probation Officer.
13. According to the Probation Officer, the Petitioner was married with one child aged 10 years. He is aged 32 years. He is an extrovert and responsible person. He has a mother who lives with his child. His wife left the matrimonial home and went to live with her sister in Kisumu.
14. The victim of the robbery Mr. Wilson Omondi Oloo is the Petitioner's distant cousin and this was discovered after the robbery. That he has since pardoned the Petitioner as the stolen property was recovered.
15. The petitioner's Mother Ann Arum prays for mercy for her son and together with her elder son say the Petitioner was a good child who fell victim of circumstances. The Community led by the Village Elder Asere Julia Ogando have no issue with the Petitioner and speak well of him as a good child but that there are bad boys in the village who terrorize villagers. Five (5) prison staff interviewed spoke well of the Petitioner. That he is the most disciplined prisoner.
16. Prior to his arrest, the Petitioner was operating a welding shop in Eldoret Town. The Petitioner regrets the offence. He claims to have fallen victim of peer pressure but now he appreciates where he went wrong.
17. He requires reintegration into the society. The Social inquiry report is highly positive of the Petitioner and a recommendation that he should be considered for a non-custodial (Probationary sentence) this was after a risk needs responsivity assessment was done by the Probation Officer, Rhodah Wanyonyi who concluded that the risk of the Petitioner re-offending and or absconding is nil.
18. The Prosecution Counsel Mr. D. Okachi opposed non-custodial sentence and submitted that the mitigating factors had no merit for the Court to consider non-custodial sentence as the offence of robbery with violence is serious and deserves deterrent sentence.
19. Counsel submitted that it is good for the State and the Citizens if the Petitioner remains in custody as there is no remorse in writing. That this Court should not render an ineffective sentence.
20. I have considered the further submissions by the Petitioner's Advocate, that his client is a first offender and reformed and the Prosecution Counsel's submissions in opposition.
21. I have given serious consideration to the pre-resentencing social inquiry report which recommends probation sentence for the Petitioner. I take cognizance of the fact that the Petitioner is related to the Complainant victim who recovered his motor cycle and the fact that the Petitioner is aged 32 years, married, with one child, is remorseful and has learnt several trades while in prison.
22. I have given equal consideration to the fact that the offence of robbery with violence is a serious offence which can lead to loss of life or limb but that in this case, the property stolen was a motor cycle which was recovered and the fact that the victim was not injured. The offence is also traumatizing to the victims and the society at large. I have also considered the fact that death sentence is lawful sentence and in appropriate cases, the court would not hesitate to impose it on the convict.
23. The Petitioner was influenced by peer pressure but the offence is not only serious but prevalent in the area and as was correctly submitted by Mr. Okachi Prosecution Counsel, this Court would be rendering an ineffective sentence and setting a dangerous precedent if it went by the social inquiry report and resented the petitioner to probation service, considering the nature of the offence, however, remorseful or rehabilitated the Petitioner may appear or sound.
24. I have considered the sentencing guidelines and the nature of the offence and in my view, non-custodial sentence is not appropriate for the Petitioner who has already served part of the custodial sentence. Sentencing is in the discretion of the Court and it is not done to appease the complainant but the society at large for the wrongs committed by the offenders.

25. Accordingly, I find and hold that prison term is appropriate for the Petitioner to serve and return to the Society as a fully rehabilitated individual.

26. Furthermore, his Advocate in the written submissions asked for custodial sentence of 14 years and even cited authorities as benchmarks for this Court to follow. Accordingly, I hereby resentence the petitioner to serve prison term. The death sentence meted out on the Petitioner Eric Omondi Okello is hereby set aside and substituted with imprisonment term of 15 years to run from the date of his arrest. File Closed. Orders accordingly.

Dated, Signed and Delivered at Siaya this 24th Day of June, 2019.

R. E. ABURILI

JUDGE

In the presence of:

The Petitioner

Mr Okachi Senior Principal Prosecution Counsel for State

CA: Brenda and Modestar