



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CONSTITUTIONAL PETITION NO. 10 OF 2019

(CORAM: HON. R.E. ABURILI – J.)

STEPHEN OTIENO ODHIAMBO.....PETITIONER

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

1. From the onset, there is no doubt that the Petitioner herein Stephen Otieno Odhiambo was convicted and sentenced to suffer death for the offence of Robbery with Violence contrary to section 296(2) of the Penal Code. This was vide **Siaya P.Ms Cr. Case No. 4 of 2005 in a judgment rendered on 28.3.2017.**
2. The Petitioner was jointly charged with 4 others. The 2 Counts of capital robbery had Aloice Juma Oluoch and Lilian Adoyo Agutu as Complainants and the total value of the property robbed was KShs.9,100/=.
3. The Petitioner challenged the conviction and sentence before Kisumu High Court vide HC Cr. A. 59/2007 but vide judgment rendered by J.R. Karanja & Mwera JJ, the High Court affirmed the conviction and sentence.
4. The appeal to the Court of Appeal never bore any fruit. The death sentence was later commuted to life imprisonment in 2009 by His Excellency the President.
5. The Petitioner has now approached this Court seeking to mitigate and resentencing in view of the window of opportunity created by the **Supreme Court in Supreme Court Petition 15 and 16 of 2015 Francis Muruatetu Vs. Republic** wherein the Supreme Court made it clear that death sentence was not the mandatory sentence for capital offenders and that in so far as it deprived the trial Court of discretion to mete out appropriate sentence in appropriate cases, and denied the convicted person the opportunity to mitigate, it was time to revisit the mandatoriness of death sentence.
6. For avoidance of doubt, the Supreme Court in the above cited case did not outlaw or declare death sentence unconstitutional. This is so because **Article 26 of the Constitution** is clear that death sentence where imposed pursuant to statute is not unconstitutional. In other words, in appropriate cases, a Court of law should not shy away from imposing a death sentence to a convict, having regard to the circumstances of each case.
7. The Petitioner has exhausted all avenues for appeal. He has thrown in the towel in so far as challenging conviction for capital robbery is concerned. He has however approached the seat of justice seeking for a last chance for the Court to consider resentencing him for the offence he committed when he was only 22 years old. The offence was committed on 1st December 2004 at Kochieng 'A' Sub-Location in Siaya District (as it then was within the former Nyanza Province. The Petitioner was in a gang of robbers who were armed, beat up Aloice Juma Oluoch thoroughly to sub-due him and other 10 victims to surrender their property.
8. The description by the witnesses' evidence compiled by the trial Court is traumatizing and horrific. No human being ever wants to meet a robber. A robber is forever armed and with intention to harm or kill his victim, sometimes, even where there is no resistance. A robber can only be described as a heartless being.
9. The Petitioner has been in prison from the year 2004 and pleads with the Court to help him because he did not know what he was doing.
10. That he has learnt the 3 grades of carpentry and joinery. He exhibited a letter from Prison authorities showing that he had reformed. That he has never been or had a discipline case in prison and hence he was given special stage in prison. That he had bad friends who misled him into committing the robbery. He is now 43 years old.

11. In his written submissions he states that he is a first offender and very remorseful, he has earned a good character record in prison and demonstrated rehabilitation. That he deserves a chance to get back home and care for his young family who have missed his love and fatherly support.

12. The Prosecution Counsel M/s. Odumba left the matter to the discretion of the Court.

13. Having considered the mitigations by the Petitioner, the circumstances under which the offence was committed, the period served in prison and good character of the Petitioner who has also learnt life's skills and the fact that he promises to be useful not harmful to the society at large, I am of the view that the Petitioner deserves a second chance.

14. In the end, I allow the Petition on resentencing. I set aside the death sentence as committed to life imprisonment and substitute it with an order that the Petitioner is hereby resentenced to serve 25 years in Prison, to be calculated from the date of his arrest. Accordingly, the petition for resentencing is allowed.

15. 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 in person

Mr. Okachi Senior Principal Prosecution Counsel for state

CA: Brenda and Modestar