



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIIAYA

CRIMINAL DIVISION

SIAYA CR. REV. NO. 55 OF 2019.

ELIUD MOSES OWINO APWAPO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being a Petition of resentence in Kisumu HC Const. Pet. No. 28 of 2019

dated 31.7.2019 Before Hon.J. T.W. Cherere- J).

RULING

1. The Convict/Applicant **Eliud Moses Owino Apwapo** was convicted and sentenced to suffer death for the offence of **Robbery with Violence contrary to section 296 (2) of the Penal Code vide Siaya P.M. Cr. Case No. 718 of 2017.**
2. He appealed against conviction and sentence vide Kisumu HCRA No. 371 of 2009. The appeal was dismissed.
3. He challenged the High Court decision before the Court of Appeal vide C.A. No. 371 of 2009.
4. The Court of Appeal dismissed the appeal and upheld the conviction and sentence of the Lower Court.
5. In 2018, the Applicant petitioned this Court vide Const. Petition No. 1 of 2018 seeking for resentencing on the basis of the decision in the Supreme Court of Kenya **Pet Nos. 15 and 16 of 2015. Francis Karioko Muruatetu V. Republic** where it was held by the Supreme Court that mandatory death sentence was unconstitutional as it deprived the Court of the discretion in sentencing and that it also denied the Convict an opportunity to mitigate as such mitigations would not matter.
6. The Court, after considering the Petition on its merits, allowed it and resented the Convict to 20 years imprisonment.
7. The Convict then approached this Court by another Petition seeking for remission of sentence but the Court advised him to file a Constitutional Petition seeking to declare **Section 4(b) of the Prison Act unconstitutional which he did vide Kisumu H.C. Const. Petition No. 28 of 2019** and he was successful. The Court granted him orders for remission.
8. He has now come back to this Court seeking for revision of sentence which is the remainder after remission.
9. He urges the Court to place him on non-custodial sentence to enable him fend for his children as espoused in **Article 53(1) (e)(2)** of the Constitution since their education is threatened. To the application, he has annexed Certificates of life's skills attained in jail and his good conduct and Industry and discipline. He has earned recommendations by the Prison's authorities and therefore he wants an Order that the remainder portion of his sentence be served on non-custodial terms.
10. I have carefully considered the application by the Convict Eliud Moses Owino Apwapo.
11. I have also taken into account his Industry, discipline and recommendations by Prisons authorities.
12. This Court does appreciate that there are in prison, people who have reformed. They have been rehabilitated and given a chance to get back into the society, they will be useful human resources.
13. The Court also appreciates that the Applicant has made concerted efforts to leave prison through lawful means and has succeeded in

many ways and on most occasions. I empathize with the applicant because of his health condition.

14. However, one cannot have a bite at the cherry twice, the saying goes and neither can one have his cake and eat it.

15. In criminal proceedings, this Court becomes *functus officio* the moment it renders its decision. This Court having rendered its decision in resentencing the Applicant from the commuted sentence of death to life and to a custodial term of 20 years which has earned him remission, the jurisdiction of this Court is spent.

16. For the above reasons, I find and hold that the application for revision of sentence of 16 months remaining for the Applicant to complete following remission is an abuse of this Court's process. It is hereby declined and dismissed.

17. This file is closed.

DATED AT SIAYA THIS 26 DAY OF SEPTEMBER, 2019.

HON. LADY JUSTICE R. E. ABURILI

JUDGE