



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CONSTITUTIONAL PETITION NO. 18 OF 2019

BENJAMIN OBAT AYOKI.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

(Being an Application seeking Resentencing in Kisumu HCCRA No. 79 of 2005:

from Original Criminal Case No. 1072 of 2004 at Principal Magistrate's court,

Bondo delivered on 26.4.2005 by Hon. S.N. Mbingi, Senior Resident Magistrate)

JUDGMENT

1. The Petitioner Benjamin Obat Ayoki was convicted of the offence of Robbery with violence contrary to Section 296(2) of the Penal Code vide Bondo PM's Court Cr. Case No. 1072 of 2004.
2. The charge particulars were that on 28/11/2004 at Masala sub-Location, East Uyoma Location, Bondo District within Nyanza Province, jointly with others not before court, robbed Crispo Aluoch Oiko of cash Kshs. 3,000/= and at or immediately before or immediately after the time of such robbery, used personal actual violence to the said Crispo Aluoch Oiko.
3. Upon conviction by Hon. S.N. Mbingi, SRM on 26/4/2005, the trial magistrate sentenced the Petitioner to suffer death as provided for by the law. This was after according the Petitioner an opportunity to mitigate wherein he stated that he was sickling and had overstayed in remand. The Prosecution intimated that the Petitioner was a first offender.
4. Aggrieved by the conviction and sentence of death imposed on him, the Petitioner appealed vide Kisumu HCCRA No. 79/2005 and a two-Judge Bench comprising J.W. Mwera J (as he then was), and M.G. Mugo J (as she then was) after hearing the appeal found it devoid of merit. The learned Judges dismissed the appeal against conviction and sentence, thereby upholding the trial court's decision and death sentence. This was vide a judgment delivered on 18/12/2007 at Kisumu.
5. Dissatisfied with the above decision of the High Court, the Petitioner tried his luck by exercising his right of appeal to the Court of Appeal at Kisumu vide Kisumu CA Cr. Appeal No. 140/2008 which appeal was also dismissed.
6. In 2009, the death sentence imposed on the Petitioner was commuted to life imprisonment by His Excellency the President and on 14/12/2017, the Supreme Court in **Francis Karioko Muruatetu V R Supreme Court Petition 15 & 16 of 2015** changed the landscape of mandatory death sentence.
7. In the said decision, the Supreme Court held that mandatory death penalty was unconstitutional in as far as it denied the convict an opportunity to mitigate before being sentenced and in addition, that such penalty in essence deprived the trial court of the discretion in meting out appropriate sentences, having regard to the circumstances of each case.
8. The above decision did not outlaw death sentence as Article 26 of the Constitution is clear that death sentence is not unconstitutional where it is provided for in law. What that means is that in appropriate cases, the trial court will not hesitate to mete out death sentence but this should be after according the convict an opportunity to mitigate and considering the circumstances of under which the offence was committed.
9. It is on the basis of the decision in the Muruatetu case that this court has seen an avalanche of petitions for resentencing. However, before considering such Petition, the court has had to recall the trial court records for perusal and appreciation of the evidence adduced before the

trial court and to understand the circumstances under which such offence was committed.

10. In his Petition, dated 10/4/2019, the Petitioner claims that the death sentence imposed on him was unconstitutional and inhuman, that he has been in custody for 14 years since his arrest, that the court should consider the time spent in prison in revising his sentence. A careful reading of Francis Muruatetu decision reveals that Sentence Review or re-sentencing is still in the discretion of the court. The Petitioner must demonstrate that they deserve such review of sentence. They do not earn it as of right.

11. The Petitioner submitted orally claiming that he is 63 years old and that he was 44 years on being arrested. He prayed for a non-custodial sentence. That he committed the offence because of being a drunkard. He sought for forgiveness from the Complainant as the robbery never helped him at all. He has learnt carpentry and his message to the young people is "never to engage in crime."

12. In response, the Prosecution led by Senior Principal Prosecution Counsel, Mr. D. Okachi, submitted that owing to his advanced age and years served, the Petitioner can have a chance for non-custodial sentence.

13. The Petitioner filed in court copies of Certificates showing that he has attained Grade 1 Upholstery in August 2012 at Naivasha Prisons Testing Centre.

14. I had the opportunity to hear and see him plead with the court's leniency and I am satisfied that his Petitioner deserves favourable consideration, taking into account the fact that the complainant lost Kshs. 3,000/= in the process of being robbed and he suffered minor injuries classified as harm. PW1, the Complainant himself confirmed his testimony that the Petitioner was very drunk when he was arrested from his house at around 5.00am after robbing the complainant at 7.30pm. The Petitioner, from PW1's testimony was an amateur robber who, upon being called by the Complainant by name, took off upon realizing that the victim knew him well. He must have used the Kshs. 3,000/= stolen from the complainant to drink the whole night partying with his gang of about 7 other people.

15. Unfortunately, he carried the cross of facing death penalty all alone as his co-offenders were not arrested and charged since the complainant did not identify them. The Petitioner is a clan mate of the victim hence he knew him very well.

16. Taking into account all the above and the fact that the Petitioner is now 63 years, and his mitigation and promise to be a good ambassador teaching young people that crime does not pay and as Kshs. 3,000/= and some crown of thorns which injured the victim when he was thrown off his bicycle over 14 years ago have earned the Petitioner nothing but regrets of wasted life in prison, I exercise discretion and resentence the petitioner to serve fifteen years in prison to be calculated from 23/11/2004 when the Petitioner was first arrested. The death sentence as commuted to life imprisonment is hereby set aside. Therefore, unless otherwise lawfully held, the Petitioner shall be released from prison forthwith.

17. Orders accordingly.

Dated, signed and Delivered at Siaya this 26th day of November 2019

R.E. ABURILI

JUDGE