



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

MISCELLEANOUS CRIMINAL APPLICATION NO. 22 OF 2018

VINCENT ONYANGO MUSINGO.....APPLICANT

VERSUS

REPUBLICRESPONDENT

((Being a Petition for resentencing from original Ukwala PM CRC 568 of 2011, HCCRA No. 59 of 2013 and KCA No. 111/14))

JUDGMENT

1. The Petitioner/Applicant herein **Vincent Onyango Musingo** was vide Ukwala P.M's Court, Criminal Case No. 568/2011 convicted and sentenced to death for the offence of **Robbery with Violence contrary to Section 295 as read with Section 296(2) of the Penal Code.**
2. He also faced, jointly with another, **Gabriel Omondi**, the second count of being in unlawful **possession of a firearm and ammunition contrary to Section 89(1) of the Penal Code.**
3. The two were also jointly charged with **consorting with a person in possession of a firearm contrary to Section 89(2) of the Penal Code.**
4. They were convicted on all counts and on the count of Robbery with Violence they were sentenced to suffer death but sentence in respect of the other charges was held in abeyance. This was on 8.5.2013.
5. The convicts appealed to the High Court at Kisumu vide **Kisumu HCCRA 59/2013** which was dismissed on 7.7.2014 by Hons Chemitei and Muchelule – JJ.
6. The convicts preferred another appeal to the Court of Appeal vide Kisumu Court of Appeal Criminal Appeal Number 111/2014 and on 11.10.2016, the Court of Appeal comprising D.K. Maraga,(as he then was) D.K. Musinga and A.K. Murgor – JJA dismissed the second appeal, upholding the conviction and sentence of the trial Court and as upheld by the High Court.
7. Having reached a dead end, the convicts waited for their fate. On 4.12.2017, the Supreme Court vide **Petition Nos.15 and 16 of 2015 Francis Karioko Muruatetu and Others Versus Republic** held that the mandatoriness of death sentence was unconstitutional, in so far as it deprived the trial Court of judicial discretion in sentencing and also denied a convicted person the opportunity to mitigate before being sentenced.
8. For avoidance of doubt, the Supreme Court did not hold that death sentence was unconstitutional as is misapprehended by many Petitioners, as Article 26 of the Constitution is clear that death sentence is not unconstitutional where it is prescribed by Law.
9. In 2015, the death sentence which this Petitioner/Applicant faced with his co-convict Gabriel Omondi, a Petitioner in Constitutional Petition No. 9 of 2019 which was determined by this court on 24.6.2019 was commuted to life imprisonment.
10. In this Petition, the Petitioner/Applicant had an advocate Mr. Okuta representing him but the latter kept the Court waiting forever until the Petitioner had to decide to represent himself.
11. He submitted orally on 6.3.2019 that the complainant visited him in person and forgave him hence he had to sack his advocate. He submitted in mitigation that he has a family, he has learnt a lot in prison including Industrial work, welding, electric Trade Test I and can make soaps. He showed the Court several certificates to that extend.
12. He submitted further that he is 43 years old, had been in prison for 7 years and learnt how to live with people. That he will never commit any crime and that he committed the crime due to bad friends who influenced him. That he knows the consequences of engaging in crime and that he had now learnt how to fend for himself and his family.

13. The prosecution Counsel Mr. Okachi left it to Court. The delay in determining this Petition was due to the adjournments occasioned by the Petitioner and the delay in submitting to this Court the trial Court records which were at Kisumu Court of Appeal.
14. The Petitioner also availed to this Court a letter dated 1.3.2019 from Officer in Charge, Kisumu Maximum Security Prison recommending him for consideration favorably reason being that he was worthy of overall qualifications, having been trained in various Industrial skills and prisoners' progressive stages (stage 4) and added responsibilities.
15. The trial Court record shows that the Petitioner was a Police reservist who was lawfully armed but who misused his Rifle and in the company of Others used it to rob innocent citizens and threaten their lives. The Rifle G3 No. 93007942 had been issued to him at Kapkoi Police Patrol Base in Kitale, Trans Nzoia. The Rifle had several rounds of ammunition. The robbers commandeered the complainants who were in a motor vehicle on a sales mission. The incident took place during day time and the robbers were arrested near the scene of crime.
16. The Petitioner herein travelled all the way from Kitale to Siaya with a Rifle to commit a robbery. He denied the offence throughout the trial and mounted appeal processes despite the overwhelming evidence against him and his co-convict Gabriel Omondi.
17. As a Police reservist who was employed by the Government and entrusted with a firearm to protect citizens and their property, he abused the public trust.
18. In **Petition No. 9 of 2019 Gabriel Omondi V. Republic** I observed that the Petitioner therein showed remorse and his attitude in Court was evident.
19. In this particular Petition, the Petitioner kept taking this Court round the circles and holding the Court at ransom to delay the conclusion of this matter, which prompted me to ask for the original trial Court records to be availed for the Court to appreciate circumstances under which the offence was committed.
20. His demeanor does not show remorse. As a person who was accustomed to using a Rifle which is a lethal weapon, he did not impress the Court as a genuinely remorseful person.
21. He was not jobless when he committed the robbery therefore he cannot claim learning the lives' skills has taught him to fend for himself and his family. As a Police Reservist he knew the consequences of engaging in crime using the firearm which had been issued to him. He must have thought that he would never be caught yet being in law enforcement he knows the old adage that the long arm of the law would catch up with him.
22. I have considered all his mitigation and the fact that he left behind a family. However, if the petitioner cared about that family he should have avoided criminal behavior at all costs.
23. In my humble view, the Petitioner using the firearm influenced his other co-accused to be robbers. He cannot claim to have been influenced by bad friends. He was the bad friend who took advantage of the possession of the lethal weapon to influence others into crime. He must pay for his crimes, for, that is what the purpose of punishment is all about. Having said that, I exercise discretion and resentence the Petitioner/Convict to serve Prison sentence of fifty (50) years in prison to be calculated from the date when he was arrested on 7.6.2011. The sentence will run concurrent with the sentences imposed on him in the other two counts.
24. To that extend, the Petition for resentencing is allowed.

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

R. E. ABURILI

JUDGE

In the presence of:

Petitioner in person

Mr. Okachi Senior Principal Prosecution Counsel

CA: Brenda and Modestar