REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CONST. PETITION CASE NO. 1 OF 2018

ELIUD MOSES OWINO APWAPO.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Petitioner **Eliud Moses Owino Apwapo** was the Accused person in the lower Court vide **Siaya R.M's Court Criminal Case No. 718/2007** wherein he was charged, jointly, with **Beatrice Adhiambo Owuor** with the offence of **Robbery with Violence contrary to Section 296 (2) of the Penal Code**.

The particulars of the offence were that on 2.8.2007 at around 20.30 hours at Rabango Estate in Siaya District, within Nyanza Province, they jointly with others not before Court, robbed Marshal Tito Abonyo of mobile phone make **Motorolla V. 980 S/No.354909002279564**, wristwatch make Armitron diamond and cash KShs.600 all valued at KShs.70,000 and at/or immediately before or after the time of such robbery wounded the said Marshal Tito Obonyo.

The Petitioner pleaded not guilty and after a full trial, the two Accused were found guilty and were both sentenced to death by Hon. G.K. Mwaura Principal Magistrate on 12.5.2008. This was after the Prosecution stated and the Petitioner conceded that he had previously been convicted for the offence of being found in possession of narcotic drugs and being sentenced to serve 4 months in prison. Notably **Court 2** of the charge related to **Handling Stolen goods contrary to Section 322 (2) of the Penal Code** whereas Count 3 was being in **Possession of narcotics drugs contrary to Section 3 (1) as read with Section 3 (2) (a) of the Psychotropic substance control Act Cap 70 Laws of Kenya.**

The Petitioner was also found guilty on count on being found with narcotics and sentenced to serve 4 years.

Being dissatisfied with the judgment of the trial Court both on conviction and sentence, the Petitioner herein filed an appeal vide Kisumu High Court Criminal Appeal No. 54 of 2008, which appeal was heard and determined by a two Judge Bench comprising Hon. **Justice J.W. Mwera (as he then was) and Hon J.R. Karanja** on 1st December 2009. The Hon Judges dismissed the 1st Appellant/Present Petitioner's appeal and upheld his conviction and sentence. They however acquitted the 2nd Appellant (Accused in the Lower Court).

Dissatisfied with the decision of the High Court, the Petitioner herein filed an appeal to the **Court of Appeal vide Cr. A. at Kisumu Criminal Appeal No. 371 of 2009** wherein Judges Onyango Otieno, Azangalala & Kantai JJ, A heard and determined the appeal on 8th November 2015 dismissing the Petitioner's appeal and upholding the conviction and sentence imposed on the Petitioner. They also dismissed his claim that his Constitutional rights were violated because he had been arraigned in Court, 2 days after the time stipulated in law had elapsed.

Having exhausted the avenues for appeal without success, the Petitioner is now before this Court by way of a Notice of Motion dated 21st February 2018 seeking orders that this Court be deemed in the interest of upholding the Petitioners' fundamental rights and that (sic) he be present during the hearing of his application. The grounds upon which the Application is predicted are that: (a) The mandatory death sentence stipulated in **Section 296(2) of the Penal Code** rendered his right to mitigation as provided for in **Section 329 of the Criminal Procedure Code** ineffective thus hindering the arrival at an appropriate sentence by the trial Court, and that the unjustified disregard of **Section 329 of the CPC by the trial Court denied him fair trial under Article 25(c) of the Constitution**. At the oral hearing in Court, the Applicant submitted in addition to his written submissions that he prays for the Court to review his sentence at this stage and level not to send the file to the trial Court for resentencing. He therefore mitigated stating that he has since reformed in Prison, learnt many skills which he will apply in the community given a chance to serve a non-custodial sentence. That he was 39 years old when he committed the offence and that he has learnt many lessons having been led into crime by ignorance and peer pressure. He promises never to indulge in crime. That he has 3 children and a wife who resides with her parents in Kisumu but that she visits him. He stated that crime is very expensive. That he has land in Bondo and he would embark on farming if he finds nothing else to do, He regrets committing the offence and is ready to live in harmony with other people in Society. He apologies to the victim of the crime and prayed for leniency. He relied on several authorities to support the application for review of sentence.

In opposing the application, Mr. Okachi Prosecution Counsel submitted that the offence committed was serious and that the applicant does not deserve any Mercy hence the deterrence sentence meted out on him was necessary to serve as a lesson to members of the Community. However, Mr. Okachi concluded with a submission that if the Court is minded to commute the death sentence with a custodial sentence, then the same should be deterrent enough.

In the Applicant's further written submissions presented to Court at the hearing, he maintains that his conviction and imprisonment was a blessing in disguise because he had since gone back to school, received formal Education at 'O' level and acquired technical skills and that he had also undergone several trainings in health and legal matters which shows that he is reformed and can support himself and his family through lawful earnings as he remains a law abiding citizen of the Community. He also reiterated that he is remorseful and that therefore the Court should have leniency on him. He annexed documents which include KCSE certificate No. 1351935 showing he attained a grade C- while in Prison in the year 2014; Diploma in Biblical Studies, Certificate in Home Based Care for Community Health Workers; Certificate in Basic Counseling skills awareness, certificate in Behavior charge and communication, certificate in Prison Paralegal Training, Tailoring Grade 1, II Trade Test, among many other practical skills training certificates. I have carefully considered the Applicant's Application for review of his sentence of death meted out to him in 2008. I have also considered the fact that the offence was serious in that besides the Complainant losing property he was seriously injured. He suffered bullet wounds as a result of the robbery incident as shown by the P3 form which was produced in the trial Court by the Prosecution. The bullet wound was on the left hand.

I am cognizant of the fact that the Applicant was given an opportunity to mitigate as shown on page 24 of the judgment of the trial Court and he stated in mitigation.

> "I seek help to have my properties that are in the Police to be given to my people. I apply for proceedings."

The trial Court meted out what he believed was only one penalty being death sentence. This Court does appreciate that the Applicant at the trial was not represented by an Advocate therefore he may not have appreciated what mitigation meant in a case where he knew that the only sentence available in law was death. The legal position as to whether death sentence is the only sentence available for convicts of Capital Robbery and Murder is now settled. This is following the decision in the Muruatetu case decided by the Supreme **Court (See: S.C. Petition No. 15 of 2015 and 16 of 2015 Francis K. Muruatetu & Another Vs. Republic & Others**. In this case, the Supreme Court made it clear that where the sentence espoused in law is mandatory death sentence, the trial Court had the discretion to sentence the convict to any other prison sentence, albeit death sentence was lawful.

It must however be made clear that the Supreme Court did not outlaw death sentence and neither does the Constitution outlaw death sentence

Albeit this Court has the Jurisdiction to review sentence, it can, where it is satisfied that there are no grounds for review of the same, having regard to the circumstances, it may nonetheless reject such application, with reasons. Indeed, as held by the Supreme Court in the Muruatetu (supra) case, mitigation is an important congruent element of fair trial. Further, that the mandatory nature of death sentence in our Statutes deprives the Court the use of judicial discretion in a matter of life and death hence such law can only be described as harsh, unjust and unfair. In addition, that where the Court listens to mitigating circumstances but has nonetheless, to impose a death sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the Accused Persons under **Article 25 of the Constitution**, an absolute right.

I have no reason to depart from the above judicial fiat passed by the apex Court of this Country.

In addition, while imposing appropriate sentence, the Court must always be guided by certain principles and guidelines contained in the 2016 Judiciary of Kenya sentencing Policy guidelines whose objectives are:

> **(1) Retribution – to punish the offender for his/her Criminal conduct in a just manna.**
>
> **(2) Deterrence; To deter the offender from committing a similar offence in future and to discourage other prospective offenders.**
>
> **(3) Rehabilitation, to enable the offender freeform from his criminal disposition and became a law abiding citizen.**
>
> **(4) Restorative justice: To address the need arising from the Criminal conduct such as loss and damages.**
>
> **(5) Community Protection: To protect the Community by incapacitating the offender.**
>
> **(6) Denunciation: To communicate the Community's condemnation of the Criminal conduct.**

Death sentence does meet some of the objectives of sentencing it is ultimate – an eye for an eye and a tooth for a tooth – Retribution.

However, rehabilitation of an offender is an equally important objective just as protection of the public from harm. The Convict/Applicant in this case has demonstrated before this Court that despite his evil deeds in the past, he regrets the incident and is not only ready to be reintegrated back into Society to live a more meaningful life, but that he has learnt hard lesson and in his own words he says "Crime is expensive." Whatever that statement means, to the convict, it is a message he is sending to the whole society that crime does not pay and this Court has on many occasions reiterated to offenders that crime does not pay.

The convict has learnt several skills at the expense of tax payers. He has been in prison awaiting the day when he would be hanged for over ten years. He has been behind bars from 1.10.2007 which is nearly 11 years now. He was 39 years then and with 10 plus years behind bars, he is just about to climb the 5th floor of life.

In my humble view, bearing in mind the touchy mitigations, albeit the victim of the crime suffered serious injuries, the convict deserves a chance to serve custodial sentence which will eventually lead to his release back into the society to enable him apply the skills that he has learnt in a positive and meaningful manner.

For the above reasons, I allow the application for review of sentence. I set aside the death sentence imposed on the Applicant/Convict and substitute it with a custodial sentence.

The Convict/Applicant shall accordingly serve twenty years imprisonment to be calculated from the date he was arraigned in Court for trial on 18.10.2007. In so ordering, I have taken into account all the years the convict has been in Prison and the use of lethal weapon on the Complainant who sustained bullet wounds. He will therefore serve the remainder term and be released back into Society to play a more meaningful role.

I so Order.

Dated, Signed and Delivered at Siaya this 31st day of August, 2018.

R. E. ABURILI

JUDGE