



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**PETITION CASE NO. 4 OF 2017**

**MOSES ODONGO ODINGA ..... APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an Appeal against both the Conviction and Sentence dated 2.10.2007 in Criminal Case No. 272 of 2007 in R.M's Court Siaya by Hon. G.K. Mwaura –R.M. )***

**JUDGMENT**

The Petitioner **Moses Odongo Odinga**, was convicted and sentenced by the **R.M. Siaya vide Siaya R.M. Cr. Case No. 272 of 2007**, to suffer death for the offence of **Robbery with Violence contrary to Section 296(2) of the Penal Code**, on 2.10.2007. He appealed to the High Court vide Kisumu HC. CR. A. No. 136 of 2008. Which appeal was heard and determined by Hon. J.R. Karanja – J. and Hon. A. A. Aroni – J., and dismissed on 23.3.2010.

Dissatisfied with the decision of the High Court, the Convict appealed to the Court of Appeal at Kisumu and vide judgment dated 4<sup>th</sup> November 2011, the Court of Appeal, E.O. Okubasu, E.M. Githinji and J.W. Onyango Otieno JJA dismissed the appeal and upheld the High Court's decision which latter decision upheld the subordinate Court's decision.

The Petitioner then filed this Petition by way of Notice of Motion on 9.11.2017, asserting that he be granted an acquittal as a relief since this Court is not only limited to reliefs under **Article 23 of the Constitution** and that incase this Petition does not affect the above relief of acquittal, then let this Court be pleased to order for a retrial as stipulated in **Article 50 (6) (b) of the Constitution**.

The basis upon which the Petition is predicated is that is the Complainant in the Criminal Case No. 272/2007, has new compelling evidence which she would like to adduce before this Court. Secondly, that every person is equal before the law and has a right to equal protection and benefit of the law; thirdly, that the Complainant in this case seeks for a reconciliation which is an alternative form of dispute resolution that this Court needs to be guided by.

The Petition was supported by the affidavit sworn by the Petitioner on 9.11.2017. In which he reiterated the grounds and maintained that the Complainant Grace Anyango Dawa whose telephone number is given in the affidavit and Box number, is ready to come and adduce the new evidence in person or swear an affidavit as this Court may deem it right.

At the hearing of the petition the Petitioner presented written mitigation pleading that as he had served his life imprisonment for 12 years, he was reformed and met the purpose of imprisonment, which accords offenders an opportunity to rehabilitate.

That he has managed to live peacefully with inmates and the Prison authorities hence the Chaplancy's recommendation that he is a reformed and instrumental Prisoner in the Prison Church Ministry.

That he had trained and obtained a Diploma in Biblica Studies through the Association of Faith Churches and Ministers International AFCM and International School of Ministries (ISOM) and also undertaken Masonry Training and acquired Grade (1) certificate which puts him in a better position to support his family well through legal means of earning a living.

That he was a sole breadwinner for his family and his long incarceration has put his children to suffer in the hands of a neighbour a peasant farmer hence the Court should consider giving him a non-custodial sentence taking into account the period already served in prison.

In his submissions orally in Court, the Petitioner reiterated what is contained in the written mitigation and added that his wife died in a road accident in 2016 and his mother-in-law who was the next care giver too died this year leaving his children aged between 19 years and 12 years including the last born whom he left at age 3 days old.

Further, that given an opportunity, he will work as a preacher or a mason.

In response, Mr. Okachi, Prosecution Counsel, submitted that the offence committed was capital and if the Court considers it fit to commute death sentence then it can do so but that Robbery with violence is a traumatizing offence not only to the complainant but the society as a whole. Further, that justice is a two way traffic as victims of the offence also deserve justice. Affidavit by Complainant was afterthought.

I have considered the petition and note that it is a replica of Petition No. 6/2018 save that in the latter Petition, the grounds are different and it was filed in 2018. It would appear that after filing this Petition in November 2017, the Petitioner grew weary because it was not being determined as fast as he wished so he filed Petition No. 6 of 2018, especially after learning of the Muruatetu case where the Supreme Court made it clear that death sentence is not a mandatory sentence in capital offences and that therefore the trial Court would have the discretion in sentencing an Accused Person in capital offences, after taking into account Mitigation by the convict. It is for this reason that I believe this Petitioner in Petition No. 6/2018 focused on re-sentencing and not on new evidence, in his Petition and only submitted on new evidence later after learning of the Muruatetu case.

Having already determined in Petition 6/2018 that the Applicant is suitable for custodial sentence of 15 years imprisonment to be calculated from the date he was arraigned in Court in Siaya – R.M. Cr. Case No. 272/2007, it would be superfluous to arrive at a different decision in this Petition.

Accordingly, I find, as I did find in Petition No. 6/2018, taking into account the mitigation given that the death sentence as commuted to life imprisonment is hereby set aside and substituted with Prison sentence of 15 years to be calculated from the date the Petitioner convict was arraigned in the trial Court. It is hoped that the Petitioner has learnt great lessons in Prison and will be an ambassador of the Rule of Law and order in our society when he finally sees liberty.

Orders accordingly.

**Dated, Signed and Delivered at Siaya this 31<sup>st</sup> day of August, 2018.**

**R. E. ABURILI**

**JUDGE**