



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
CONSTITUTION PETITION CASE NO. 6 OF 2018

(Re-Sentencing)

(CORAM: R. E. ABURILI – J)

MOSES ODONGO ODINGA.....APPELLANT

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:

In his Petition filed in Court by way of Notice of Motion on 2.7.2018 and supported by a sworn affidavit, the Petitioner **Moses Odongo Odinga**, seeks for a fresh sentencing. In view of the decision of the Supreme Court “S.C. Petition Nos. 15 and 16 of 2015.” **Francis Karioko Muruatetu and Others** wherein it was held that death sentence is a discretionary sentence and not a mandatory sentence in ‘Capital’ offences where the Accused is tried and convicted. He claims that he has reformed and lived peace fully in custody with his fellow inmates, that he has learnt several trades including Masonry and Theology hence he would be useful in his community if given a chance to get a non-custodial sentence.

He urges the Court to consider the time spent in Prison since his conviction in Siaya R.M. CR. Case No. 272 of 2007 for the offence of Robbery with violence wherein he was sentenced to suffer death.

He however, appealed against the said conviction and sentence vide Siaya HCRA 136/2008 which appeal was dismissed and his appeal to the Court of Appeal at Kisumu vide C.A. No. 156 of 2010 but the 2nd appeal was also dismissed.

He therefore only pleads for re-sentencing.

However, at the hearing, he tended to shy away from his original Petition for re-sentencing and instead alleges that there is new evidence from the Complainant to the effect that the latter swore an affidavit stating that it is not the Petitioner convict herein who robbed her. He stated that the Complainant had been coming to Court but that she had now re-located to Uganda.

He even filed very useful decision that support the assertion that where a Complainant appears after conviction and swears an affidavit excusing the Convict from commission of a crime then the Court should acquit him. See **Hassan Mohamed Namwiba Vs. R. H.C. Pet.12/2014 at Kakamega.**

The Petitioner claims that her property allegedly robbed from her by the Appellant and that in any case he is now born again and skilled to work in the Community. That the Court should consider the period he has served in Prison and acquit him because he has been vindicated by the victim of the robbery.

In opposing the Petition, the Prosecution Counsel, Mr. Okachi, submitted that the offence was serious and that the victim's affidavit is an afterthought as the author has not come to Court to be cross-examined on the same. He however left the matter to the discretion of the Court.

I have carefully considered the Petition by the Convict, and his submission as supported by the authorities in the **R Vs. Muruatetu (supra) case, the case of Hassan M. Namwiba V R. (supra)** and the objection by the Prosecution Counsel, Mr. Okachi. I have also considered letter dated 27.6.2018 from Rev. Lucas Owalla the Chaplain Kisumu Maximum Prison, which states that the Appellant is a reformed person from the heart and fit to be integrated back to Society after his Prison term.

He is now trained in Theology, behavioral change communication and Grade 1 Masonry.

I have seen the affidavit sworn on 28.2.2018 by the Grace Anyango Dawa at Kisumu, claiming that she supports this petition because although she was robbed of her property in 2006, she realised that the Petitioner was not involved in the act and that she begs to forgive him after consultation in Prison. She says her property was recovered at Gem Mutumbu at the home of Charles, so she has no claim against him and wants reconciliation to be promoted.

From the above Court record, the Court observes serious contradiction in that, whereas the Petition seeks for re-sentencing on account of the recent Supreme Court decision in **R Vs. Muruatetu** which abolished.

Mandatory death sentence, in the submissions by the Applicant/Petitioner he claims that he is innocent because the victim of the crime has sworn an affidavit exonerating him from the crime hence that is new evidence and hence shifts the Petition to that under **Article 50(6) of the Constitution**.

In my humble view, the Petitioner is obviously struggling by all means to find freedom from the sentence meted out by the trial Court. He had all the opportunity from the time of appeal to the High Court, to the Court of Appeal to avail the victim of the robbery to swear an affidavit or be examined on the allegation that she realized that the Petitioner was not the robber. She did not bring that evidence then and she also does not state when her property was allegedly recovered from one Charles Otieno at Gem Mutumbu. She does not state what action she took against the said Charles Otieno after recovering her property from him. She is also not available for cross-examination by the State, on her deposition as she is said to be in Uganda with no mention as to when she is likely to return to the Country.

My view is that shifting the Petition from resentencing to adduction of new evidence and therefore seeking for an acquittal is an afterthought. It is unacceptable, and I would on that ground dismiss the submission by the Petitioner touching on acquittal and on the new evidence which I find suspect.

Nonetheless, this Court has the power to consider the resentencing aspect as it was the first Appellate Court that reconsidered the trial Court's record. I note that the Petitioner was sentenced to death upon conviction for the offence of Robbery with violence but the death sentence was commuted to life imprisonment by the President of the Republic of Kenya.

The Petitioner's record in Prison is indeed impressive and he also shows a great remorse saying that this family has suffered while he is in Prison. He lost his wife in a road accident whereas his mother-in-law who was caring for his children also died this year, as per his submissions, in Petition No. 4 of 2017 where he only seeks for resentencing and where he was equally charged with Robbery with Violence, convicted and sentenced to death which was committed to life imprisonment. The Court has taken all the mitigation into account and the fact that Robbery with violence traumatizes not only the victim but also the community at large as it could result in death of the victim besides robbing one of hard earned property. The Courts in meting out sentence after considering mitigations are guided by principles of deterrence and rehabilitation or reformation of the offender.

The Prison life has not been wasteful for the Petitioner as he has learnt trades that can make him a useful person in society. He can employ himself and others as well as being an ambassador for the rule of law for those involved in crime to change. In my view and from my own observation for the Petitioner in Court, he appears remorseful and reformed and ready to reintegrate back to society. He has lost nearly 12 years liberty but he is lucky he never faced the hangman's noose.

Sentencing is never for an eye for an eye. It should serve a better purpose of rehabilitating the offender. Offender wrong-doing society from home

For the above reasons, I am persuaded that the Petitioner deserves a more lenient sentence which is custodial but not necessarily life sentence so that he serves the community in a positive way, with a hope that he will never engage himself or others in crime again.

Accordingly, and considering that the victim did not sustain serious injuries during the robbery, I hereby set aside the life sentence imposed on the Petitioner through commutation by the President and substitute it with a Prison term of 15 years to run from the date when the Petitioner was first arraigned in the trial **Court in Siaya RM Cr. Case No. 272 of 2007.**

Orders accordingly.

Delivered, Dated and signed this 31st day of August, 2018.

R. E. ABURILI

JUDGE