

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISC. APPL. NO. 23 OF 2017

CORAM: D.S. MAJANJA J.

BETWEEN

PAUL OUMA OTIENO..... APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The applicant's application is for resentencing following the Supreme Court decision in *Francis Karioko Muruatetu & Another v Republic SCK Pet. No. 15 OF 2015 [2017] eKLR* declaring the mandatory death sentence for the offence of murder unconstitutional. In the case of *William Okungu Kittiny v Republic KSM CA Criminal Appeal No. 56 of 2013 [2018] eKLR*, the Court of Appeal applied *Muruatetu Case (Supra) mutatis mutandis* to the provisions of **section 296(2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)* which imposes the mandatory death penalty for the offence of robbery with violence.

2. The applicant, **PAUL OUMA OTIENO**, was charged, convicted and sentenced to death for the offence of robbery with violence contrary to **section 296(2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)* at a trial before the Chief Magistrate's Court in *Kisii Criminal Case No. 923 of 2008*. He was also convicted of being in possession of a firearm without a firearm certificate contrary to **section 4(2)** of the *Firearms Act (Chapter 114 of the Laws of Kenya)* for which he was sentenced to 10 years' imprisonment. On the third count, he was convicted of being in possession of ammunition contrary to **section 4(2)(a)** of the *Firearms Act* and sentenced to 7 years' imprisonment and on the fourth count, he was convicted of being in possession of public stores contrary to **section 324(3)** of the *Penal Code* and sentenced to 1-year imprisonment. The trial court ordered that the sentences on the second, third and fourth counts run concurrently.

3. He appealed against the conviction and sentence to the High Court in *Kisii Criminal Appeal No. 176 of 2010*. His appeal was dismissed on 30th September 2011. The High Court affirmed the death penalty on the first count and directed that the other sentences be held in abeyance. The appellant elected not to pursue a further appeal to the Court of Appeal. He has now filed this application for resentencing.

4. The facts of the case were that on 31st May 2006 at Sori Market of Migori District within Nyanza Province, jointly with others not before the court while armed with dangerous weapons, namely AK 47 rifle and a kitchen knife, the appellant robbed Alloys Illa Oyugi of cash Kshs. 450,000/-, three mobile phones make Nokia 3310, Samsung A800 and Motorola C200 all valued at Kshs. 474,551/- and immediately before the time of such robbery threatened to use actual violence on the said Alloys Illa Oyugi.

5. In the plea before this court, the petitioner told the court that he had been in prison since he was convicted in 2010 although he had been in remand since he was charged in 2006. He prayed for leniency. Counsel for the State left the issue of the sentence to the court.

6. I have considered the facts of the case which involved the use of a firearm and the fact that he pleaded for leniency. In *Wycliffe Wangusi Mafura v Republic ELD CA Criminal Appeal No. 22 of 2015 [2018] eKLR* where the Court of Appeal imposed a sentence of 20 years where the appellant was involved in robbing an Mpesa shop with the use of a firearm with which he threatened the attendant but was caught before he inflicted any violence on her. Likewise, in *Paul Ouma Otieno alias Collera and Another v Republic KSM CA Criminal Appeal No. 616 of 2010 [2018] eKLR*, the Court of Appeal sentenced the appellants to 20 years' imprisonment where the robbery was aggravated by the use of a firearm. In fact, the latter case involved the applicant who is now considered a repeat offender.

7. Considering all the mitigating and aggravating factors, the period spent in pre-trial custody and the cases I have cited, I re-sentence the applicant to **20 years' imprisonment** commencing the date of sentence before the trial court that is from **31st August 2010** in respect of the Count 1 relating to robbery with violence. The other sentence on Count 2, 3 and 4 shall run concurrently with Count 1 as ordered by the trial court.

DATED and DELIVERED at KISII this 21st day of September 2018.

D. S. MAJANJA

JUDGE

Applicant in person.

Mr Otieno, Senior Prosecution Counsel, instructed by the Director of Public Prosecutions for the Respondent.