



**REPUBLIC OF KENYA**

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

**PETITION NO.74 OF 2018**

**CORAM: CHERERE- J.**

**BETWEEN**

**STEPHEN AKWANY alias JULIUS OCHIENG...PETITIONER**

**AND**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. **STEPHEN AKWANY alias JULIUS OCHIENG**, (hereinafter referred to as the petitioner) was on 17th May, 2012 convicted and sentenced to death for 5 counts of robbery with violence contrary to section **296(2)** of the Penal Code in **Bondo Criminal Case No. 572 of 2009**. He lodged an appeal **Kisumu High Court Criminal Appeal No. 68 of 2012** which was dismissed on 22nd January, 2014 whereupon the conviction and sentence were upheld. The petitioner subsequently appealed to the Court of Appeal in **Kisumu Criminal Appeal No.84 of 2014**. The Court of Appeal in a judgment dated 29th July, 2016 similarly upheld his conviction and sentence.

2. By a petition filed on 26th September, 2018, the petitioner has petitioned this court for resentencing.

3. Mr. Muia, learned counsel for the state submitted that the petition was not opposed but urged court to consider that the case involved 6 victims upon whom violence was threatened by the appellant and others who were armed with pangas while pretending to be police officers. He further contended that the offences that the petitioner was convicted and sentenced for call for punitive and deterrent sentences and thereby proposed that the petitioner be sentenced to an imprisonment term of not less than 25 years.

4. In response, the petitioner urged the court to hand him a sentence that will help him realize his expectation of reuniting with his family.

**Analysis and Determination**

4. At the time of the petitioner's conviction, death was the only available sentence for robbery with violence.

5. The Supreme Court decision in ***Francis Kariuki Muruatetu & Another v Republic & 5 Others [2016] eKLR*** declaring the mandatory death sentence unconstitutional has necessitated resentencing of all persons previously sentenced to the mandatory death sentence. In the case of ***William Okungu Kittiny v Republic KSM CA Criminal Appeal No. 56 of 2013 [2018] eKLR***, the Court of Appeal applied the ***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 and held that death was a discretionary maximum sentence.

6. In the case of ***Michael Kathewa Laichena & another v Republic [2018] eKLR***, Majanja J, précised the procedure that a court considering resentencing should take and stated as follows:

***“The Sentencing Policy Guidelines, 2016 (“the Guidelines”) published by the Kenya Judiciary provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. Since the Guidelines did not take into account the fact that the death penalty would be declared unconstitutional, the Court in the Muruatetu Case (Supra, para. 71), considered that in re-sentencing in a case of murder, the following mitigating factors would be applicable;***

- (a) *age of the offender;*
- (b) *being a first offender;*
- (c) *whether the offender pleaded guilty;*
- (d) *character and record of the offender;*
- (e) *commission of the offence in response to gender-based violence;*
- (f) *remorsefulness of the offender;*
- (g) *the possibility of reform and social re-adaptation of the offender;*
- (h) *any other factor that the Court considers relevant.*

7. The court further stated that the **Guidelines** do not replace judicial discretion but are intended to promote transparency, consistency and fairness in sentencing.

8. The maximum sentence for simple robbery is 14 years' imprisonment. The mitigating circumstances in this case are that the petitioner could be considered a first offender. The facts from the record show that the offence took place at night and that the robbers who were armed with pangas terrorized people at Uhanya Beach and wounded 2 of the complainants and threatened to use actual violence on the three other complainants.

9. Under the proviso to **section 333(2)** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**, the court is entitled to take into account the period the petitioner has spent in custody in determining the sentence. The court record shows that the petitioner was arrested on 27.4.09 and has remained in custody to date. He remained in custody for 3 years during the trial and has served 6 years and 6 months since the date of his conviction.

10. The use of guideline judgments of Superior Courts has also been underlined to ensure consistency and fairness. In the case of **Wycliffe Wangusi Mafura v Republic ELD CA Criminal Appeal No. 22 of 2016 [2018] eKLR**, 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.

11. After considering all the mitigating and aggravating factors, and the fact that the petitioner has been in custody for 9 ½ years, I re-sentence him an imprisonment term of **15 years** from date of initial conviction which is 17th May, 2012.

**DATED AND SIGNED IN KISUMU THIS 29<sup>th</sup> DAY OF November 2018**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

**Court Assistant** - Felix

**Petitioner** -

**For the State** - Mr Muia