



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

PETITION NO.72 OF 2018

CORAM: CHERERE- J.

BETWEEN

DAVID OUMA ONYANGO.....PETITIONER

AND

REPUBLIC.....RESPONDENT

JUDGMENT

Introduction

1. **DAVID OUMA ONYANGO**, (hereinafter referred to as the petitioner) was on 20th September, 2002 convicted and sentenced to death for robbery with violence contrary to section **296(2)** of the Penal Code. Petitioner lodged an appeal **Kisumu High Court Criminal Appeal No. 334 of 2002** which was dismissed on 17th July, 2007 whereupon the conviction and sentence were upheld. The petitioner subsequently appealed to the Court of Appeal in **Kisumu Criminal Appeal No. 311 of 2007**. The Court of Appeal in a judgment dated 27th March, 2009 similarly upheld his conviction and sentence.

2. By a petition filed on 17th 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. The state urged court to consider that the robbery was violent and that the petitioner was armed with a firearm committed with which he threatened to shoot the complainant. The state proposed that the petitioner be sentenced to an imprisonment term of 25 years.

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 other than threaten to shoot the complainant, the petitioner did not cause any actual harm to the complainant.

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 20th September, 2002. He has served 16 years from 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 16 years, I re-sentence him an imprisonment term of **20 years** from date of initial conviction which is 20th September, 2002.

DATED AND SIGNED IN KISUMU THIS 20th DAY OF December 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Petitioner - Present

For the State - Mr Muia