



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

PETITION NO.78 OF 2018

CORAM: CHERERE- J.

BETWEEN

MOSES ATELA OTHIRA.....PETITIONER

AND

REPUBLIC.....RESPONDENT

JUDGMENT

Introduction

1. **MOSES ATELA OTHIRA**, (hereinafter referred to as the petitioner) was on 26th June, 2007 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. 285 of 2009** which was dismissed on 27th October, 2009 whereupon the conviction and sentence were upheld. The petitioner does not appear to have lodged an appeal with the Court of Appeal.

2. By a petition filed on 16th October, 2018, the petitioner has petitioned this court for resentencing.

3. Mr. Muia, learned counsel for the state urged court to consider that the robbery was violent and that the petitioner was armed with what he pretended was a firearm and that complainant was seriously injured. The state proposed that the petitioner be sentenced to an imprisonment term of 15 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 the petitioner was armed with a pair of sheers and that complainant and his wife suffered bodily harm during the robbery.

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 7th November, 2006. He was convicted on 26th June, 2007 which was 7 months from date of arrest. He has served 11 years and 6 months 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 12 years, which include 7 months during the trial, I re-sentence him an imprisonment term of **15 years** from date of initial conviction which is 26th June, 2007.

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