



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**CONSTITUTIONAL CRIMINAL PETITION NO. 7 OF 2018**

**(CORAM: R. E. ABURILI - J.)**

**IN THE MATTER OF SEEKING FOR A REVIEW OF MITIGATION AND  
SENTENCING UNDER ARTICLE 50(2)Q OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLES 22(1),  
19-20, 48, 50, 258 AND 259 OF THE CONSTITUTION.**

**IN**

**GEORGE OTIENO ODERO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The Petitioner **George Otieno Odero** Petitions this court by his petition filed on 4/7/2018 claiming in his grounds that: -

- 1. The imposition of mandatory death sentence to him was arbitrary and unconstitutional and that the execution of the same amounted to denial of his rights to fair trial as stipulated under Article 50(2) of the Constitution of Kenya;*
- 2. That he was spent so far 10 years in custody and has lived peacefully with his fellow inmates and person authorities and has attended vocational training which had earned him a certificate in Islamic Religious Education I.R.E. as shown by attended document;*
- 3. That he is very remorseful to the incident and he regrets a lot with that what he is going through while in custody and he promises not to repeat this or any other crime in his life time when he is reunited back in the society.*
- 4. That he promises to be a good example in the society by sharing with them the rough experience he had undergone in custody and will provide teaching on morality.*
- 5. That he was a first offender and promises not to indulge in criminal activities again in future.*
- 6. That he is remorseful to the incident that has ruined his life.*
- 7. That he urges the court to consider the period served in prisons in sentencing him.*

2. The Petitioner also file a “supporting affidavit” which, however, is not commissioned hence it remains as a statement of facts not on oath. The Petition is brought under **Article 50(2)q of the Constitution** seeking for a review of his mitigation and sentencing.

3. It is also brought under **Articles 22(1), 19-20, 48, 50, 258 and 259 of the Constitution.**

4. It is alleged that he was charged that convicted of the offence of Robbery and robbery with violence contrary to **Section 295 and 296(2) of the Penal Code** and he was sentenced to suffer death, which he considers to be arbitrary and unconstitutional as it affects the right to fair trial as stipulated in **Article 50(2) of the Constitution** and that this court has power to hear and determine this petition as directed by the Supreme Court, **Articles 23(1) and 165 of the Constitution.**

5. That this court has power to pass sentence that is convenient depending on the gravity of the case.

6. On 28/8/2018 the Court called for the trial records to be availed but the same were never availed despite a reminder nonetheless, the petition as filed shows that the Petitioner was vide Siaya PM Cr. Case No. 731/2016 convicted for the offence of Robbery with Violence contrary to **Section 296(2) of the Penal Code** and sentenced to death. He appealed to the High Court at Kisumu in 2009 but the appeal was dismissed. He also appealed to the Court of Appeal vide **Ksm CA. No. 212/2009** but the appeal was dismissed.

7. As he awaited the death sentence to be executed, the same was commuted to life imprisonment by His Excellency, the President. In the meantime, light at the end of the tunnel shone on him and vide **Supreme Court Petitions Nos 15&16/2015, the Supreme Court in the Francis Kariuki Muruatetu Vs R** held that death sentence was not a mandatory sentence hence giving a new lease of life and hope to all capital offenders who have been returning to this court seeking for resentencing.

8. The Petitioner petitions the court, on the basis of the **Muruatetu case**, to resentence him, taking into account the period he has spent in prison the time he was convicted in the year 2006 to date. While in prison, he has learnt several skills of teaching I.R.E in Madrasa and making of soap. He is 35 years old meaning he went to prison at a very young age of 24 years or thereabouts. The mother was in court. She visits him in prison.

9. He says that has reformed and can educate the society on being law abiding. He regrets the offence and says if he will be given a chance to get back into the society, he will never commit any offence. He is remorseful. He learnt that the Complainant who was called Oloo died.

10. Certificates of what he learnt in prison were filed in court which include soap making.

11. Albeit the Petitioner claims that he was not accorded a fair trial and that death sentence was arbitrary and unconstitutional, what the **Muruatetu case** espouse is that death sentence is not mandatory sentence.

12. The Supreme Court did not outlaw death sentence as **Article 26 of the Constitution** is clear that death sentence when imposed as stipulated by legislation shall not be unconstitutional, in other words, the Supreme Court affirmed the legality of the death sentence as a discretionary sentence. A committee was established by the Office of Attorney General and Department of Justice as directed by the Supreme Court to develop a framework for the resentencing of all persons who were sentenced to death but the framework is yet to be developed and operationalized.

13. Accordingly, based on precedents, this court is called upon to exercise its discretion in resentencing convicted persons who petition the court for reconsideration of the death sentence imposed on them.

14. In this case, the Petitioner was convicted and sentenced to suffer death for the offence of robbery with violence and he has exhausted all the appeal mechanisms.

15. The sentence meted out was lawful save that it is not mandatory sentence anymore. Therefore, this court must consider the circumstances under which the offence was committed and whether the trial court took into account any mitigations before sentencing the Petitioner.

16. Regrettably, despite calling for the trial records, the same have not been forthcoming. Not even the prosecution availed the trial record to court.

17. I shall therefore proceed to consider the mitigation given by the Petitioner in his Petition wherein he regrets the offence, he was a first offender, has spent 11 years in prison and learnt several trades and skills which he can apply given a chance to get back into the society. He was only 24 years at the time of conviction. He has learnt his lessons and pleads for leniency as he promises to be an ambassador of good morals in society.

18. In addition, I am guided by the factors that ought to be considered in so far as sentencing is concerned, as stipulated in the Sentencing Policy Guidelines, 2016 that is inter-alia; that sentence imposed by the courts should meet the following objectives; retribution, deterrence, rehabilitation, restorative justice, community protection and denunciation and as was stated by the court in the **Michael Kathewa Laichena & Another v Republic (2018) eKLR case** expounding on the sentencing Guidelines that:

*“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 will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. Since the Guidelines did not take into account the fact the death penalty would be declared unconstitutional, the Court in the Muruatetu Case (Supra, para. 71), held considered mitigating factors that would be applicable in re-sentencing in a case of murder as follows; (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.”*

19. Considering the above mitigations and the fact that it is not clear whether the Complainant died as a result of the robbery or whether he died of other natural causes and the prevalence of the offence in this country, and as the Petitioner was a first offender, I would on the strength of the **Francis Muruatetu case** set aside the death sentence as commuted to life imprisonment and substitute it with a custodial sentence. And considering that the Petitioner has been in prison for a period of 11years, I hereby sentence him to serve 20years imprisonment to be calculated from the date he was first arrested and remanded in custody.

**I so order.**

**Dated, Signed and Delivered in open court at SIAYA this 18<sup>th</sup> day of December 2018.**

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

The appellant in person

Mr Ngetich Prosecution Counsel for the Respondent

CA: Brenda and Modestar