



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL CONSTITUTIONAL PETITION NO. E001 OF 2021

CORAM: R.E. ABURILL, J

JARED OUMA OMOLLO.....PETITIONER/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being a petition for resentencing in Siaya SRM Court's Criminal Case No. 46 of 2006 delivered on 3/5/2006 and Kisumu High Court Criminal Appeal No. 70 of 2006 dated 15/7/2008)

JUDGMENT

1. The Petitioner/applicant herein is **Jared Ouma Omollo**. He was charged, tried and convicted of the offence of Robbery with violence contrary to Section 296(2) of the Penal Code vide Siaya SRM Cr. Case No. 46 of 2006 and sentenced to death. This was vide judgment and sentenced delivered on 3/5/2006 wherein the Hon. Trial magistrate sentenced the Petitioner to death, which was the only available and mandatory sentence provided for in law.
2. Aggrieved by the conviction and death sentence imposed, the Petitioner filed an appeal vide Kisumu High Court Criminal Appeal No. 70 of 2006 which appeal was heard and determined by a two Judge Bench comprising Hon. Mwera and Karanja JJ (as they then were). The learned judges dismissed the Petitioners' appeal vide their judgment delivered on 15/7/2008.
3. From the High court Appeal record which was retrieved and brought to this court, the Petitioner filed an appeal to the Court of Appeal as per leave granted by Mwera J (as he then was) in an application dated 1/8/2006 under the then Rule 110(1) A and B of the Court of Appeal Rules, 1972 which is the current Rule 113 (1) (2) of the Court of Appeal Rules.
4. The Petitioner was granted leave to appeal out of time and to file his appeal as a pauper.
5. The Petitioner also filed a Notice of Appeal to the High Court on 1/8/2008 and the same was accordingly received by the Registrar on 28/8/2008.
6. I observe from the complete court records submitted to this court that the trial court record which had been returned to Siaya Magistrate's Court was effectively resubmitted to Kisumu High Court but there is no mention of what became of the appeal for which leave was granted by Mwera J.
7. Nonetheless, in his submission before this court in support of the petition for resentencing on account of alleged unconstitutionality of Section 296(2) of the Penal Code which provides for mandatory death sentence, the Petitioner claims that no response has been forthcoming from the Court of Appeal.
8. In the intervening period, the petitioner's death sentence was commuted to life imprisonment as per the warrant of committal for a sentence of imprisonment or fine dated 3rd May, 2006.
9. The death sentence which was handed down as mandatory sentence having been commuted to life imprisonment, the Petitioner cannot claim that he is serving an unconstitutional sentence.
10. Furthermore, Article 26(3) of the Constitution provides that a person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law.
11. It follows that death sentence in itself is not unconstitutional as it is stipulated under Section 296(2) of the Penal Code.

12. What the Supreme court found in the now infamous **Francis Karioko Muruatetu vs Republic [2017]eKLR** decision is that mandatory death sentence is unconstitutional in so far as it deprives the trial court of the judicial discretion in sentencing and further denies the accused person the opportunity to mitigate before sentence is meted out.

13. The above decision has been applied with necessary modifications by courts in Kenya to mean that all mandatory sentences are unconstitutional. This court has applied the Muruatetu decision in various decisions and proceeded to resentence convicts who have brought similar applications before this court. This court's decisions on resentencing in mandatory sentences followed several other Court of Appeal decisions.

14. As fate would have it, the Supreme Court has now, through directions given on 5/7/2021 made it clear that the Francis Muruatetu decision is only applicable in Murder cases and inapplicable to other cases where the law provides for mandatory sentences. The Supreme Court stated inter alia:

“To clear the confusion in regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason and robbery with violence, that a challenge of those sentences should be properly filed in court”.

15. The court further said that the cases filed should be presented and fully argued before the High Court and escalated to the Court of Appeal if necessary at which a similar outcome as Muruatetu may be reached. It stated:

“Muruatetu cannot be the authority for stating that all the provisions of the law prescribing mandatory or minimum sentences are inconsistent with the constitution,”

16. That new development effectively locks out all other petitioners including the applicant herein, considering the fact that his death sentence was commuted to life imprisonment. He cannot be heard to say that his death sentence was unconstitutional considering the fact that the trial court took into account the mitigations before sentencing him to death and the death sentence has been commuted to life imprisonment. He further had the opportunity to ventilate his grievances through an appeal process from the High Court to the Court of Appeal.

17. The trial court record shows that the accused was given the opportunity to mitigate upon being convicted on 3/5/2016 by Hon. S.A. Okalo, Senior Resident Magistrate, upon the Prosecutor stating that ***“he may be treated as a first offender.”*** The accused in mitigation said: ***“may the court assist me. I have orphaned children.”***

18. The trial magistrate then stated: ***“I have considered the fact that the accused is a first offender. I have taken into account his mitigation. The offence the accused committed has one sentence – death. Accordingly, I sentence the accused to death.”***

19. Following the recent directions given by the Supreme Court in the Francis Muruatetu case, and as the applicant herein had his death penalty commuted to life, I find this petition/application on unconstitutionality of death sentence imposed on him devoid of any merit. The same is hereby declined and dismissed.

20. The Petitioner should follow up his dormant appeal before the Court of Appeal and argue out on the question of whether death sentence which is no longer relevant to his case was unconstitutional.

21. Orders accordingly.

22. File closed.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 21ST DAY OF JULY, 2021 VIRTUALLY IN THE PRESENCE OF APPLICANT AT KIBOS MAXIMUM PRISON

R.E. ABURILI

JUDGE

In the presence of:

Ms Nambisia Prosecution Counsel for state

CA: Ms Modestar and Mboya