



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL PETITION NO. 17 OF 2018

JOSEPH ONYANGO OWUOR PETITIONER

-VERSUS-

REPUBLIC..... RESPONDENT

JUDGMENT

The Petitioner, **JOSEPH ONYANGO OWUOR**, has sought the following 4 substantive orders;

“(a) A declaration that new and compelling evidence has become available, which evidence if the trial had an opportunity to view, would have reached a different conclusion and thus a retrial is necessary.

(b) A declaration that the manner in which the trial court conducted and subsequently consolidation of the petitioner’s case with that for which he was never charged or mentioned as a suspect was unfair, in bad taste and not in furtherance of the course of justice as a breach of the petitioner’s right to a fair hearing within a reasonable time.

(c) An order for a fair trial within a reasonable period.

(d) A declaration that the mandatory death sentence prescribed by Section 204 of the Penal Code is unconstitutional and the consequent award of damages for that illegality.”

1. The Petition was filed by the Law Firm of **AMONDI & CO. ADVOCATES**, on 24th January 2018.
2. On 1st October 2018 the Petitioner and the Respondent agreed that the case would be set down for re-sentencing.
3. The said agreement was informed by the pronouncement by the Supreme Court in the case of **FRANCIS KARIOKO MURUATETU & ANOTHER Vs REPUBLIC PETITION NO. 15 OF 2015**.
4. However, the Petitioner had a change of mind, and decided that he wished to canvass the whole petition.
5. On 12th June 2019 the Petitioner told the Court that he wished to canvass his application personally. After ascertaining from the Petitioner if he was sure about representing himself, the court allowed him to proceed with the Petition.
6. However, when the hearing was scheduled to start, at 10.59a.m, Mr. Achura advocate came on the record as the Petitioner’s lawyer.
7. The Petitioner told the Court that he was happy to have Mr. Achura represent him.
8. Counsel informed the Court that the Petitioner had instructed him to pursue the relief of a re-trial. At that stage, Mr. Achura advocate sought an adjournment so that he could have an opportunity to discuss the matter with the advocate who was on the record, as acting for the Petitioner.
9. On 23rd September 2019, the Petitioner said that although the state had given him an advocate, the said advocate had not contacted him on

that date. He therefore sought an adjournment.

10. After several other adjournments, which were precipitated by the absence of the Petitioner's advocate, the Petitioner decided that he was better off if he represented himself.

11. Eventually, the Petitioner filed his submissions.

12. As a precaution, the court opted to ascertain from the advocate who was on record, that he had agreed to have the Petitioner act for himself.

13. When the Petitioner emphasized that he wished to act for himself, the Court allowed him to proceed.

14. In his oral submissions, the Petitioner said that the petition was based on new and compelling evidence. He said that the person who had been arrested is named **EDWIN**.

15. In the circumstances, the Petitioner submitted that it was not known how the said **EDWIN** became **JOSEPH**.

16. The Petitioner drew the attention of the Court to the fact that **PW9** had testified that the person he arrested was **EDWIN OCHIENG**. As the Petitioner is named **JOSEPH ONYANGO**, he was of the view that that was new evidence which could have yielded a different result, if it had been brought to the attention of the trial court.

17. In answer to the Petition, Ms Maurine Odumba, learned prosecution counsel, pointed out that the Petitioner had been charged with **FOUR (4) counts of Robbery with Violence** contrary to **Section 296 (2) of the Penal Code**; **TWO (2) Alternative counts of Handling Stolen goods** contrary to **Section 322 (2) of the Penal Code**; and **ONE (1) count of Being in possession of Ammunition without a Firearm Certificate** contrary to **Section 4 (1) as read with Section 4 (3) of the Firearm Act**.

18. At page 92 of the record of the proceedings from the trial court, is the evidence which the Petitioner alluded to when he said that the person who was arrested by **PW9** was **EDWIN OCHIENG**.

19. In order to appreciate the totality of the evidence tendered by **PW9**, I perused the record of proceedings from page 91 of the record, from where the Petitioner herein commenced cross-examination of **PW9**.

20. The witness said;

“We arrested 3 suspects who were Edwin Ochieng, which is the name you gave us as your name. Then there was John Muga and Naftali Onyango.”

21. The said witness went on to testify as follows;

“I asked you your names and you said you were Edwin Ochieng.

.....

You were booked at Kondele with the offence of robbery in the name of Edwin Ochieng alias Job.

I know you are charged in this court. It was later established that you gave us false names.”

22. He concluded his testimony by saying that;

“Joseph Onyango's name was obtained by investigating officer.”

23. In the circumstances, I find that the identity of the person who was arrested is neither new nor outstanding. It is an issue that was raised during the trial.

24. And the witness gave a sound explanation concerning how the name Edwin Ochieng arose.

25. Therefore, there was absolutely no basis for ordering a re-trial.

26. Secondly, the Petitioner was convicted on Four (4) counts of **Robbery with Violence**.

27. In the circumstances, the Petitioner ought to have demonstrated to this Court that he was entitled to a variation of the sentence which was imposed by the trial court, and which was varied by the High Court, on appeal.

28. I find that the Petitioner failed to demonstrate that the circumstances in which the multiple offences were committed called for a variation

of the sentence.

29. The Petitioner also failed to demonstrate to this court, how the trial court had violated his right to a fair trial within a reasonable time.

30. In the result, the Petition lacks merit, and the same is dismissed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 21ST DAY OF JULY 2021

FRED A. OCHIENG

JUDGE