



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISC. CR. APPLICATION NO. 60 OF 2019

PAUL OMONDI ABUOR.....APPLICANT

-VERSUS-

REPUBLIC..... RESPONDENT

JUDGMENT

The Petitioner, **PAUL OMONDI ABUOR**, was convicted for the offence of **Attempted Robbery with Violence**, contrary to **Section 297 (2)** of the **Penal Code**. He was then sentenced to suffer death as by law prescribed.

1. He appealed to the High Court, but his appeal was dismissed.
2. Thereafter, he appealed to the Court of Appeal, but that appeal was also dismissed.
3. He has now invoked the pronouncement of the Supreme Court, in the case of **FRANCIS KARIOKO MURUATETU Vs REPUBLIC, PETITION NO. 15 OF 2015**, and is calling upon this court to re-sentence him.
4. Pursuant to **Section 297 (2)**, a person who is convicted for the offence of **Attempted Robbery with Violence** shall be sentenced to death.
5. In effect the prescribed sentence is of a mandatory nature. The Supreme Court declared as unconstitutional, the mandatory nature of the death sentence for persons convicted for committing murder.
6. In the case of **WYCLIFFE WANGUSI MAFURA Vs REPUBLIC, CRIMINAL APPEAL NO. 22 OF 2015**, the Court of Appeal reiterated the following findings which it had made in the case of **WILLIAM OKUNGU KITTINY Vs REPUBLIC, CRIMINAL APPEAL NO. 56 OF 2013**;

**“From the foregoing, we hold that the findings and holding of the Supreme Court, particularly in paragraph 69, applies Mutatis Mutandis to Sections 296 (2) and 297 (2) of the Penal Code.**

**Thus, the sentence of death under Sections 296 (2) and 297 (2) of the Penal Code is a discretionary maximum punishment.”**

7. The learned Judges of Appeal made it clear that the decision of the Supreme Court had an immediate and binding effect on all other courts, so that the said other courts have jurisdiction to direct a re-hearing on the issue of sentence.
8. In the case of **WYCLIFFE WANGUSI MAFURA Vs REPUBLIC** (above-cited), the Court of Appeal set aside the Death Sentence, and substituted it with Imprisonment for 20 Years.
9. Meanwhile, in the case of **EVANSON MUIRURI GICHANE Vs REPUBLIC, CRIMINAL APPEAL NO. 277 OF 2007**, the Court of Appeal held as follows;

**“The appellant was convicted of an offence of attempted robbery with violence, punishable by death.**

**In terms of Section 389 of the Penal Code the appellant shall not be liable to imprisonment for a term exceeding seven years.**

**But he was sentenced to death.**

**The apparent conflict in the law may only be resolved by Parliament.**

**But the appellant is entitled to the less punitive of the two sentences.”**

10. In the circumstances, the Court of Appeal set aside the death sentence and substituted it with;

**“..... a prison term that will result in the appellant’s release from prison since the appellant was convicted and sentenced on 5<sup>th</sup> March 2004, and should have been sentenced to imprisonment for a term not exceeding seven years.”**

11. That decision was made on an appeal.

12. In this case, I have been unable to verify whether or not the Petitioner had raised the issue about the sentence, when he was canvassing his appeals.

13. However, as no such issue was addressed in the Judgment of the Court of Appeal, that is probably because it was not raised at that stage.

14. In my considered opinion, it would be wrong for this Court to delve into the determination of a point of law that could have been raised at the stage of appeal, but which appears not to have been canvassed by the Petitioner, at that stage.

15. I cannot purport to sit on an appeal over a decision of the Court of Appeal. I cannot even purport to sit on an appeal over a decision of the High Court. The law has not conferred upon me the jurisdiction to hear appeals arising from decisions made by the Superior Courts.

16. If I had such jurisdiction, I would have invoked **Section 389** of the **Penal Code**, and proceeded to re-sentence the Petitioner to imprisonment for a period not exceeding seven years.

17. But as I lack jurisdiction to do so, I can only invoke the authority bestowed upon this Court by the Supreme Court, when it declared unconstitutional, the mandatory nature of the death sentence, for persons convicted for the offence of murder.

18. And because the said pronouncement applies Mutatis Mutandis to **Section 297 (2)** of the **Penal Code**, I do hereby set aside the death sentence which was handed down by the trial court.

19. I now sentence the Petitioner to 20 Years imprisonment, and the said sentence shall run from 17<sup>th</sup> September 2004 when the Petitioner was first sentenced.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 7<sup>TH</sup> DAY OF JULY 2021**

**FRED A. OCHIENG**

**JUDGE**