



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL PETITION NO. 41 OF 2020

VALENCE MOMANYI OGARO.....PETITIONER

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

The Petitioner, **VALENCE MOMANYI OGARO**, was convicted for the offences of;

(a) Arson, contrary to Section 332 of the Penal Code; and

(b) Grievous Harm. Contrary to Section 234 of the Penal Code.

1. The learned trial magistrate sentenced the Petitioner to Life Imprisonment for each of the 2 offences.
2. His first appeal was dismissed by the High Court, prompting the Petitioner to lodge a second appeal. However, the second appeal was also dismissed, by the Court of Appeal.
3. The Petitioner has now invoked the decision of the Supreme Court in the case of **FRANCIS KARIOKO MURUATETU & ANOTHER Vs REPUBLIC, PETITION NO. 15 OF 2015**, and asked this Court to either review the sentences or to have him re-sentenced.
4. He stated that the Penal Code had previously prescribed only the Life Imprisonment as the sentence for either Arson or for Grievous Harm.
5. However, it is now the understanding of the Petitioner that;

“..... the SUPREME COURT and COURT OF APPEAL decisions have now actually untied the hands of judicial officers in sentencing of offenders, and can now exercise full discretion for the same hearing, considering all the surrounding circumstances.”

6. As the Petitioner has correctly stated, the Supreme Court did not disturb the validity of the death sentence. It was only the mandatory nature of the death sentence, as provided for under **Section 204** of the **Penal Code**, that was declared unconstitutional.
7. It is equally true that in the case of **JARED KOITA INJIRI Vs REPUBLIC, CRIMINAL APPEAL NO. 93 OF 2014**, the Court of Appeal held the mandatory nature of the sentence stipulated by **Section 8** of the **Sexual Offences Act** should be considered unconstitutional.
8. However, the Court of Appeal did not set aside the sentence of Life Imprisonment because;

“The sentence imposed fails to conform to the tenets of a fair trial that accrue to the accused person under Article 25 of the Constitution, as an absolute right.”

9. The learned Judges of Appeal only set aside the Life sentence because of its mandatory nature.
10. The Petitioner submitted that this Court ought to set aside the Life sentences against him because of the mandatory nature of the said sentences.
11. It is to be noted that the Petitioner does appreciate the fact that the trial courts may exercise its discretion freely, when handing down a

sentence to the person who it had convicted, and that the Court should be able to impose any of the prescribed sentences, if the circumstances of the case so demand it.

12. In that respect, the Petitioner cited the following words of the Supreme Court of India in the case of **ALISTER ANTHONY PEREIRA Vs STATE OF MAHARASHTRA**, which were quoted with approval by the Court of Appeal in **THOMAS MWAMBU WENYI Vs REPUBLIC, CRIMINAL APPEAL NO. 21 OF 2015**

“Sentencing is an important task in matters of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done.

.....

What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive of the crime, nature of the offence and all other attendant circumstances.”

13. In my considered opinion, those are the factors which led the Supreme Court to declare the mandatory nature of the death sentence as unconstitutional.

14. In order to bring himself within the scope of the cases which call for sentencing, the Petitioner was obliged to demonstrate that the sentences imposed upon him were of a mandatory nature.

15. In answer to the Petition, Ms Maurine Odumba, learned Prosecution Counsel submitted that the prescribed sentences for the offences of **Arson** and **Grievous Harm** were not of a mandatory nature.

16. Pursuant to **Section 234** of the **Penal Code**;

“Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.”

17. Meanwhile, **Section 332 (a)** of the **Penal Code** stipulates that;

“Any person who wilfully and unlawfully sets fire to –

(a) any building or structure whatever, whether completed or not

(b)

(c)

(d)

is guilty of a felony and is liable to imprisonment for life.”

18. According to the Respondent, those two statutory provisions utilize the phrase “*Liable To*”; and that that phrase does not give rise to a mandatory sentence.

19. In the case of **THOMAS WAMBU WENYI Vs REPUBLIC**, (above-cited) the Court of Appeal quoted with approval, the following words of Sir Henry Webb C.J. in the case of **KICHANJELE S/O NDAMUNGU Vs REPUBLIC (1941) 8 EACA 64**, wherein the learned Chief Justice stated as follows, regarding the proper construction of the words “*liable to*”;

“The wording used throughout the code is ‘shall be liable to’, but a consideration of the various sections shows, in our judgement, that the use of the words ‘shall be liable to’ does import that the sentence mentioned in any particular section in which these words occur is merely a maximum and that the court may impose any lesser sentence below the limited indicated.”

20. The learned Judges of Appeal made it clear that the use of the words

“shall be liable to imprisonment for life with hard labour in Section 145 of the Penal Code, gave room for the exercise of judicial discretion.”

21. Accordingly, I find that neither **Section 234** nor **Section 332 (a)** of the **Penal Code** had prescribed any mandatory sentence. Therefore, the sentences are not amenable to review or to an order for resentencing.

22. In any event, the learned trial magistrate did not hand down the sentences just because the statute had prescribed them as the mandatory sentences.

23. The trial court called for a Probation Report, and upon giving consideration to it, the court noted that the Report was “not suitable”. On the strength of the unfavourable report, the learned trial magistrate made a conscious decision that;

“The accused has previous anti-social tendencies, and need (sic!) complete exoneration from the society.

In the circumstances, I find that the harm that he caused the complainant herein is so grievous, as seen in court; and also having burnt her house, I hereby commit the accused to a life sentence on both counts.”

24. It is crystal clear that the trial court deemed the aggravating factors to far outweigh the mitigation. In the said circumstances, the learned trial magistrate concluded that the Petitioner ought to be kept away from the society, completely.

25. When the Petitioner’s appeal at the High Court was dismissed, the learned Judge held that the sentence which had been handed down by the trial court, cannot be said to be harsh or excessive.

26. On its part, the Court of Appeal described the sentence as lawful, and it found no basis for interfering with the decision of the High Court.

27. On my part, I have found no basis in law, to warrant a re-sentencing of the Petitioner.

28. Accordingly, the Petition is dismissed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 7TH DAY OF JULY 2021

FRED A. OCHIENG

JUDGE