



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CRIMINAL PETITION NO. 5 OF 2020**

**GAFAR IDD ODONGO .....PETITIONER**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Petitioner, **GAFAR IDD ODONGO**, was convicted for the offence of **Robbery with Violence** contrary to **Section 296 (2)** of the **Penal Code**. For that offence, he was sentenced to suffer death as by law prescribed.

1. He was also convicted for the offence of **Personation** contrary to **Section 105 (b)** of the **Penal Code**. For that offence he was sentenced to 12 Months imprisonment.
2. He appealed to the High Court, but the convictions were upheld. However, in respect to the sentence of imprisonment for the offence of Personation, the same was to be held in abeyance as directed by the High Court.
3. Thereafter, when the Petitioner canvassed his second appeal, before the Court of Appeal, the said Court upheld the convictions.
4. When canvassing the appeal at the Court of Appeal, the Petitioner abandoned the challenge against the sentences.
5. He has now moved this Court, seeking a revision of the death sentence, which had been handed down in respect to the offence of robbery with violence.
6. He also requested this Court to take into account the period which he spent in custody whilst he was still on trial.
7. The Petition was premised upon the decision of the Supreme Court in the case of **FRANCIS KARIOKO MURUATETU & ANOTHER Vs REPUBLIC, PETITION NO. 15 OF 2015**.
8. The gist of that decision was that the mandatory nature of the Death Penalty for the offence of **Murder**, contrary to **Section 203** of the **Penal Code**, was unconstitutional.
9. The Supreme Court had emphasized that the mandatory nature of the death sentence, for the offence of Murder, deprived the Court of the opportunity to hand down an appropriate sentence which was befitting the particular offender.
10. In order for the trial Court to make an informed decision concerning what an appropriate sentence is, it is necessary that the said Court ought to give the accused person an opportunity for mitigation.
11. The process of mitigation allows the accused to provide information which could influence the decision on sentencing.
12. In this instance, the trial Court did not accord the accused an opportunity for mitigation.
13. When canvassing the Petition herein, the Petitioner informed the Court that he now has a deep sense of meaning, purpose, hope and faith. He had completed a course on Islamic Education, and had become an Imam.
14. He had also taken full advantage of the rehabilitation programmes which are offered within the Prison facilities. He exhibited the Certificates which he was given after attaining Grades III, II and I in Masonry.

15. Whilst noting that the Petitioner had definitely put his time to good use, whilst he has been behind bars, I must emphasize that the achievements attained after conviction cannot have had any impact at the time when the trial court was sentencing him.
16. In my understanding, it is the mandatory nature of the death penalty which was deemed by most of us to deprive us of any discretion when sentencing an accused person for offences such as Murder or Robbery with Violence. It was for that reason that the Courts would either proceed to hand down sentences without giving the accused an opportunity for mitigation, or the Court would record the mitigation but thereafter state that it had no option but to hand down the prescribed sentence.
17. In the circumstances, when the trial Court had handed down "*the mandatory sentence*", as prescribed by statute, it is now settled that the Court would have violated the non-derogable right of the accused person to a fair trial, as the mitigation circumstances of the said accused had not been taken into account.
18. I so hold because it is inconceivable that the mandatory nature of the death sentence could be unconstitutional for the offence of Murder, yet be deemed to be compliant with the Constitution for the offence of Robbery with Violence.
19. I therefore find and hold that the Death sentence which was handed down to the Petitioner herein was unconstitutional, because the trial court did not take into account the mitigation circumstances prior to pronouncing the sentence.
20. The next question concerns the remedies available to the Petitioner. The said question arises because the Petitioner was no longer facing the death sentence.
21. As he informed the Court, the original sentence was commuted by H. E. the President of the Republic of Kenya, in the year 2009.
22. Following the commutation of the death penalty to life imprisonment, it is my considered view that the Court would be acting in vain if it purported to be granting of an order for the revision of a sentence which was no longer in place.
23. The Petitioner is now serving a life sentence. He has not demonstrated to this Court that the said sentence should be reviewed.
24. I also note that whilst **Section 333 (2)** of the **Criminal Procedure Code** requires the Court to take into account the period which an accused had spent in custody whilst he was still on trial, there is a practical difficulty in giving credit for that period when the Petitioner is serving Life Imprisonment.
25. In principle, there is no doubt that if the Petitioner was imprisoned for a specified duration, such as 10 Years, this Court would have directed the Prison Authorities to deduct from that sentence, the period of 6 Months which the Petitioner spent in custody during his trial.
26. But in Kenya, when a person is sentenced to Life Imprisonment, the said sentence is not defined by law, in terms of duration. In contrast, there are jurisdictions in which a Life Sentence has been defined to mean either 30 Years or 40 Years or any other specified duration. In those other jurisdictions, the duration would have been reduced by the 6 Months which the Petitioner spent in remand, whilst he was still on trial.
27. However, as Life Sentence in Kenya means literally that the person would spend the rest of his life in prison, the Prison Authorities cannot be directed to deduct 6 Months from an unknown duration. Neither this Court nor the prison authorities know how long the Petitioner will live: therefore it is not possible to then have him released 6 months before he is recalled by his maker.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 9<sup>TH</sup> DAY OF NOVEMBER, 2021**

**FRED A. OCHIENG**

**JUDGE**