



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CONSTITUTIONAL PETITION NO. 23 OF 2019

NICHOLAS OUMA OWELE Alias BONGO.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

(Being a Constitutional Petition for Resentencing against conviction and sentence

in Bondo Principal Magistrate's Court Criminal Case Number 1769 of 2010 and Kisumu High Court

Criminal Appeal Number 29 of 2014 and Kenya Court of Appeal Criminal Appeal Number 122 of 2014);

JUDGMENT

1. The Petitioner in this Petition is **Nicholas Ouma Owele alias Bongo**. By his petition filed on 6.12.2018 he seeks for re-sentencing. He claims that he was convicted and sentenced to death vide Bondo Principal Magistrate's Court Criminal Case Number 1769/2010, for the **Offence of Robbery with Violence Contrary to Section 296(2) of the Penal Code**. He appealed to the High Court vide **Kisumu HCCRA 29/2014** but he lost the appeal. Still dissatisfied, he filed an appeal to the Court of Appeal at Kisumu vide **Kenya Court of Appeal Number 122 of 2014**. That appeal too was dismissed.

2. He has now petitioned this Court for resentencing claiming that the death penalty imposed on him was arbitrary and inhuman and that it denied the Petitioner the right to a fair trial **Contrary to Article 50 (4) of the Constitution**.

3. He also laments that the provision of **Section 296(2) prescribing death sentence for offence of robbery with violence violates Section 134 and 137 at the Criminal Procedure Code** which prescribes the rule of framing a charge.

4. The Petition is supported by a supporting affidavit sworn by the Petitioner wherein he reiterates the assertion in the Petition and relies on the **Supreme Court Petition Number 15 of 2015, Francis Karioko Muruatetu and Another Versus The Republic** where the Supreme Court held that the mandatoriness of death penalty was unconstitutional in so far as it deprives an accused person of the right to mitigate and further, that it also denies the trial Court the discretionary power to mete out appropriate sentence in appropriate cases having regard to the circumstances of each case.

5. The Petitioner who was unrepresented submitted orally seeking for assistance from the Court saying he had been in prison since 2011 and urged the Court to set aside the mandatory death sentence imposed on him and substitute it with a custodial sentence because he had reformed in prison. He submitted that his parents died and left him with his grandmother. That life was bad in prison. That he had bad company and that he did not listen to the advise of his grandmother.

6. He submitted that he was now 33 years old and that they used pangas and rungunus to rob their victims. He submitted that he wants to live with hope in prison knowing that one day he will be set free. He stated that he was still waiting for execution of his death sentence.

7. The Respondent represented by Mr. Ng'etich Prosecution Counsel left the matter to the Court to decide what appropriate sentence to impose on the Petitioner.

DETERMINATION

8. I have considered this petition which was initially filed in **Kisumu vide Petition Number 89 of 2018** but transferred to this Court on 28th May 2019 by Hon. F. Ochieng – J.

9. In the Court of Appeal, the Petitioner together with Musa Ouma Obare were the appellants. The Court of Appeal acquitted the Petitioner in Counts 1 and 2 and affirmed their convictions in Count 3 and also dismissed the appeal against sentence on the ground that the trial Court record shows that the Petitioner and his Co-accused were accorded an opportunity to mitigate and that the trial Magistrate therefore exercised his discretion after according the Petitioners an opportunity to mitigate and that in the circumstances the superior Court had no reason to interfere.
10. The decision of the Court of Appeal was rendered on 15.11.2018 with full knowledge of the decision in **Francis Muruatetu and Another Versus Republic(supra)**. The Court of Appeal was therefore alive to the fact that death sentence as mandatory sentence in **Robbery with Violence** cases was unconstitutional but it nonetheless sustained or upheld the same. Nonetheless, the Court of Appeal never referred to the said Supreme Court decision in its holding.
11. It is important at this stage to clarify that the **Francis Muruatetu** decision did not render death sentence unconstitutional. It is the mandatoriness thereof that was found to be unconstitutional. The apex Court made it clear that in appropriate cases, the trial Court was not barred from imposing death sentence, having regard to the circumstances under which the offence was committed and taking into account mitigations by the convict.
12. In the instant case, as correctly observed by the Court of Appeal, the Petitioner was accorded an opportunity to mitigate but showed no remorse at all and the trial Court record shows that all the accused persons as convicted, in mitigation, they simply asked for Court proceedings.
13. In other words they were very sure of winning their appeals at the higher level. The trial Court did not state in its judgment and sentencing remarks that it had no discretion to mete out any other sentence other than the mandatory death sentence. If it had said so, then the call for the convicts to mitigate would not have had any effect on the sentencing.
14. The Petitioner was represented by an advocate before the Court of Appeal and nothing prevented him from urging the superior Court from considering the decision in **Francis Muruatetu and Another Versus Republic case**, in the event that the Court found the conviction of the appellant to be sound and safe, so that only sentence would be tampered with.
15. However, as the trial of the Petitioner took place before the decision in **Francis Muruatetu** was rendered, and as the Court of Appeal did not refer to the **Francis Muruatetu** decision in the appeal, I am of the humble view that this Court as petitioned has the power to reconsider the petition for resentencing. I would have referred the matter back to the trial Court but the trial and sentencing Magistrate is no longer in the Station, considering the fact that the trial ended in 2012.
16. The Petitioner now claims that he had bad company and that he did not take his grandmother's counsel and he fell in bad company that is why he ended up being a robber, having been left orphaned.
17. He had maintained his innocence but he now appears remorseful. He has been in prison for close to 10 years Death Sentence is lawful where it is prescribed by Statute as stipulated in **Article 26 (1) of the Constitution** hence the sentence imposed was lawful and not unconstitutional as **Section 296(2)** prescribes for death sentence upon conviction.
18. However, the trial Magistrate at the material time did not have discretion to sentence the Petitioner to any other alternative sentence other than death sentence, although he did not say so.
19. Being a convict on death now, the Petitioner has not learnt any life's skills while in prison. He was no doubt a young adult at the time of committing the heinous robbery with violence. He is now 33 years meaning he was about 23 years as at the time he committed the offence on 25.12.2010. From his belated mitigation, he had a troubled upbringing albeit that is no excuse for resorting to crime.
20. I have considered the circumstances under which the offence was committed. The robbers were armed with rungas, pangas, and torches, sticks, hammers, whips. It was night and they waylaid their victims on the way. Some of the stolen items like mobile phone were recovered.
21. I have considered the fact that the value of the robbed property was not much and the victims who were injured did not sustain serious injuries.
22. The Petitioner seeks for custodial sentence that will give him hope of reforming and returning back to the society after he has learnt some lessons.
23. Having considered all the above, I exercise Judicial discretion and resentence the Petitioner to serve Thirty (30) years in prison taking into account the period already served and order that he shall not be entitled to be released on remission until he has learnt life's skills trades in prison that will enable him live a useful independent life in the community. The Petitioner shall accordingly be enrolled in any of the trades for training while in prison and complete the training before the remission of his sentence can be considered.
24. Accordingly the petition for resentencing succeeds. Death sentence imposed on the Petitioner is hereby set aside and substituted with Thirty (30) years imprisonment to be inclusive of the period already served and remission to be considered only after the Petitioner has enrolled in and trained in the various life's skills and trade offered in prison.
25. Orders accordingly.

Dated, Signed and Delivered at Siaya this 22nd day of January, 2020

R.E. ABURILI

JUDGE

In the presence of:

The Petitioner in person

Mr. Okachi SPPC

CA: Brenda and Modestar