



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: A.K NDUNG'U J.

CONSTITUTIONAL PETITION NO. 88 OF 2019

NICKSON OTIENO ODERO.....APPLICANT

VERSUS

REPUBLIC THROUGH ODPP.....RESPONDENT

RULING

1. By way of a petition, Nickson Otieno Odero (hereinafter the applicant) moved this court for orders that the sentence imposed on him following a conviction for robbery with violence be revised on the basis that the sentence of death imposed on him is unconstitutional, inhumane and degrading.
2. The background of this matter is that the applicant was charged with robbery with violence in Criminal Case No. 52 of 2005 at the Magistrate's Court at Oyugis. He was found guilty and convicted and sentenced to death. His appeal against the conviction and sentence both at the High Court and at the Court of Appeal were dismissed.
3. The applicant places reliance on the Supreme Court decision in **Francis Karioko Muruatetu & Another vs Republic [2017]eKLR**. His assertion is that the death sentence imposed on him is unconstitutional.
4. Of note is that all the decisions made in this matter at the Magistrates' Court, the High Court and the Court of Appeal were before the decision in Muruatetu case.
5. The Supreme Court in **Francis Karioko Muruatetu & Another –vs- Republic** pronounced itself as follows;

“(51) The dignity of the person is ignored if the death sentence, which is final and irrevocable, is imposed without the individual having any chance to mitigate. We say so because we cannot shut our eyes to the distinct possibility of the differing culpability of different murderers. Such differential culpability can be addressed in Kenya by allowing judicial discretion when considering whether or not to impose a death sentence. To our minds a formal equal penalty for unequally wicked crimes and criminals is not in keeping with the tenets of fair trial.”
6. From the foregoing, the death sentence meted mandatorily on the applicant and affirmed by the High Court and the Court of Appeal is unconstitutional. As held by the Supreme Court this deprived the courts the opportunity of issuing sentences depending on the peculiar circumstances of each case which goes to the very core of a fair trial whose outcome will be just.
7. In exercising my discretion of the appropriate sentence, I must look at the circumstances of the case including any mitigating factors.
8. I have had due regard to the charges herein. Medical evidence in the P3 forms produced indicate that the victims were subjected to assault leading to physical harm. Matters are made grave by the fact that in the attack there was the rape of one of the victims as per the P3 form filed in respect of Rose Atieno Awino.
9. The Court of Appeal in **Daniel Gichimu Githinji & Another –vs- Republic [2018]eKLR** interfered with a sentence of death where the violence meted out on the victim was minimal and item robbed was recovered. The court stated;

“In the instant appeal, we find that both appellants stated in their mitigation before the trial court that they were first offenders, a fact not disputed by the prosecution. We also take note of the fact that the infliction of violence on PW 1 was

minimal and the item robbed from her was also recovered. In our view, a sentence of fifteen years imprisonment would suffice in the circumstances. We therefore find it prudent to interfere with the sentence affirmed by the first appellate court, set it aside and substitute it with one of fifteen years' imprisonment to run from the date of the arrest of the appellants. To that extent only does the appeal succeed."

10. A similar approach was deployed in Charles Mwinzi –Vs- Republic [2019] eKLR where the Court of Appeal substituted the death sentence on robbery with violence with a 10 years sentence due to the minimal amount of injury inflicted on the complainant.

11. In our instant case the circumstances on the gravity of violence meted out are different. The degree of violence which included a rape on one of the victims is monumental.

12. In the backdrop of the foregoing, I am persuaded that the death sentence imposed mandatorily on the applicant is unconstitutional.

13. What sentence would serve the ends of justice? I have alluded to the nature of the violence and injuries on the victims. In the circumstances of this case a sentence of 35 years imprisonment would suffice. I set aside the death sentence which was commuted to life imprisonment in 2002 and substitute thereof a sentence of 35 years imprisonment to run from the 15/11/2005 when the trial court imposed the death sentence.

Dated, Signed and delivered at Kisii this 13th day of February, 2020.

A.K NDUNG'U

JUDGE

In the presence of:

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions for the respondent.

Applicant in person.