



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**(CORAM: CHERERE- J.)**

**PETITION NO.22 OF 2020**

**BETWEEN**

**DANIEL OMONDI MIGAN.....PETITIONER**

**AND**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. **DANIEL OMONDI MIGAN, (Petitioner)** was convicted on 08<sup>th</sup> April, 2005 on 4 counts of robbery with violence contrary to section 296(2) of the Penal Code in **Nyando Criminal Case No. 334 of 2004** and was sentenced to death. He lodged an appeal in **Kisumu High Court Cr. Appeal No. 66 of 2005** which was dismissed by a judgment dated 30.09.08 and the court further ordered that the sentences in the 2<sup>nd</sup> to 4<sup>th</sup> counts be held in abeyance. The Petitioner appealed to the Court of Appeal in **Kisumu Criminal Appeal No. 349 of 2008** which by a judgment dated 27.11.09 upheld the conviction and sentence. The death sentence was commuted to life imprisonment in 2009.

2. By a petition filed on 28.02.2020, the Petitioner has petitioned this court for resentencing.

3. Ms. Gathu, learned counsel for the state submitted that the Petitioner and two others while armed with a knife attacked and robbed 4 complainants and injured them. The state urged the court to resentence the Petitioner to 20 years.

**Analysis and Determination**

4. At the time of the Petitioner's conviction, death was the only available sentence for robbery with violence.

5. The Supreme Court decision in **Francis Kariuki Muruatetu & Another v Republic & 5 others [2016] eKLR** declaring mandatory death sentence unconstitutional has necessitated resentencing of all persons previously sentenced to mandatory sentences. In the case of **William Okungu Kittiny v Republic KSM CA Criminal Appeal No. 56 of 2013 [2018] eKLR**, the Court of Appeal applied the **Muruatetu Case (Supra) mutatis mutandis** to the provisions of section 296(2) of the Penal Code (Chapter 63 of the Laws of Kenya) which imposes the mandatory death penalty for the offence of robbery with violence and held that death was a discretionary maximum sentence.

6. I have considered the **Sentencing Policy Guidelines, 2016** and its application which is intended to promote transparency, consistency and fairness in sentencing (See **Michael Kathewa Laichena & another v Republic [2018] eKLR**).

7. The maximum sentence for simple robbery is 14 years' imprisonment. The mitigating circumstances in this case are that the petitioner could be considered a first offender. The facts from the record shows that the offences took place at night and the robbers although were armed with a knife and a pistol, there was no medical evidence that any actual violence was meted on the complainants.

8. Under the proviso to section 333(2) of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**, the court is entitled to take into account the period the petitioner has spent in custody in determining the sentence. The court record shows that the Petitioner was arrested on 20.03.04 and was convicted one year later on 08.04.05. He remained in custody for 1 year and has served about 15 years since conviction within which time he has obtained 3 diplomas in Bible Studies.

9. The officer in charge Kisumu Maximum Prison has by his letter dated 09.03.2020 vouched for the Petitioner's good conduct. I have considered that the Petitioner has undertaken several courses and I have come to the conclusion that he has the potential for productive life outside prison.

10. I have considered judgments of Superior Courts that are intended to ensure consistency and fairness. In the case of **Wycliffe Wangusi**

**Mafura v Republic ELD CA Criminal Appeal No. 22 of 2016 [2018] eKLR**, the Court of Appeal imposed a sentence of 20 years where the appellant was involved in robbing an Mpesa shop with the use of a firearm with which he threatened the attendant but was caught before he inflicted any violence on her.

11. I therefore re-sentence him to **20 years'** imprisonment on each of the 4 counts from date of the date of his sentence on **08<sup>th</sup> April, 2005**. The sentences shall run concurrently.

**DATED THIS 14<sup>th</sup> DAY OF April, 2020**

**T. W. CHERERE**

**JUDGE**

**Court Assistants - Ms. Amondi/Ms. Okodoi**

**Petitioner - Present**

**For the State - Mr. Onanda**

**Order**

**This judgment has been delivered to the parties via video conferencing (skype) due to measures restricting court operations due to the COVID -19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March, 2019.**