



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE- J.)

PETITION NO.21 OF 2020

BETWEEN

TOM ODHIAMBO OMWARE.....PETITIONER

AND

REPUBLIC.....RESPONDENT

JUDGMENT

1. **TOM ODHIAMBO OMWARE, (Petitioner)** was convicted on 05.12.2008 for robbery with violence contrary to section **296(2) of the Penal Code** in **Winam Criminal Case No. 2228 of 2002** and was sentenced to death. He lodged an appeal in **Kisumu High Court Cr.Appeal No. 171 of 2008** which was dismissed by a judgment dated 21.07.2009. The Petitioner appealed to the Court of Appeal in **Kisumu Criminal Appeal No. 327 Of 2009** which by a judgment dated 17.12.10.

2. By a petition filed on 20.02.2020, the Petitioner has petitioned this court for resentencing.

3. Ms. Gathu, learned counsel for the state submitted that on the night of 29.08.2007, the Petitioner and five others while armed with a pistol and a panga robbed and shot at the complainant injuring him on the right scalp and right ear pinnae. The state urged that the Petitioner who had served 12 years be resentenced the Petitioner to 30 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 offence took place at night and the robbers who were armed with a panga and a pistol used actual violence on the complainant.

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 convicted on 05.12.2008. He has served about 12 years since conviction within which time he has obtained 4 diplomas in Bible Studies and various other certificates.

9. The officer in charge Kisumu Maximum Prison has by his letter dated 03.03.2019 vouched for the Petitioner's good conduct. From the foregoing, it is apparent that the Petitioner 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. In this particular case, the complainant was shot at on the head and survived by a whisker. I therefore re-sentence him to **20 years'** imprisonment from the date he was sentenced on **05th December, 2008**.

DATED THIS 14th 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 15th March, 2019.