



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL PETITION NO. 55 OF 2019**

**ANTHONY ODHIAMBO OLANDO.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being A Petition for REsentencing in Siaya PMCRC No. 568 of 2007 on 24.4.2006*

*before Hon. G.K. MWAURA –P.M. and Kisumu High Court Criminal Appeal NOS 38,*

*39 AND 40 of 2008(CONSOLIDATED) before Hon. J.W. Mwera and J.R. Karanja J.J.*

*and Kenya Court of Appeal NO. 158, 159 & 160 OF 2009 (CONSOLIDATED)*

**JUDGMENT**

1. The Petitioner Anthony Odhiambo Olando was vide **Siaya P.M. CR. Case No. 56 of 2007** convicted and sentenced to death for the offence of **Robbery with Violence contrary to Section 296(2) of the Penal Code**. This was vide a judgment delivered on 14.4.2008 by Hon. G.K. Mwaura Principal Magistrate.
2. The Petitioner appealed to the High Court at Kisumu vide **Kisumu HCCRA No. 39 of 2008** which appeal was dismissed on 2.6.2008 by **Hon J.W. Mwera and J.R. Karanja JJ**. Still dissatisfied with the judgment of the High Court, the Petitioner soldiered on to the Court of Appeal. By a judgment rendered in **KCA CRA No. 158, 159 and 160 of 2009 (Consolidated)**. The Appellant lost his appeal which was dismissed.
3. The death sentence was later commuted to life imprisonment by His Excellency the President in 2009.
4. The Petitioner is therefore serving life imprisonment by executive fiat. Light shone at the end of the tunnel when in December 2017 vide **Supreme Court Petition No. 15 and 16 of 2015 (consolidated) in Francis Karioko Muruatetu v Republic**, the Supreme Court held inter alia, that the mandatoryness of death sentence for the offence of murder, and by extension, Robbery with Violence was unconstitutional for the following key reasons:
  - (1) **That it deprived the trial court of the Judicial discretion in sentencing having regard to the circumstances of each case, and**
  - (2) **That it denies a convicted person an opportunity to mitigate which mitigations/the trial Court would take into consideration in sentencing.**
5. As a result of the above decision by the apex Court, our Courts have witnessed an avalanche of Petitions for resentencing in all manner of cases where mandatory sentences were imposed, including capital Robbery and Sexual Offences.
6. The Petitioner in this Petition filed on 11.11.2019 claims that the mandatory death sentence is degrading and inhumane and therefore unconstitutional and that his rights under Article 27(1) (2) (5) of the Constitution were violated. That he has been in custody for 11 years from the time of arrest in 2007.
7. In his Oral submissions, he mitigated saying that he was remorseful and asked for leniency of the Court. That he committed the offence in ignorance and that he can never commit such an offence again and that he was misled. He urged the Court to give him a second chance to get back into the community. He availed to Court copies of testimonials including certificate in Industrial soap making, Biblical Studies and a letter of recommendation from the Prisons Officer in charge at Kisumu Maximum Prison Mr. Tindi Emmanuel S.P. highly recommending the Petitioner for any possible assistance as he was reformed and able to reintegrate well back into the Society since his general character and

discipline are exemplary.

8. The Respondent through the prosecution Counsel Mr. D. Okachi, submitted that based on the testimonials, the Court may consider the courses undertaken and Public interest and make its determination.

9. I have considered the Petition by the Petitioner, the testimonials and submissions. The only issue for determination is whether the Petition is merited. It is not in dispute that the Petitioner committed the offence for which he was sentenced to death and his appeals bore no fruit until the Francis Karioko Muruatetu (supra) decision.

10. It is important to note that death sentence is not unconstitutional where it is imposed pursuant to a legislative provision. This is the stipulation of Article 26(3) of the Constitution. Accordingly, as far as our Constitution which is the Supreme law of the land is concerned, Death Sentence imposed by a court of competent jurisdiction is not unconstitutional, inhumane or degrading.

11. The trial Court record shows that the Petitioner and his co-convicts were first offenders but in mitigation they all said nothing. In my humble view, as there was only one sentence prescribed by law then, the mitigations would not have changed anything or made any difference to the death penalty which was meted out on the Petitioner and his Co-accused/Convicts, and which sentence was mandatory then.

12. It is for that reason that I must consider the mitigations by the Petitioner as submitted and his testimonials placed before this Court.

13. The Petitioner has been in prison from 2007 to date which is close to 13 years now. He claims to be remorseful and has learnt life's skills. He has been recommended by the officer-in-charge of Kisumu Maximum G.K. Prison for favourable consideration on account

14. of his exemplary character and discipline.

15. It is hoped that the Petitioner, given an opportunity to serve custodial sentence will not re-offend once he gets back into the open democratic Society. Public interest demands that offenders be punished for their wrongdoing and in cases where they are a great risk to the rest of humanity, they be kept away from the society until they are rehabilitated and reformed. The Petitioner has served nearly 13 years on death row. He is now serving an indefinite life imprisonment.

16. In my humble view, and based on the testimonials, I am persuaded that the Petitioner is reformed and rehabilitated. The offensive weapons used in committing the offence were pangas and rungun and a toy pistol. The Complainant Julius Omondi Atieno was wounded during the violent Robbery. He was waylaid on the way home after a long journey from Tambach Teachers Training College *en route* a funeral.

17. The Robbers emptied his pockets of all the money that the complainant had and his property stolen violently. His vehicle was seriously damaged. They beat him using heavy weapons on the head, he would have died. The degree of injury sustained by the Complainant as per the P.3 Form dated 18.7.2007 was maim. Some property stolen were recovered.

18. Robbery with Violence is a heinous crime that is motivated by greed. People who use so much of their energy to rob others deserve no mercy but the Petitioner has owned up to the crime after the evidence adduced against him before Courts of Justice nailed him to the offence.

19. For the reasons that the Petitioner is reformed and rehabilitated but the Complainant who was seriously injured too deserves Justice, I exercise discretion and resentence the Petitioner to serve Twenty-five (25) years imprisonment to be calculated from 17<sup>th</sup> July, 2007.

20. Orders accordingly.

**Dated, Signed and Delivered at Siaya this 7<sup>th</sup> Day of May, 2020 via skype due to the Covid 19 situation.**

**R. E. ABURILI**

**JUDGE**