



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

PETITION NO. 28 OF 2018

MOSES OUMA OBURE.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Petitioner **Moses Ouma Obure** by his Petition filed in Court on 11.12.2018 seeks from this Court a declaration that his Constitutional rights were breached by the Respondent by convicting and sentencing him to serve as unlawful sentence.
2. He relies on the provision of **Articles 50 (2) (9), 165(3), 159 (2) (a) (b) and 22(4) and 163(7) of the Constitution.**
3. According to the Petitioner and as evidenced by the trial Court record, he was charged, tried, convicted and sentenced to death vide **Bondo Principal Magistrate's Case No. 1769 of 2010 for the offence of Robbery with Violence. On 29.2.2012.** He appealed against the said death sentence to the High Court **Criminal Appeal No. 37 of 2012** which appeal was dismissed.
4. Being dissatisfied with the High Court's decision, the Petitioner appealed to the **Court of Appeal vide KCA No. 122 of 2014** which appeal was also dismissed.
5. The death sentence was later commuted by His Excellency the President to life imprisonment on 24.10.2016.
6. Having exhausted all appeal mechanisms, the Petitioner is now lawfully serving life imprisonment.
7. However, all was not lost after all, light came at the end of the tunnel when on 14.12.2017 the Supreme Court of Kenya in the **Supreme Court Pet. Nos 15 and 16 of 2015 (consolidated) Francis Karioko Muruatetu and Others V. Republic** rendered a landmark decision declaring unconstitutional, the mandatoriness of the death sentence in capital Robbery.
8. Nonetheless, that landmark and iconic decision has been misunderstood and misinterpreted by many individuals including this Petitioner, who believes that the apex Court declared death sentence unconstitutional.
9. I say misinterpreted because the Supreme Court made it clear that death sentence was not mandatory sentence in robbery with violence cases as such mandatoriness takes away the discretionary power of the trial Court in meting out appropriate sentences after taking into account mitigations by the convicted offenders and circumstances of the offence in question.
10. The Supreme Court in rendering itself as such was cognizant of **Article 26 of the Constitution** which stipulates that death sentence is not unconstitutional where it is meted out pursuant to a statutory enactment.
11. A Constitutional provision is never unconstitutional. The Constitution does not outlaw death sentence and neither did the Supreme Court in the **Francis Muruatetu (Supra)** case outlaw death sentence. The Court was concerned with the Mandatoriness of the death sentence.
12. That being the case, I have no hesitation at this stage to find and hold that death sentence meted out on the Petitioner as stipulated in **Section 296(2) of the Penal Code** is not unconstitutional. It is lawful sentence.
13. Accordingly, the Declaration sought by the Petitioner cannot hold and the same is dismissed.
14. However, this Court exists to do justice especially in Constitutional, Petitions, and make any other order which meets the ends of justice can issue.

15. I am cognizant of the fact that the Petitioner is a prose litigant (unrepresented but assisted by some prison paralegal (PPL) to draft his Petition.

16. What I gather from his oral submissions in Court is that he is seeking for resentencing in line with the **Francis Muruatetu (Supra)** decision.

17. He seeks for custodial sentence because life in prison is uncertain such that the commutation from death sentence to life imprisonment is not helpful to him. He states that he has reformed while in jail. That he now knows how to relate with people.

18. That the victim of the violent robbery that send him to the gallows visits him in prison, they come from the same village and that he only helped recover the robbed items and returned them to the Complainant that is why he got into

trouble courtesy of the doctrine of recent possession.

19. However, when the Petitioner was cautioned against seeking for an acquittal by this Court as the Court of Appeal had upheld his conviction, he changed facts and stated:

“I pray that I be helped although I committed the offence”

20. The Prosecution led by Senior Principal Prosecution Counsel Mr. D. Okachi opposed the Petition submitting that the offence committed deserved deterrent sentence of death and that the Petitioner was blowing hot and cold recanting the Court process that found him guilty. That there were no grounds warranting reduction of sentence and that certificates from Prison are not evidence of remorse.

21. The Petitioner availed from Prison certificates of completion of Bible correspondence courses, Grade 1 certificate in painting and decoration, certificates in beadwork and Bead design, soap making, Yoghurt and cordial juice making, drug and substance abuse prevention training and a letter dated 6.3.2019 from Officer-in-Charge Kisumu maximum Security Prison recommending that the Petitioner Prisoner has gone through Prisoners progressive stages and is at stage 4 with added responsibilities of training, supervision and guiding other inmates in the general discipline.

22. There is no doubt that the Petitioner was found guilty of the offence of robbery with violence, was convicted and lawfully sentenced to suffer death which at the time was the only available mandatory sentence.

23. Upon such conviction what would be in issue is whether the Petitioner/Convict was given an opportunity to mitigate and whether such mitigations were taken into account. Perusing the judgment in Bondo P.M. Cr. Case No. **1769/2010** delivered on 29th February, 2012 by P.W. Mutua, Principal Magistrate, I note that after conviction of the Petitioner and his 2 co-accused persons, the Prosecutor stated that all the Accused Persons may be treated as first offenders. The Petitioner who was the 2nd Accused Person in Mitigation stated:

“I pray for proceedings”

And so was his co-accused **Nicholas Ouma Owele Agol**. Noting that the Accused persons were unrepresented, in such a serious matter and knowing that mitigation in a conviction for robbery with violence may not have changed anything or persuaded the trial Court to mete out any other lesser sentence, in my humble view, the Petitioner and his co-accused could not be blamed for failure to mitigate.

24. In addition, the trial Magistrate cannot be faulted for failure to take into account any mitigations as he was duty bound to mete out death sentence which was mandatory, then.

25. This Court further observes that albeit their appeals against conviction and sentence were dismissed by the Court of Appeal on 15.11.2018 which was after the decision by the Supreme Court decision in **Francis Muruatetu (Supra)** the Court of Appeal made no reference to the principles espoused in the **Francis Muruatetu** case especially as far as giving an alternative sentence was concerned.

26. Accordingly, I find and hold that the Petitioner has a right to seek for resentencing and rehearing of his mitigation.

27. Regrettably the Petitioner still maintains his innocence which is a foregone conclusion as this Court cannot sit on appeal of the decision of the Court of Appeal. This Court is bound by the Court of Appeal decision.

28. The mitigation given are that the Petitioner has learnt several skills while in prison, he has also learnt how to relate with people in society. That he is reformed and that he should be considered for a custodial sentence to serve and get back into the society.

29. I have considered the recommendation from the prison officer in charge at Kisumu Maximum Security Prison. The Petitioner is said to be disciplined and in responsible for training others in various skills. He has acquired certificates in Life's skills including Biblical studies.

30. The Petitioner did not indicate his age but from my own observation of him in Court, he is still a young man and he has quickly learnt those life's skills while in prison with a hope of getting back into the society at large.

31. He was a first offender as per the Prosecutions address before the trial Court. There is no contrary view. He was arrested on 25.12.2010 and has been in custody now for 8 years 2 ½ months.

32. The weapons used in the commission of the robbery are pangas, rungas and torches, hammers. The value of the property robbed is between KShs 4,000/= and 22,300/= which included mobile phones and KShs.3000/=.

33. There is no evidence that the victims of the robbery were physically injured. They were off course traumatized but the lost phones were recovered and the Petitioner herein even surrendered them to the Complainant. One of the phones and that is the evidence that effectually nailed him to the offence of robbery (PW4's phone) there was a struggle between the Complainants and the robbers but there was no physical injury.

34. In the premises, I exercise my discretion and set aside the death sentence meted out on the Petitioner as commuted to life imprisonment by His Excellency the President and resentence the Petitioner to a custodial sentence.

35. This is so because the Petitioner has demonstrated through the prisons service that he is now responsible enough to live in harmony with the rest of the society as the Complainant even visited him in prison an indication of reconciliation.

36. I resentence the Petitioner to serve 20 years in Prison, to be calculated from the date of his arrest.

37. Orders accordingly.

Dated, Signed and Delivered at Siaya this 12th day of March, 2019.

HON. R. E. ABURILI

JUDGE