



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE- J.)

PETITION NO.07 OF 2019

BETWEEN

CLIFFORD OTIATO.....PETITIONER

AND

REPUBLIC.....RESPONDENT

JUDGMENT

Introduction

1. **CLIFFORD OTIATO**, (hereinafter referred to as the petitioner) was on 20th June, 2008 convicted and sentenced to death for robbery with violence contrary to section 296(2) of the Penal Code in **Maseno Criminal Case No. 961 of 2008**. Petitioner lodged an appeal **Kisumu High Court Criminal Appeal No. 142 of 2008** which was dismissed on 11th June, 2010 whereupon the conviction and sentence were upheld. The petitioner subsequently appealed to the Court of Appeal in **Kisumu Criminal Appeal No. 181 of 2010** and the appeal was similarly dismissed and his conviction and sentence upheld in a judgment dated 26th April, 2012.

2. The petitioner has petitioned this court for resentencing. He urged the court to consider that he had reformed.

3. Mr. Muia, learned counsel for the state urged court to consider that the robbery was committed by Petitioner and others who were armed with pangas and that complainant was robbed and injured. The state proposed that the petitioner be resented to 10 more years over and above the years already served.

Analysis and Determination

4. The Supreme Court decision in **Francis Kariuki Muruatetu & Another v Republic & 5 others [2016] eKLR** declaring the mandatory death sentence unconstitutional has necessitated resentencing of all persons previously sentenced to the mandatory death sentence. 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.

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

6. 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 pangas severely injured the complainant.

6. 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. Petitioner has served about 11 years since conviction.

9. 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. In **Robert Achapa Okello vs Republic [2018] eKLR**, this court resented the Petitioner who had been in custody for 15 years to period served on account of the fact that no violence was meted on the complainants unlike in this case where complainant was injured.

10. After considering all the mitigating and aggravating factors, the fact that the complainant was severely injured and the fact that the petitioner has already served close to 11 years imprisonment, I re-sentence him to **20 years** imprisonment from date of conviction.

11. Further to the foregoing, the Petitioner's sentence having been commuted to a definite imprisonment term is also entitled to benefit from remission of sentence **if he meets the conditions**. It is so ordered.

DATED AND SIGNED IN KISUMU THIS 4th DAY OF April 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Petitioner - Present in person

For the State - Mr. Muia