



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE- J.)

PETITION NO.03 OF 2019

BETWEEN

EVANS OTIENO OGUTU.....PETITIONER

AND

REPUBLIC.....RESPONDENT

JUDGMENT

Introduction

1. **EVANS OTIENO OGUTU**, (hereinafter referred to as the petitioner) was convicted and sentenced to death for two counts of robbery with violence contrary to section 296(2) of the Penal Code in **Kisumu Criminal Case No. 140 of 2003**. He lodged an appeal in **Kisumu High Court Criminal Appeal No. 398 of 2003** which was dismissed and the conviction and sentence were upheld. His appeal **Criminal Appeal No. 323 of 2008** to the Court of Appeal was likewise dismissed and the conviction and sentence upheld.

2. By a petition filed on 12th March, 2019, the petitioner has petitioned this court for resentencing.

3. Mr. Muia, learned counsel for the state submitted that the complainants were robbed and injured. The state urged the court to direct that the petitioner served 15 more years over and above the period he had served.

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 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.

6. I have considered the ***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 armed with pangas used actual violence on the two 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 has served about 16 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 v Republic [2018] eKLR***, court resentenced 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.

10. After considering all the mitigating and aggravating factors, the fact that the petitioner and others committed two robberies with violence and the fact that the petitioner has been in custody for about 16 years, 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 16th DAY OF May, 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Petitioner - Present in person

For the State - Ms Gatho