



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**HC PETITION NO. 93 OF 2018**

**PETER ODHIAMBO ODHIAMBO.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**NOTES ON RE-SENTENCING**

Peter Odhiambo Odhiambo was convicted for the offence of Murder, and he was then sentenced to suffer Death, as by law prescribed.

1. His appeal to the Court of Appeal was dismissed on 22<sup>nd</sup> March 2012.
2. Following the pronouncement by the Supreme Court, that it was unconstitutional for any trial court to hand down the death penalty as a matter of course, the Petitioner has made an application that he should go through a fresh process of re-sentencing.
3. It is important to emphasize here that the Supreme Court did not declare the Death penalty to be unconstitutional.
4. The said court made it clear that it was only the automatic sentencing of a convict, that was unconstitutional because the said sentence would have been handed down before the court had given to the convict, an opportunity for mitigation.
5. Sentencing is an integral part of the trial. Therefore, the process must also be a reflection of fairness.
6. Justice and fairness can only be attained if the sentence handed down is informed by not only what is prescribed by law, but also through taking into account the reasons and factors highlighted by both the prosecution and the convict.
7. If the trial court appreciates the circumstances under which the offence was committed; and if the court is made aware of the factors surrounding the commission of the offence, it would then be possible for the court to hand down an appropriate sentence.
8. In this case, the record of the proceedings before the trial court were not provided to me.
9. The Petitioner did not have his copy of the said proceedings.
10. The learned state counsel also did not have his copy of the proceedings.
11. And efforts by the learned Deputy Registrar of this court, to trace the original court record, failed to yield the desired goal.
12. Effectively, therefore, this court is unaware as to whether or not the learned trial Judge had given the Petitioner an opportunity for mitigation before he was sentenced.
13. As it is possible that the Petitioner was accorded an opportunity for mitigation prior to being sentenced, that would imply that the Petitioner has failed to satisfy the requirements for re-sentencing.
14. In the result, although Mr. Muia, learned state counsel, urged the court to hand down a fresh sentence of six (6) more years in jail, I find no basis in law, to enable the court to exercise its discretion in the manner suggested, or at all.
15. Accordingly, the Petitioner will continue to serve the sentence handed down by the learned trial Judge.

**SIGNED, DATED AND DELIVERED AT KISUMU**

**This 17<sup>th</sup> day of July 2019**

**FRED A. OCHIENG**

**JUDGE**