REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL PETITION NO.15 OF 2018

SAMSON OMONDI ONGOU...1ST PETITIONER

PAUL NDEGE OWUOR...........2ND PETITIONER

VERSUS

REPUBLIC.......................................RESPONDENT

RULING

1. The Notice of Motion filed herein on **16th May 2018**, was taken out by the first applicant/petitioner, **Samson Omondi Ongou**, seeking a re-hearing of the sentence imposed on him by the Senior Resident Magistrate at Oyugis in Criminal Case No.924 of 2004.

A first appeal against conviction and sentence was dismissed by the High Court at Kisii and so was a second appeal to the Court of Appeal at Kisumu.

In the originating case at Oyugis, the applicant was charged together with the second applicant/petitioner, **Paul Ndege Owuor**, with robbery with violence, contrary to **Section 296 (2)** of the **Penal Code** and were both convicted and sentenced to death as by law established.

2. The present application like many other such applications was prompted by the Supreme Court of Kenya (SCOK) decision in the case of **Francis Karioko Muruatetu & Another –vs- Republic SC Petition NO.15 of 2015**, where it was held that **Section 204** of the **Penal Code** was inconsistent with the Constitution and invalid to the extent that it provides the mandatory death sentence. However, the court clarified that the decision did not outlaw the death penalty which continued to be applicable as a discretionary maximum punishment.

The second applicant/petitioner's application filed herein on 17th September 2018, is more or less based on grounds similar to those contained in the first applicant's application.

Both application were consolidated and heard together by way of written submissions.

Learned Counsel, **Mr. Odingo**, appeared for the first applicant and filed his submissions on the 20th June 2019.

The second applicant appeared in person and presented his written submissions.

3. For the avoidance of doubt, this is not an appeal on either conviction or sentence or both but a hearing or re-hearing on sentence with a view to giving effect to the aforementioned Supreme Court decision on the mandatory death sentence provided for under **Section 204** of the **Penal Code**.

A consideration of the submissions by both applicants shows that instead of vigorously offering mitigating or further mitigating factors for this court to exercise discretion in their favour, they embarked on attacking the death sentence as being unconstitutional thereby behoving upon this court to have it set aside and impliedly set them at liberty. This was more pronounced in the first applicant's submissions that those of the second applicant.

4. Be that as it may, the record of the original file in Oyugis court shows that even though **Section 296 (2)** of the **Penal Code** attracted a mandatory death sentence, the applicants were given the opportunity to mitigate before being sentenced. This application is therefore a third or so bite at the cherry and may not be that merited considering that they invaded a fellow villager in ungodly hours of the night while armed with offensive weapons and seriously assaulted him and his family before robbing him of his money.

They at the material time posed as police officers as they were dressed in police uniforms. However, the death sentence meted out against them may not have been necessary in the circumstances but was mandatory in nature such that the trial court had no discretion to omit it for a

less severe sentence given that severity of sentence is a matter of fact rather than law (see, **Bernard Omari Kigwaro –vs- Republic – Kisumu Criminal Appeal No.320 of 2007 (C/A)**.

5. In the **Muruatetu case** (supra), the Supreme Court affirmed that the mandatory nature of the death sentence was inconsistent with the constitution, a fact which was first noted by the Court of Appeal in the case of **Godfrey Ngotho Mutiso (2010) e KLR**, where it was also noted that the constitution envisages a situation in which the right to life can be curtailed. Such situations would include instances where a person is found guilty of murder, treason, robbery with violence and attempted robbery with violence. All these are offences provided for in the Penal Code.

The right to life is therefore not absolute and can be limited by the state in accordance with any written law. In this case, the law is the penal code.

6. **Article 26** of the **Constitution** recognizes the inherent right to life and that the life of a person begins at conception. However, that right is curtailed under **Sub-Section (3)** in the following terms:-

> **"A person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written Law"**.

As noted hereinabove, the applicable written law in the present circumstances is the Penal Code. No doubt, in Kenya, death as a penalty has been sanctioned by the Constitution.

As was held in the **Godfrey Mutiso case** (supra), the death penalty remains a lawful sentence in this country and appears set to remain so for a long time to come as demonstrated in the **Muruatetu case**.

7. With regard to the mandatory nature of the death sentence as provided in **Section 204** of the **Penal Code**, the court in the same **Godfrey Mutiso case** held as follows:-

> **"On our own assessment of the issue at hand and the material placed before us, we are persuaded, and now so hold, that section 204 of the penal code which provides for a mandatory death sentence, is antithetical to the constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial. We note that while the constitution itself recognizes the death penalty as being lawful, it does not say anywhere that when a conviction for murder is recorded, only the death sentence shall be imposed. We declare that section 204 shall, to the extent that it provides that death sentence is the only sentence in respect of murder is inconsistent with the letter and spirit of the constitution, which as we have said, makes no such mandatory provision."**

Needless to say that the holding is applicable **"mutatis mutandis"** to all other provisions of the **Penal Code** providing for mandatory death sentence such as **Section 296 (2)** of the **Penal Code** under which the applicants herein were charged, convicted and sentenced to death.

8. In that regard, the court stated that:-

> **"We have confined this judgment to sentences in respect of murder cases, because that was what was before us and what the Attorney General conceded to. But we doubt if different arguments could be raised in respect of other capital offences such as treason under Section 40 (3), robbery with violence under Section 296 (2) and attempted robbery with violence under Section 297 (2) of the Penal Code. Without making conclusive determination on those other sections, the arguments we have set out in respect of Section 203 as read with Section 204 of the Penal Code might well apply to them".**

9. The **Godfrey Mutiso case** firmly ascertained that mitigation was required to determine the appropriate sentence in cases where there had been convictions for capital offences. Thus, sentencing discretion to trial courts in murder cases and indeed all capital offences was introduced therein and firmly carried forward in the **Muruatetu case** thereby overruling a contrary opinion by the Court of Appeal in **Joseph Njuguna Mwaura & Others –vs- Republic (2013) e KLR**, which maintained the mandatory nature of the death sentence.

In arriving at its decision, the Court in the **Godfrey Mutiso case** quoted that following passage from the Supreme Court of Uganda in the case of **Attorney General –vs- Kigula & 417 Others Constitutional Appeal No.3 of 2006:**

> **"A trial does not stop at convicting a person. The process of sentencing a person is part of the trial. This is because the court will take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence. This is clearly evident where the law provides for a maximum sentence. The court will truly have exercised its function as an impartial tribunal in trying and sentencing a person. But the court is denied the exercise of this function where the sentence has already been pre-ordained by the legislature, as in capital cases. In our view, this compromises the principle of fair trial"**.

10. These applications are undoubtedly a reflection by the two applicants of their desire to have the mandatory death sentence imposed upon them by the trial court at Oyugis reconsidered and substituted for a less severe sentence if not an absolute discharge.

Having carefully considered the circumstances of this case and noted hereinabove, this court's opinion is that the impugned death sentence was unnecessary but the trial court had no other option at the time. The **Godfrey Mutiso** and **Muruatetu cases** provided the route for other sentences without outlawing the constitutionally ordained death sentence.

In that regard, rather than remitting the case to the trial court to impose an alternative sentence, this court in order to ease the applicants' anxiety hereby substitutes the impugned death sentence to twenty (20) years imprisonment with effect from the date of the sentence i.e 25th March 2014.

J.R. KARANJAH

JUDGE

09.10.2019

[Dated and delivered this 9th day of October, 2019]