REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CONSTITUTIONAL PETITION NO.2O OF 2018

SAMWEL ISINYA NYAKUNDI.....1ST PETITIONER

COLLINS EVANS OMONDI.....2ND PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING

[1] Samwel Isinya Nyakundi (first applicant/petitioner) and **Collins Evans Omondi** (second applicant/petitioner) were charged before the Senior Resident Magistrate at Homa Bay with ***"inter alia"*** four counts of robbery with violence, contrary to **Section 296 (2)** of the **Penal Code** which carried a mandatory death sentence. They both pleaded not guilty to all the counts and were tried, convicted and sentenced to suffer death on count one while the sentences on the remaining similar counts were held in abeyance for the obvious reason that a person cannot suffer death twice or more but only once.

Being dissatisfied with the conviction and sentence, the applicants preferred a first appeal which was dismissed in its entirety by the High Court at Homa Bay. They then proceeded to the Court of Appeal at Kisumu on a second appeal which was pending as at the time the present applications were filed. It was however, withdrawn on the 27th March 2019, apparently to allow the applicants pursue this application.

[2] The first applicant's application was by way of a notice of motion dated 3rd August 2018, while that of the second applicant was by way of a petition filed herein on 3rd July 2019.

Both applications are based on the grounds contained in the notice of motion and the petition as fortified by the averments in the respective supporting affidavits.

Basically, the main prayer in both applications is for review and/or substitution of the death sentence with a less severe sentence if not an absolute discharge in line with the Supreme Court decision in the case of **Francis Karioko Muruatetu & Another –vs- Republic (2017) e KLR**, which abolished the mandatory nature of the death sentence and affirmed the Court of Appeal decision in that regard, in the case of **Godfrey Ngotho Mutiso –vs- Republic [2010] e KLR**.

[3] Both applications were consolidated and heard together by way of written submissions. In that regard, the first applicant's submissions dated 20th June 2019, were filed on 24th June 2019 through **Messrs Odingo & Co. Advocates**, while those of the second applicant were filed on the 3rd July 2019.

This court gave due consideration to the submissions and noted that heavy reliance was placed on the **Muruatetu case** (supra) and several other superior courts decisions which came after it or after the **Godfrey Mutiso case** (supra) in order to prevail upon this court to exercise discretion in favour of the applicants.

The state, through the learned **Senior Assistant Deputy Public Prosecutor Mr. Oluoch**, opposed the applications on the main ground that the offences were aggravated in nature such that four human lives were lost.

The state therefore urged this court not to reduce the sentence as it would not be in the public interest to do so.

[4] The basic issue arising for determination is whether the mandatory death sentence which was imposed upon the two applicants in **Homa Bay CMCC No.9 of 2014**, should be reviewed and substituted for a less severe sentence preferably a term of imprisonment, if not, an absolute discharge.

Generally, as was held by the Court of Appeal in **Bernard Omari Kigwaro –vs- Republic – Kisumu Criminal Appeal No.320 of 2007**, severity of sentence is a matter of fact rather than law.

In the Ugandan case of **Attorney General –vs- Kigula & 417 others Constitutional Appeal No.3 of 20006**, the Supreme Court of Uganda held that a trial does not stop at convicting a person and that the process of sentencing is part of the trial 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.

The same court went on to observe that the court would be denied the exercise of its function as an impartial tribunal in trying and sentencing a person where the sentence has already been pre-ordained by the legislature, as in capital cases. This compromises the principle of fair trial.

[5] The right to life is not absolute and can be limited by the state in accordance with any written law.

Indeed, in the **Godfrey Mutiso case**, the court stated 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 which is the applicable written law in the present context.

Under, **Article 26 (3)** of the **Constitution**, a person shall not be deprived of life intentionally, except to the extent authorized by the constitution or other written law.

It is therefore without doubt that in this country, the death penalty is sanctioned by the constitution. It remains a lawful sentence and appears set to remain so for a long time to come as implied in the **Godfrey Mutiso case** and demonstrated in the **Muruatetu case**.

[6] The sentence of death imposed against the two applicants by the trial court was therefore lawful for all intents and purposes.

Despite the death sentence being mandatory at the material time, the applicants were allowed by the trial court to mitigate and did in fact mitigate before pronouncement of the sentence.

The circumstances of the offences coupled with the gruesome and macabre nature of the violence meted out against the victims by the offenders, the applicants included, could not have attracted any other sentence than that of death with or without the mandatory sentence provided for under **Section 296 (2)** of the **Penal Code**.

It would therefore serve no useful purpose for this court to review and substitute the impugned death sentence with a less severe sentence or even remit the matter to the trial court for that purpose.

In sum, the objection by the state/republic is hereby sustained with the result that the applicants' applications as consolidated are accordingly dismissed.

J.R. KARANJAH

JUDGE

09.10.2019

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