



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**MISCELLANEOUS PETITION NO. 2 OF 2019**

**CHARLES ONYANGO.....PETITIONER**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**JUDGMENT**

1. The Petition herein was filed on 28.1.2019 by the Petitioner/Convict Charles Onyango Otieno. The Petitioner was convicted sentenced to serve death penalty vide Bondo P.M's Court Cr. Case No. 574 of 2003 for the offence of robbery with violence contrary to section 296(2) of the Penal Code. He appealed vide Kisumu High Court Criminal Appeals Nos. 63 and 64 of 2004 with his co-convict Naboth Owino Otieno, the only two people/accused who were convicted by the trial Court for **Robbery with Violence contrary to Section 296 (2) of the Penal Code**. All the other 6 accused persons were acquitted for lack of sufficient evidence to convict them, at the trial stage.
2. The Petitioner claims that his co-convict Naboth Owino Otieno died in prison. The petitioner appealed to the High Court and Court of Appeal vide **HCRA 63 of 2004 at Kisumu and Court of Appeal CRA No. 574 of 2004** which were all dismissed for want of merit.
3. Light shone at the end of the tunnel when the **Supreme Court in Pet. No. 15 and 16 of 2015 Francis Karioko Muruatetu** and Others held that death sentence though lawful, but that its mandatoriness was unconstitutional as it deprived the trial court of the judicial discretion to mete out appropriate sentence, having regard to the circumstances of each case. Further, the Supreme Court was clear that the death sentence deprived an accused/convicted person of the right to mitigate before the court can mete out an appropriate sentence.
4. Owing to the principles laid down in the above decision by the apex court, this court has seen an avalanche of constitutional Petitions by convicted persons who were handed mandatory death sentence, seeking resentencing and majority of them seeking for re-sentencing from life imprisonment which was commuted by His Excellency the President, from death sentence to custodial sentences.
5. For avoidance of doubt, the Supreme Court did not say that death sentence was unconstitutional. Thus, in appropriate cases, the trial court may mete out such sentence having regard to the circumstances under which the offence was committed. Article 26 of the Constitution also stipulates that death sentence is not unconstitutional where it is provided for by statute.
6. In the present Petition, the Petitioner was given an opportunity to mitigate but he only stated that he was an orphan, he stays with his uncle and that he was the only person at home.
7. In this petition, the petitioner says that he was 18 years when he was convicted and now he is 35 years old. He has been in prison for 17 years and he claims that he has reformed. That he now knows that he has to obey the law and live with people. He promises not to commit any other offence given a custodial sentence to give him an opportunity to get back into the community. He regrets the offence saying he saw his co-convict die in prison. He has availed to court documents and testimonials showing that he is now of good conduct and has learnt several life's skills including Electric welding and Biblical Studies.
8. He has also availed a letter of recommendation dated 12.11.2019 from the in-charge of Kisumu Maximum Prison Industry to the effect that in 2009 his death sentence was committed to life imprisonment and that he is of good general character and his discipline is exemplary.
9. Having considered all the above mitigations and the fact that the offender is now rehabilitated and of good conduct and discipline, and having considered the age of the Petitioner when he committed the offence as a young adult at 18 years old, in the company of 7 other people and the weapons used in the commission of the offence on 17.6.2003 and the fact that the complainants in the six (6) counts though lost their property and suffered actual bodily harm and in three of the offences the complainants were either assaulted under section 251 of the Penal Code or indecently assaulted under **Section 144(1) of the Penal Code (Count III)**, where the accused persons forced the complainant to have sexual intercourse with her step son, which offence is serious besides the robbery with violence, I exercise discretion and allow the Petition for resentencing and set aside the mandatory death sentence which was commuted to life imprisonment in 2009 and substitute it with a prison term of twenty five years(25) to be calculated from the date of arrest on 17.6.2003. Orders accordingly.

**Dated, Signed and Delivered at Siaya this 19<sup>th</sup> Day of November, 2019.**

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

The petitioner in person

Mr. Okachi for Prosecution

CA: Brenda & Modestar