



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CRIMINAL PETITION NO: 18 OF 2018**

**ROBERT OBARA LANGO.....PETITIONER**

**VERUS**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

(1) The applicant **Robert Obara Lango** was among the four accused persons, who initially appeared before the Senior Resident Magistrate Mbita in the year 2013, and pleaded not guilty to a charge of robbery with violence contrary to **S. 296(2)** of the penal code. He also faced an alternative count of handling stolen property, contrary to **S. 322 (2)** of the penal code.

After the completion of the trial in the year 2014 the applicant was convicted on the alternative count and sentenced to imprisonment for a period of seven (7) years. He was dissatisfied with the conviction and sentence and preferred a first appeal before the high court. A two Judge bench at the High court dismissed the appeal and found that he was actually guilty of the main count of capital robbery. He was accordingly slapped with the then mandatory sentence of death. Notably he had been warned of the drastic consequences should the appeal fail but he soldiered on. Undeterred the applicant preferred a second appeal to the court of Appeal at Kisumu, but it was withdrawn on 26<sup>th</sup> March 2019 in favour of the present application vide the notice of motion dated 20<sup>th</sup> June 2019 and file on 24<sup>th</sup> June 2019 together with the applicants written submissions through Ms. Odingo & Co. Advocates.

(2) After hearing the application the applicant through his learned counsel relied wholly on his submissions. The state/respondent through the learned Senior Assistant Deputy Public Prosecutor- Homa Bay did not oppose the application for reasons that the offence was not aggravated in nature and that the value of the stolen items was minimal.

After due consideration of the application, it is apparent to this court that the application is amongst the hundreds of thousands such applications which have flooded the corridors of justice across the country following the supreme court decision in the now very famous case of **Francis Kariako Murwatetu & Another Vs. Rep (2017) eKLR**, which outlawed or abolished the mandatory nature of the death sentence prescribed for all capital offences, including treason, Murder, robbery with violence and attempted robbery with violence. In effect the Supreme Court merely affirmed the decision of the court of appeal in that regard in the case of **Godfrey Ngotho Mutiso Vs. Rep (2010) eKLR**.

(3) The question here is whether the death sentence imposed on the applicant by the first appellate court should be reviewed and/or substituted for a less severe sentence such as a term of imprisonment or a non-custodial sentence. This is in fact the gist of the present application.

Basically, the process of sentencing is part of the trial as the court will take into account the evidence, the nature of the offence and the circumstances of the case in arriving at an appropriate sentence. The principle of fair trial is invariable compromised where the sentence has already been pre-ordained such as was in capital cases (See **AIG Vs Kigula & Others Constitutional Appeal No. 3 of 2006 SC(U)** thereby bringing into play the constitutional imperative of the right to life under Article 26(3) of the constitution. However in the **Godfrey Ngotho Mutiso** case (Supra), the court of appeal stated that the constitution envisages a situation in which the right to life can be curtailed e.g where a person is found guilty of murder, treason, robbery with violence and attempted robbery with violence.

(4) Therefore, the imposition of the death sentence upon the applicant after being convicted of capital robbery by the appellate court was lawful and ought not be interfered with except by way of a second appeal which was in this case withdrawn by the applicant. Riding on the wave of the decision in the Murwatetu case it may however be noted that prior to the imposition of the death sentence by the court the applicant is not offered an opportunity to mitigate mostly due to the mandatory nature of the sentence at the time. In fact most of this type of applications are intended to have the original cases remitted back to the trial courts or first appellate courts for re-trial on sentencing after considerations of the convict's mitigations. It is mainly for this reason that the present application must succeed. Other reasons would include the fact that the offence was not aggravated in nature and that the total value of the stolen items was indeed minimal.

In sum, the application is allowed with orders that the applicant be accorded the opportunity to present his mitigation before re-sentencing by this court.

In that regard, the applicant may now mitigate for this court to either reaffirm the death sentence imposed on him or substitute it for a less severe sentence.

**Dated and delivered this 7<sup>th</sup> day of November 2019.**

**J.R KARANJAH- J**

7/11/2019