



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL PETITION NO.16 OF 2018

(CORAM: R. E. ABURILI - J.)

IN THE MATTER OF SEEKING FOR A REVIEW OF MITIGATION AND RE SENTENCING UNDER ARTICLE 50(2)Q OF THE CONSTITUTION

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLES 22(1), 19-20, 48, 50, 258 AND 259 OF THE CONSTITUTION.

IN

AKIMU AZED WAKOLI.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Petitioner **AKIMU AZED WAKOLI** Petitions this court by his petition filed on 25th September, 2018 claiming that: -

1. The imposition of mandatory death sentence to him was arbitrary inhuman and deprived him of his right to a fair trial under Article 50(2)(q) of the Constitution;

2. That he was spent so far 12 years in custody and has lived peacefully with his fellow inmates and person authorities and has attended vocational training which had earned him two Diplomas in Biblical Studies as shown by attached documents;

3. That he is very remorseful to the incident and he regrets a lot with that what he is going through while in custody and he promises not to repeat this or any other crime in his life time when he is reunited back in the society.

4. That he promises to be a good example in the society by sharing with them the rough experience he had undergone in custody and will provide teaching on morality.

5. That he was a first offender and promises not to indulge in criminal activities again in future;

6. That he is remorseful to the incident that has ruined his life and the life of his family who have suffered;

7. That he urges the court to consider the period served in prisons in sentencing him.

2. The Petitioner also filed a supporting affidavit. The Petition is to be brought under **Article 50(2)(q) of the Constitution** seeking for a review of his mitigation and sentencing. The petition is also brought under **Articles 22(1), 19-20, 48, 50, 159(1), 165(3)(6) 258 and 259 of the Constitution.**

3. It is alleged that he was charged that convicted of the offence of Robbery with violence contrary to **Section 296(2) of the Penal Code** and he was sentenced to suffer death, and that the trial court claimed that his hands were tied as there was no other lawful sentence other than death sentence, which was commuted to life imprisonment by the President and that vide the Supreme Court decision in the **Francis Kariuki Muruatetu & Another v Republic case Supreme Court Petition No 15 of 2015** this court has power to resentence him as death sentence is not mandatory sentence. That this court has power to pass sentence that is convenient depending on the gravity of the case.

4. On 9th October, 2018 this Court called for the trial records to be availed and today the same were availed namely Siaya PMs Court Cr. Case No 1066 of 20116 wherein the petitioner herein was tried and convicted and sentenced to suffer death for robbery with violence contrary to **Section 296(2) of the Penal Code by Hon G.K Mwaura, Principal Magistrate on 14th March, 2008**. The petitioner was convicted with three other people.
5. He appealed to the High Court at Kisumu vide Kisumu Cr. Appeal. No 19 of 2008 but the appeal was dismissed. He also appealed to the Court of Appeal vide **Kisumu CA. Cr Appeal No. 19 of 49 of 2009** but the appeal was also dismissed.
6. As he awaited the death sentence to be executed, the same was commuted to life imprisonment by His Excellency, the President. In the meantime, light at the end of the tunnel shone on him and vide **Supreme Court Petitions Nos. 15&16/2015, the Supreme Court in the Francis Kariuki Muruatetu Vs R** held that death sentence was not a mandatory sentence hence giving a new lease of life and hope to all capital offenders who have been returning to this court seeking for resentencing.
7. The Petitioner petitions the court, on the basis of the **Muruatetu case**, to resentence him, taking into account the period he has spent in prison the time he was convicted in the year 2006 to date. While in prison, he has been trained in Biblical studies and tailoring but due to bad eyesight he was unable to complete the course. He was 49 years at the time of conviction and is now 62 years. He has a wife and children who are school going with one almost joining university through difficulties. His wife is said to have sold land to educate the children. He had 20 acres of land in Trans Nzoia County and used to be a driver but that due to his age and poor eyesight he may not work as a driver. He promises to be a good ambassador to the rest of the society given a chance to go back into the society.
8. He states in submission that he has reformed and can educate the society on being law abiding. He regrets the offence and says if he will be given a chance to get back into the society, he will never commit any offence as he had never committed any offence before.
9. The Senior Principal Prosecution Counsel Mr Okachi submitted that the petitioner appears reformed and can benefit from a noncustodial sentence as he is now old and can teach others good morals and to be law abiding. This is notwithstanding the fact that the offence committed is serious and affects the entire society.
10. I have considered the petition herein in line with the **Muruatetu (supra) decision which** espouses that although death sentence is not unconstitutional, it is not a mandatory sentence in robbery with violence cases. In the above decision, the Supreme Court did not outlaw death sentence as **Article 26 of the Constitution** is clear that death sentence when imposed as stipulated by legislation shall not be unconstitutional. In other words, the Supreme Court affirmed the legality of the death sentence as a discretionary sentence. A committee was established by the Office of Attorney General and Department of Justice as directed by the Supreme Court to develop a framework for the resentencing of all persons who were sentenced to death but the framework is yet to be developed and operationalized.
11. Accordingly, based on the above precedent, this court is called upon to exercise its discretion in resentencing convicted persons who petition the court for reconsideration of the death sentence imposed on them.
12. In this case, the Petitioner was convicted and sentenced to suffer death for the offence of robbery with violence and he has exhausted all the appeal mechanisms.
13. The sentence meted out was lawful save that it is not mandatory sentence anymore. Therefore, this court must consider the circumstances under which the offence was committed and whether the trial court took into account any mitigations before sentencing the Petitioner.
14. In doing so, the court is alive to the fact that as death sentence was the only sentence available for capital offences, most convicts did not find it necessary to mitigate as their mitigation would not persuade the court to mete out any other alternative sentence.
15. The complainant in the trial court was George Ochieng Kadega. The robbery took place at Ligega village, Ligega Sub location within the then Siaya District now Siaya County. The objects of robbery were an amplifier, one pocket radio, one yashika camera and a wrist watch and Kshs 3,000 all valued at Kshs 28,000. Some of the items were recovered. The robbers terrorized the complainant and his family as they demanded one million Kenya Shillings which he did not have. They demanded for keys to his Pajero vehicle but were unable to drive it away as it had a secret lock. They forced the complainant to start it and as they were driving away they abandoned it on realization that the police had been alerted of the robbery.
16. The complainant was an evangelist. He was terrorized together with his family but they survived the ordeal. The robbers used guns to rob and terrorize the complainant and his family.
17. The evidence that convicted the petitioner and his co accused was that of fingerprints found on the vehicle and in the complainant's house which evidence can never lie as it is forensic evidence. The accused persons were also positively identified at identification parades.
18. The petitioner herein was asked to mitigate and he maintained that he was innocent. He was sentenced to suffer death as prescribed by law. All the appellate courts have affirmed his conviction and therefore this court cannot purport to address his innocence. He remains guilty of the heinous offence of robbery with violence. However, this does not mean that a guilty person cannot be rehabilitated and reform to be a better person in society.
19. **Considering the mitigations and the prevalence of the offence in this area, albeit the Petitioner was a first offender, I would on the strength of the Supreme Court of Kenya decision in the Francis Muruatetu case (supra) set aside the death sentence imposed on the Petitioner AKIMU AZED WAKOLI as commuted to life imprisonment and substitute it with a custodial sentence. And considering that the Petitioner has been in prison for a period of 12 years, his age which is now 62 years, I hereby resentence AKIMU AZED WAKOLI the petitioner herein to a prison term of 15 years to be calculated from the date of his arrest until his release from prison custody. This is in accordance with the proviso to Section 333(2) of the Criminal Procedure Code which**

stipulates that where a person has been in custody prior to sentence the sentence shall take into account of the period spent in custody.

20. Accordingly, the petition herein is allowed as stipulated above.

Dated, Signed and Delivered at SIAYA this 20th day of November 2018.

R.E. ABURILI

JUDGE

In the presence of:

Mr Okachi, Senior Principal Prosecution Counsel for the Republic

Akimu Azed Wakoli: Petitioner in person

Brenda: Court Assistant