



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**PETITION NO. 151 OF 2012**

**SABASTIAN OKWERO MREFU.....APPLICANT**

**V E R S U S**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

In his petition dated 26.10.2012 the petitioner is seeking to have the sentence of death imposed against him set aside. In the alternative the petitioner is seeking to have his case reviewed and mitigation taken as he was not allowed to mitigate before the trial magistrate. Parties filed written submissions in respect of the petition.

Mr. Mochere, counsel for the petitioner submitted that the petitioner was charged with the offence of robbery with violence and was convicted and sentenced to death. The petition is not questioning the guilt or innocence of the petitioner but is brought to the court so that the petitioner's rights under **Article 22** of the new Constitution can be dealt with. The death sentence is arbitrary and disproportionate. It denies the petitioner the right to life. The petitioner was also not allowed to mitigate so that the court could have known what sentence to impose. Counsel contends that in the case of **GODFREY NGOTHO MUTISO V REPUBLIC CRIMINAL APPEAL NO. 17 OF 2008 Mombasa**. The Court of Appeal held that the death sentence was inconsistent with the Constitution. Counsel maintains that the death sentence subjects the petitioner to inhuman and psychological torture. The sentence was commuted to life imprisonment but the circumstances of the case did not warrant the imposing of the death sentence. **Article 23** gives the court the discretion as to what reliefs to grant. The application is not seeking to review the evidence on record.

Mr. Oroni, State Counsel, opposed the application and submitted that the petition is mainly based on the issue of sentence. The case was heard and an appeal was dismissed by both the High Court and the Court of Appeal. The death sentence is mandatory. Counsel submitted that the court can re-evaluate the evidence and the circumstances of the case and can pass sentence and either convict or acquit the petitioner.

The background to the petition is that the petitioner was charged with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code**. The incident occurred on the 7.12.2003 at Lubao market along Webuye-Kakamega road. The robbers were armed with an AK47 Rifle and they robbed the complainant motor vehicle registration number KTV 549 ISUZU LORRY valued at KShs.800,000/=. They also robbed another complainant of motor vehicle registration number KAP 198 H TOYOTA HIACE MATATU also valued at KShs.800,000/=. The record shows that all the vehicles were recovered immediately after the incident and the robbers shot on the air. No one was injured during the incident.

The appellant was found at a sugar plantation while riding on a bicycle taxi and he was found with the keys of the stolen lorry.

It is clear to me that the petitioner is not contesting his conviction by both the trial court and the two courts that heard his appeals. The only one issue he is raising in relation to the proceedings is that **section 216** of the Criminal Procedure Code was not complied with as he was not accorded an opportunity to mitigate. Under that section the court after conviction but before passing sentence should receive evidence as it thinks fit in order to pass a proper sentence. The rest of the application is based on the contention that the death penalty is inhuman and degrading punishment. Counsel for the petitioner filed several authorities from both Kenya and other jurisdictions. The State Counsel also relied on three authorities, namely that of **JOHN MUGO KIMEMIA V REPUBLIC 2005 eKLR**, that of **REPUBLIC V AMOS KARUGA KARATU. Criminal Case No. 12 of 2006 (Nyeri)** and that of **ABUD ROGO MOHAMMED & ANOTHER V REPUBLIC. Nairobi Criminal Case No. 793 of 2010.**

I have gone through the authorities relied upon by both parties. I have also read the judgment of the Court of Appeal and the case of **GODFREY NGOTHO MUTISO**. The Court of Appeal was of the view that the death sentence is not mandatory and it can be imposed in appropriate cases but the court is at liberty to impose other sentences. I have read the judgment of my two sisters (Justice Nambuye and Justice Abida Aroni) in the case of **JOSEPH YUSUF MIMO V REPUBLIC. Kisumu Criminal Appeal No. 19 of 2010** whereby the judges set aside the death sentence and reduced the sentence to five (5) years imprisonment in a charge of attempted robbery with violence. Similarly in the case of **EVANSON MUIRURI GICHANE V REPUBLIC, Nairobi Criminal Appeal No. 277 of 2007** the Court of Appeal set aside a sentence of death where the appellant had been charged with attempted robbery with violence and sentenced the appellant to serve seven (7) years imprisonment.

Counsel for the petitioner also relied on the case of **ALBANUS MWASIA MUTUA V REPUBLIC, Nairobi Criminal Appeal No. 120 of 2004** in relation to the contention that the petitioner stayed for 22 days in prison before he was arraigned in court. I do find that this cannot be the subject of dealing with the subject as the two courts that heard the appeals could have dealt with that issue. The main issue in this petition is whether the sentence of death imposed against the petitioner was appropriate given the circumstances. Counsel for the petitioner cited several human rights instruments including International Convention on Civil and Political Rights and the African Charter on Human and Peoples rights. **Section 296 (2)** of the **Penal Code** provide that anyone charged with robbery with violence and found guilty shall be sentenced to death. There are other offences such as murder under **section 204** of the **Penal Code** that attracts the death sentence. Under **section 40(3)** anyone found guilty of the offence treason shall be sentenced to death. **Article 26** of the Constitution provides for the right to life. **Article 26(3)** provides that a person shall not be deprived of life intentionally except to the extent authorized by the Constitution or other written law. It is clear from the provisions of **Article 26** of the Constitution that the death penalty is still lawful. Once life can be taken according to the law and such situations include the sentence of death. The petitioner contends that he was not accorded the opportunity to mitigate and the Court of Appeal has held that even if one is charged with a capital offence he should be accorded the right to mitigate. This was also expressed in the **GODFREY NGOTHO** case.

I am aware that the issue of the death sentence has not been fully settled by the Kenyan courts. In some situations the courts have been convicting people charged with capital offences to several years' imprisonment instead of imposing the death penalty. Currently the Kenyan Judiciary is trying to deal with the issue of sentencing as it has been observed that in some cases conflicting sentences are imposed by the courts while in some situations the sentences are not appropriate. The death sentence is retributive. The convict is not accorded an opportunity to reform and is condemned to either life imprisonment or death. In certain situations the offences call for such punishment. In other situations the death sentence appears to be excessive. A good example is where a person charged with manslaughter can be sentenced to less than one year imprisonment depending on the circumstances of the case while two robbers who snatch a mobile phone from the victim are sentenced to death. There is disparity in the sentences imposed in such situations. Whereas a case of manslaughter confirms that life was lost, robbery with violence where the property stolen is worth less than KShs.2,000/= calls for death sentence. There assumption is that the one convicted of manslaughter can be reformed as may be what caused him

to commit the offence was provocation while on the other hand a robbery with violence convict who robs his victim of a simple item is condemned to death as he might develop and becomes a serious robber who cannot be reformed.

In the current situation there were several robbers. The evidence shows that the petitioner was not armed with any weapon. He was arrested with the keys of one of the stolen vehicles a few hours after the robbery. No one was injured during the robbery. All the robbed vehicles were recovered. Indeed the evidence shows that the robbers had attempted to use the Nissan Matatu to escape after they abandoned the lorry. They shot on the air. Given the circumstances of the robbery, I do find that the death sentence is excessive. I do agree that the sentence is not appropriate in the circumstances. The idea of imposing minimum sentence is not ideal. Judicial officers should be given discretion as to what sentence to impose given the circumstances of the case. It should not be a straight jacket arrangement whereby whenever one is convicted of a capital offence then the death sentence is the result. I do agree with the decision of the Court of Appeal in the **GODFREY MUTISO** case that the death sentence should not be the only sentence in capital offences. The court in that case stated 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 anti-ethical or 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 that extend that it provides that the death penalty is the only sentence in respect to the crime of murder is inconsistent with the latter and spirit of the constitution...”.....”we doubt if different arguments could be raised in respect of other capital offences such as treason under Section 40(3) and attempted robbery with violence under section 297(2) of the penal code.....”**

Although the petitioner was not accorded the right to mitigate I do find that it may not be appropriate to order that the matter be referred back to the trial magistrate to enable the petitioner offer his mitigation. In the **EVANSON MUIRURI GICHANE** case the Court of Appeal substituted the death sentence with a term not exceeding ten (10) years. In the **JOSEPH YUSUF MIMO** case the two judges of the High Court stated as follows:-

**“We have considered the submissions by the appellant and taken note of the fact that he is a first offender, a young man, who may if given a chance reform and have a fresh start in life. Although the offence he was charged with carries a maximum of death sentence, we are convinced that the death penalty is not appropriate. We shall in the circumstances of this case reduce the sentence meted out by the trial court. The appellant’s sentence is reduced to one of 5 years imprisonment.”**

Given the above decisions I am satisfied that the court can review the sentence even if the petitioner’s appeals were dismissed. Each case has to be determined according to its own circumstances. I do find that given the circumstances of this case the death sentence was not appropriate. The two appellate courts simply dismissed the appeals but did not deal with the issue of sentence. The petitioner has been serving his sentence since 20.6.2006. He has been in custody from the time he was charged in court on the 29.12.2003. In essence therefore the petitioner has been in custody for over 11 years. I do find that period to be enough punishment. I will substitute the death sentence and replace it with the period the petitioner has served in prison which is over 8 years’ excluding the period of about 3 years he was in remand. The petition is merited and is hereby allowed. The petitioner has served enough punishment and he shall be set at liberty unless otherwise lawfully held.

Delivered, dated and signed at Kakamega this 14<sup>th</sup> day of October 2014

**SAID J. CHITEMBWE**

**J U D G E**