



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL PETITION NO. 64 OF 2020

GEORGE OLUOCH DIMBA.....1ST PETITIONER

CHARLES OWINO OTIENO.....2ND PETITIONER

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

The Petitioners, **GEORGE OLUOCH DIMBA** and **CHARLES OWINO OTIENO** have asked the Court to review the sentences which were handed down to them in **CRIMINAL CASE NO. 37 OF 2010**.

1. The Petition is premised upon the understanding of the Petitioners that;

“..... the mandatory nature of (Death) sentence imposed on us is/was unconstitutional.”

2. According to the Petitioners, their right to mitigate under **Section 329** of the **Criminal Procedure Code**, was rendered ineffective during sentencing, because of the mandatory nature of the sentence.

3. In support of the Petition the Petitioners filed a joint affidavit.

4. In the said affidavit, the Petitioners stated as follows;

“We, GEORGE OLUOCH DIMBA AND CHARLES OWINO OTIENO, currently serving life sentence imprisonment at Kisumu Maximum Prison do hereby make this oath and state as follows....”

5. On the one hand, the Petition was brought on the basis of the mandatory **DEATH** Sentence, yet on the other hand, the Petitioners have deponed that they were serving **LIFE IMPRISONMENT**.

6. The Petitioners failed to provide any explanation or clarification why they were challenging the mandatory Death Sentence, yet they were serving Life Imprisonment.

7. It would have been useful to the Court, when determining this matter, to have been provided with the record of proceedings from the trial court. A perusal of the said record of proceedings would have enabled this Court to verify the specific sentence that the learned trial Judge had handed down to the Petitioners.

8. A perusal of the said proceedings would also have enabled the Court to determine whether or not the mitigation (if any), was given consideration by the trial court at the time of sentencing.

9. As the Petitioners did not make available the proceedings, this Court could not ascertain whether or not the sentence was handed down simply because it was the mandatory one.

10. It must be borne in mind that in the case of **FRANCIS KERIAKO MURUATETU & ANOTHER Vs REPUBLIC, PETITION NO. 15 OF 2015**, the Supreme Court held that the Death Penalty is not unconstitutional. The said Court made it clear,

that after giving due consideration to all the factors governing the process of sentencing, a Court of law would still be entitled to hand down the Death sentence in appropriate cases.

11. It is therefore possible that if the trial court did sentence the Petitioners to death, that was done on the grounds that the circumstances prevailing in this case warranted the said sentence. I cannot take any action on the basis of assumptions.

12. The Court must be guided by the facts which are on record in the proceedings leading up to the conviction and the sentencing.

13. I decline to take action based on non-verifiable assumptions or statements.

14. Accordingly, the Petition is dismissed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 16TH DAY OF FEBRUARY 2022

FRED A. OCHIENG

JUDGE