REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL PETITION NO 42 OF 2020

MARGARET LICHA YOGO.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Petitioner herein, jointly with another (now deceased) was tried and convicted of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and was sentenced to death on 24th June 2016.

2. Being dissatisfied with the said decision, the Petitioner lodged an Appeal in the Court of Appeal **Kisumu Criminal Appeal No 126 of 2016.** In a judgment dated 19th June, 2020, the Court of Appeal dismissed her Appeal in its entirety and not only affirmed the conviction but it also upheld the death sentence that was meted on her.

3. On 7th July, the Petitioner filed a Petition and an application for review of the sentence. The said application was supported by her Affidavit in which she stated that she had been in prison for the last six (6) years since the time she was arrested. She added that the mandatory sentence was unconstitutional, inhuman and degrading. She had now brought the instant Petition seeking orders for resentencing.

4. She relied on the case of **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR**, which declared that mandatory life sentence was unconstitutional. She stated that she was now aged seventy (70) years having been arrested when she was sixty five (65) years of age. She further explained that she was a family woman who had the responsibility of taking care of the academic need of her grandchildren. She added that the long incarceration and unconducive environment had caused her health to deteriorate.

5. She averred that she was a first offender and was remorseful and had undergone various transformative programs and had been awarded a Certificate of Completion in sexual and reproductive rights under YWCA and a Certificate of Attendance in a New Christ (sic). She was emphatic that she had maintained pleasant and exemplary discipline measures and had no bad behaviour. She prayed that she be given another chance and urged this court to facilitate her resettlement back in the society.

6. The State opposed the Petitioner's application for review of the sentence. It argued that the deceased, who was the Petitioner's grandson, died in a gory manner in her hands and that of her son who was now deceased. They tethered the deceased on a tree, dowsed him on paraffin and set him on fire. It submitted that sentencing is discretion of the trial court and a court ought to look at the facts of a case in its entirety before settling for any given sentence.

7. It pointed out that the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) and **Ambani vs Republic [1990] KLR 161** did not outlaw death sentence and that because it remained a lawful punishment, it urged this court to dismiss the Petition and uphold the sentence.

8. In the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra), the Supreme Court rendered itself as follows:-

> **(111) "…For the avoidance of doubt, the sentencing re-hearing we have allowed, applies only for the two petitioners herein. In the meantime, existing or intending Petitioners with similar cases ought not approach the Supreme Court directly but await appropriate guidelines for disposal of the same.** (emphasis court). **The Attorney General is directed to urgently set up a framework to deal with sentence re-hearing of cases relating to the mandatory nature of the death sentence - which is similar to that of the petitioners in this case.**"

9. The Taskforce on the Review of the Mandatory Death Sentence under Section 204 of the Penal Code Act was appointed vide Gazette Notice No. 2160 dated 15th March 2018 but guidelines were yet to be formulated despite the Taskforce Report having been duly presented to the Attorney General in October 2019.

10. Having said so, in the case of **William Okungu Kittiny v Republic [2018] eKLR**, the Court of Appeal expressed itself as follows;

> **"The decision of the Supreme Court only discouraged persons from filing petitions to the Supreme Court but the decision does not prohibit courts below it from ordering sentence re-hearing in a matter pending before those courts. By Article 163 (7) of the Constitution, the decision of the Supreme Court has immediate and binding effect on all other courts. The decision of the Supreme Court opened the door for review of death sentences even in finalized cases."**

11. This court is thus clothed with jurisdiction to re-hear and re-sentence those who are convicted of capital offences that carry a mandatory death sentence. It noted that when hearing the Petitioner's Appeal, the Court of Appeal recognised that **Francis Karioko Muruatetu & Another vs Republic** (Supra) did not outlaw the death sentence and that the blood and soul of the deceased cried for justice. The Court of Appeal saw no reason to interfere with the death sentence that was meted upon the Petitioner herein.

12. Bearing in mind the cases of **Francis Karioko Muruatetu & Another vs Republic** (Supra) and **William Okungu Kittiny v Republic** (Supra) and **The Sentencing Policy Guidelines, 2016** of the Judiciary, this court took the view that it could exercise its discretion to review the mandatory death sentence, if there was merit in doing so.

13. Having said so, whether deterrence, public protection or reformation was the objective, courts were called upon to have regard to the nature and circumstances of the offence, the offender, the victim and the public interest. In simple terms, courts look at the aggravating and the mitigating factors of the offence as well as that of the offender. The sentencing court must therefore weigh the two and come to an informed conclusion as to the type of sentence to impose.

14. The crime perpetrated by the Petitioner and her deceased son was well-planned and pre-mediated. Her defenseless grandson lost his life in a cruel, violent and callous manner. He suffered greatly for thirty eight (38) days before he died because of the injuries that were inflicted on him by the Petitioner and her son who used disproportionate and excessive force to discipline him. Indeed, it was painful that his life ended in sordid and gruesome events.

15. The Court of Appeal rendering itself on this matter on appeal had this to say:

> **"Better a death caused by a stranger than by a parent and a grandparent for the curse of generations to come loom yonder. The tethering of the deceased on a tree and the deliberate drowsing of paraffin on the deceased lead us to find that the appellant deserves no leniency."**

16. This court was in agreement with the Prosecution's submissions that courts are required to pay attention to individual aspects of a case while sentencing. It did not see any extenuating circumstance in this matter. There is need to send a strong message to the society that violence against other persons is strongly condemned. Society abhors this kind of gratuitous violence where individuals take the law into their own hands over perceived wrongs committed by fellow citizens.

17. Notably, the Officer in Charge did not give any recommendation of her consideration for the review of her sentence. This led this court to entertain doubts as to whether the Petitioner had really reformed. Be that as it may, the Petitioner was aged seventy (70) years of life and had already spent more than six (6) years behind bars. This had given her sufficient time to reflect on her actions.

18. This court thus found it proper to review her sentence from death sentence and sentence her to forty (40) years imprisonment.

DISPOSITION

19. For the foregoing reasons, the court found that the Petitioner's Petition for review of the sentence that was filed on 7th July 2020 was merited and the same be and is hereby allowed. Accordingly, the court upholds the conviction of the Applicant for the offence of murder but reviews the mandatory death sentence to forty (40) years with effect from the date of the sentence. The period the Petitioner spent in custody, if at all, shall be taken into account when computing the sentence in accordance with Section 333(2) of the Criminal Procedure Code.

20. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF APRIL 2021

J. KAMAU

JUDGE