



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE- J.)

PETITION NO.36 OF 2019

BETWEEN

CHARITY MUNANIE MWITHI.....PETITIONER

AND

REPUBLIC.....RESPONDENT

JUDGMENT

1. **CHARITY MUNANIE MWITHI**, (hereinafter referred to as the petitioner) was convicted and sentenced to death for two offences of murder contrary to **Section 203** as read with **Section 204 of the Penal Code** in **Kisumu High Court Criminal Murder Case No. 26 of 2005**. She lodged an appeal in **Kisumu Criminal Appeal No.306 of 2012** which was dismissed and the conviction and sentence were upheld.

2. By a petition filed on 20th May, 2019, the Petitioner has petitioned this court for resentencing on the main ground that the death sentence imposed on her is unconstitutional. The Petitioner avers that the death sentence was commuted to life sentence in 2006 and having exhausted all the appeal avenues and having served 14 years prays for a definite sentence.

3. Ms. Gathu, Senior Prosecution Counsel for the state opposed the resentence on the ground that the heinous crimes were unpardonable having been committed against innocent 4 year-old and 7 month old brothers.

Analysis and Determination

4. At the time of the Petitioner's conviction, death was the only available sentence for murder.

5. The Supreme Court decision in ***Francis Kariuki Muruatetu & Another v Republic & 5 others [2016] eKLR*** declaring the mandatory death sentence unconstitutional has necessitated resentencing of all persons previously sentenced to the mandatory death sentence.

6. I have considered ***The Sentencing Policy Guidelines, 2016*** and its application which is intended to promote transparency, consistency and fairness in sentencing (See ***Michael Kathewa Laichena & another v Republic [2018] eKLR***).

7. Under the proviso to **section 333(2)** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***, the court in resentencing a Petitioner is entitled to take into account the period the petitioner has spent in custody in determining the sentence and mitigating and aggravating circumstances.

8. The court record shows that the Petitioner has served about 14 years since the date of conviction. During her stay in prison, the Petitioner sat for KCPE and KCSE examinations and has also obtained numerous diplomas and certificates in different courses as a means of reformation.

9. This court requested for the Petitioner's home report and Victim Impact Assessment report for its consideration during resentence. The parents of the deceased children were not traced and the probation officer was therefore unable to file their report concerning the Petitioner's application. The Petitioner's home report as submitted by the Probation Officer is however favourable.

10. I have reflected on the fact that the attack by the Petitioner on the innocent and angelic toddlers aged 4 years and 7 months was

unprovoked and calculated. The children were strangled with neck ties and cloth material. They died of severe asphyxia with cervical spine dislocation due to strangulation. The deaths must no doubt have caused them excruciating pain. I have similarly considered that the pain caused to the parents by the death of the two children cannot be underestimated and I have come to the conclusion that the Petitioner needs to pay a heavy penalty for her crimes. I therefore re-sentence her to **40 years'** imprisonment from date of conviction on 05th November, 2010.

DATED AND SIGNED IN KISUMU THIS 30th DAY OF January 2020

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Amondi & Okodoi

Petitioner - Present in person

For the State - Ms. Gathu