



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 11 OF 2019**

**CHARO KALU THINGA.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The Petitioner was charged for the offence of murder contrary to section 203 as read with section 204 of the Penal Code Cap 63 of laws of Kenya. He was arraigned before **Hon. Omondi, J** at Malindi High Court where he was tried, convicted and sentenced to suffer death in Criminal Case No. 3 of 2008 in a judgement delivered on the 30<sup>th</sup> May 2011.

Having been dissatisfied, he appealed to the Court of Appeal where his appeal was considered and allowed. The Honourable Judges of Appeal substituted his conviction and death sentence to a conviction of manslaughter Case Section 202 as read with Section 205 of the Penal Code in a judgement dated 11<sup>th</sup> December 2015. His sentence was therefore substituted to twenty (20) years imprisonment.

In the instant petition, the Petitioner seeks resentencing following the Supreme Court of Kenya's decision in **Francis Karioko Muruatetu & Another vs Republic, Petition No. 15 & 16 of (2017) eKLR** declared the mandatory nature of the deaths sentence and the commutation of that sentence by an administration fiat to life imprisonment unconstitutional and therefore null and void.

The rationale is that the mandatory nature of death sentence as provided for under section 204 of the penal code deprived trial courts judicial discretion to consider aggravating and mitigating circumstances to enable the court to impose an appropriate sentence based on the peculiar circumstances of each case. Thus, a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution.

I have considered the Petitioner's mitigation that he is a first offender, he is remorseful, he has reformed and been rehabilitated during the time he has been behind bars. I have also complied with the provisions of Section 333(1) which states that:

***“subject to the provisions of section 38 of the penal code which states, every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this code, provided that were the person is sentenced under section (1) has, prior to such sentence, been held in custody, the sentence shall take into account the period spent in custody.”***

I have noted that the Petitioner has been in custody for approximately 12 years. I also note that he was not released on bail or bond terms during his trial. He remained in custody from his arrest up until the time of conviction. I now turn to the **Sentencing Policy Guidelines, 2016 (“the Guidelines”)**; published by the Kenya Judiciary, the sentence imposed must meet the following objectives in totality;

- a) Retribution: To punish the offender for his/her criminal conduct in a just manner.**
- b) Deterrence: To deter the offender from committing a similar offence subsequently as well as discourage other people from committing similar offences.**
- c) Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.**
- d) Restorative justice: To address the needs arising from criminal conduct such as loss and damages.**

e) **Community protection: To protect the community by incapacitating the offender.**

f) **Denunciation: To communicate the community's condemnation of the criminal conduct.**

**In light of the forgoing, Hon C. Kariuki in Stephen Kimanthi Mutunga v Republic [2019] eKLR, stated as follows:**

**“23. The guidelines were published when the mandatory death sentence was still legal and as such, they did not provide for mitigating circumstances for offences which attracted the mandatory death sentence.**

**24. To avoid a lacuna, the Supreme Court in the Muruatetu case gave guidelines with regard to applicable mitigating factors during sentence re-hearing in a murder charge. Since the mandatory death sentence was also applicable to convicts of robbery with violence, the Supreme Court guidelines are also applicable to such cases. They are;**

**a) Age of the offender;**

**b) Being a first offender;**

**c) Whether the offender pleaded guilty;**

**d) Character and record of the offender;**

**e) Commission of the offence in response to gender-based violence;**

**f) Remorsefulness of the offender;**

**g) The possibility of reform and social re-adaptation of the offender;**

**h) Any other factor that the Court considers relevant.”**

The Supreme Court in the **Muruatetu Case** however clarified that the guidelines did not in any way replace judicial discretion and are geared towards promoting consistency and transparency in sentencing hearings. They are also geared towards the promotion of public understanding of the sentencing process.

The Petitioner was involved in a witchcraft-related murder. He accused the deceased and Pw1 of being witches following the death of the one of the deceased's sons who had been admitted at Mariakani Hospital. He caused his father's death by striking him on the head with stick. This caused severe head injury secondary to depressed skull fracture and subdural hemorrhage. Police officers found the deceased's body lying in a pool of blood.

I have considered the circumstances and the sequence of events that culminated in the deceased's death. I take note of the vulnerable organ, to wit, the head which the accused mercilessly hit with a stick knowing that death could culminate. Clearly, the accused used disproportionate and excessive force by his own act to inflict grievous bodily harm on the deceased.

I take the view that the death of the deceased was caused quite deliberately, by the accused. It was premeditated. In the premises, I believe that she merits a custodial sentence, to remind him of the quest to value human life.

It is noteworthy that when passing a sentence the court must look at the objective to be achieved. Whether deterrence, public protection or reformation is the objective, courts must first of all 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 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.

I have considered precedents of other judges in re- sentencing cases involving the offence of murder. In the premises, I find no reasonable grounds to disturb the prevailing sentence as it fits with the aggravating nature of the offence that the Petitioner committed.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 29TH DAY OF JANUARY 2020**

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**R. NYAKUNDI**

**JUDGE**