



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CONSTITUTIONAL PETITION NO.15 OF 2019

(From the Judgement of the Court of Appeal in C.A No 30 of 2013)

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010 SUPERVISORY JURISDICTION AND PROTECTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS OF AN INDIVIDUAL (HIGH COURT PRACTICE AND PROCEDURE RULES
2013)**

DANIEL MWERI JEFWA.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

RULING

The petitioner was tried by the High Court at Malindi for the offence of murder contrary to Section 203 of the Penal Code. He was found guilty of the charge and convicted to suffer death as punishment under Section 204 of the Penal Code.

Being aggrieved with conviction and sentence, he preferred an appeal to the Court of Appeal and in the Judgment of the Court dated 18.19.2014, the appeal on both conviction and sentence was found to be unmeritorious.

This petition is on re-sentencing pursuant to the decision by the Supreme Court in **Francis Muruatetu v R {2017} eKLR**. The Supreme Court inter alia stated that the mandatory nature of the death penalty requirement in terms of Section 204 of the Penal Code was unconstitutional. The court further ordered that a task force under the auspices of the office of the Attorney General to develop a network directed at the past convicts sentenced to suffer the death penalty under Section 204 of the Penal Code.

In the midst of all that the High Court was faced with a valiant of petitions over the mandatory nature of the death penalty. Recognizing the legitimate expectation by the petitioners. There was virtual unanimous opinion that applying the test in **Francis Muruatetu** dicta reference be made to specific circumstances of the case as outlined by the Supreme Court to impose a particular type of punishment besides the death penalty.

The purpose of this petition is therefore to take the broad approach as summarized in the **Muruatetu case** to address the issues raised by the petitioner.

Brief Background

The offence herein culminated from allegations made by the Petitioner in the year 2008 that the deceased and Elizabeth Ngoro (Pw5) were facilitating his wife's infidelity. A meeting was conducted to try and ameliorate the situation which bore no fruit. The Petitioner is said to have prematurely left the meeting with his wife and as he left, he made threats that the pain he was feeling would end in the body of those who misled his wife.

The Petitioner later brutally killed the deceased by cutting severally using a panga which resulted in a severe loss of blood. This caused severe head trauma due to fractures caused by a sharp object as per the doctor's post mortem report. He then surrendered to the police after committing the offence.

However, as pointed by the Court of Appeal in its able wisdom, the Petitioner appears to have been a very troubled man as he suspected his wife of extra-marital affairs. He also had a strong belief that the deceased together with PW5 were behind his wife's infidelity. It seems to have been obsessed with his wife and was pained by the alleged infidelity and could not comprehend another man having sex with his wife. Therefore the Petitioner acted upon provocation which had accumulated for a period of time.

In that respect, the Court of Appeal allowed the appeal, quashed the conviction and set aside the sentence for the offence of murder. They therefore, substituted it with a conviction for the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code. He was therefore sentenced to serve 15 years imprisonment with effect from 20th august, 2012.

As part of the mitigation offered by the petitioner, he is a first offender who regrets the commission of the offence and that the petitioner urged this court to consider that he is not beyond reformation and rehabilitation. Further the he asked this court consider the pre-trial custody of 2 years and 9 months before his case was concluded. He begged this court to grant him a parole order since he has served more than half of the remission 15 years imprisonment. He also banked on the fact that he is remorseful.

On this analysis and in respect of the fundamental principles in **Muruatetu case** the only extenuating factor is that the offence culminated from cumulative provocation. However, the deceased died a cruel and painful death in the hands of the petitioner. Whereas the petitioner submits that he is now a reformed person ready to be reintegrated back to the community and his family cumulatively the aggravating factors outweigh the mitigation offered with respect to the circumstances of the offence.

The prima facie in Muruatetu case is not meant to provide a soft landing in favour of murder convicts. The burden is on the petitioner to convince the court that there are substantial and extenuating factors that will qualify for imposition of less services punishment.

In my view doing the best in the circumstances and on the facts of the case, I needless to say that the right of life sanctioned by the constitution must be jealously preserved by every person and citizen within the Republic of Kenya.

The consequence is that the petitioner's petition, finds no merit of substituting the 15 years imprisonment imposed by the Court of Appeal. The sentence shall be deemed to have commenced from the date of the Petitioner's arrest.

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

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R. NYAKUNDI

JUDGE