



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

PETITION NO. 23 OF 2019

KENGA CHARO HINZANO.....PETITIONER

VERSUS

REPUBLICRESPONDENT

CORAM: Hon. Justice R. Nyakundi

Petitioner in person

Ms. Sombo for the Respondent

RE-SENTENCING

The petitioner **Kenga Charo Hinzano** was on 2.12.2011 was convicted and sentenced to suffer death for the offence of murder contrary to Section 203 of the Penal as read with Section 204 of the same code.

The evidence as to the circumstances of the offence can be deduced from both Judgments of the High Court and Court of Appeal. The petitioner being dissatisfied with the findings of the High Court did prefer an appeal to the Court of Appeal which on considerations of the issues dismissed the conviction and sentence of death against the petitioner.

Brief background

The deceased as told by the prosecution witnesses died in very unusual circumstances on the 9.10.2010. From the evidence of PW1, the deceased was one of the mourners attending a funeral of a fellow fisherman at Matsongeleni village. As the funeral ceremony progressed, the deceased stepped out to answer the call of nature, but shortly thereafter, he came back bleeding profusely. On inquiry from (**PW1**) as what has happened, the deceased blamed it on the petitioner as the assailant who inflicted physical stab wounds by use of a knife.

In the same evidence it emerged also that sometimes back the petitioners brother also a fisherman had drowned at sea in Kipini area in September 2009. These circumstances as to cause of the injuries suffered by the deceased and the petitioner identified as the perpetrator was further alluded to by **PW2** and **PW3** respectively. The victim of assault by the petitioner died soon thereafter while undergoing treatment at Malindi Hospital.

The postmortem examination by **Dr. Chepsiror** produced on his behalf by **Dr. Kandia** confirmed the cause of death to be attributable to excessive haemorrhage due to penetrating abdominal injury. That was the background of the conviction and imposition of the death penalty against the petition.

The issue for determination is whether, this court has the jurisdiction to review and re-sentence the petitioner having lost his appeals to the highest court of the land on such matters.

On jurisdiction, the answer is found in Article 50 (6) (a) (b) of the Constitution. Secondly, the Supreme Court decision in **Francis K. Muruatetu v R {2017} eKLR** also that the mandatory death sentence for the offence of murder contrary Section 203 as read with Section 204 of the Penal Code. The decision brought about discretion in sentencing of murder convicts, and leaving the death penalty to be retained as the maximum sentence for that offence.

Under the circumstances the rights of those facing the death penalty and previous individual death sentences became a subject of review for re-sentencing hearings. The **Muruatetu (supra)** decision held, inter alia that the convicts who were already sentenced to the mandatory death penalty were all to be subjected afresh to a re-hearing of their case in so far as the sentence is concerned.

That is the *locus standi* of the petitioner to approach this court to have his case on sentence heard afresh again in reference to the Supreme Court decision.

The petition to this court by the petitioner is based on his written submissions filed in court on 23.7.2019. The petitioner submitted that in the course of his detention awaiting execution of the death sentence he has undergone various vocational trainings, including bible studies to rebuild his knowledge on the gospel.

Further, that while pending trial, by the operation of the Law, he was never granted bail. He therefore had to spend close to one year and three months in remand custody awaiting trial and conclusion of his case. The petitioner contended that the aforesaid period should be taken into account and availed to him as a benefit to the extent this court considers any other sentences in place of the death penalty.

The petitioner also submitted on mitigation relying on his changed attitude, character transformation from that of a delinquent to a disciplined and responsible citizen ready to positively contribute to the community at various levels. He also contended that re-sentencing should be considered in light of the fact that he is remorseful and regrets the offence.

In compliance with the framework in **Muruatetu case** and **the sentencing policy guidelines of the judiciary 2016**, the probation officer, filed the social inquiry report which contained victim impact statement dated 4.11.2019.

The main issues captured by the report are that:

The petitioner prior to his incarceration was a family man and going about his chores to support his family of eleven (11) children. It is further stated that the family of the deceased and that of the petitioner have reconciled under victim-offender medication to heal the wounds and trauma arising out of murder.

This being the case, the report concluded that in the event, this court exercises discretion to release the petitioner he has supportive community and family to assist in reintegration and rehabilitation without much difficulties.

It is clear therefore from the mitigation and the record that the petitioner has demonstrated merit to have his sentence reviewed pursuant to the principles of **Muruatetu case**.

The cardinal precept of **Muruatetu case** was the application of proportionality test in sentencing the offenders in violations of Section 203 of the Penal Code. That death penalty is to be imposed only in appropriate and deserving cases depending on particular facts of the indictment.

From the South African case of **State v Makwanyare {1995} 3 SA 391**, the court had this to say to the issue of proportionality:

“Proportionality is an ingredient to be taken into account in deciding whether a penalty is cruel, inhuman and degrading, factors such as the enormity and irredeemable character of the death sentence in circumstances where neither error nor arbitrariness can be excluded, the expense and difficulty of addressing the disparity which exists between accused persons facing similar charges, are also factors that can and should be taken into account in dealing with the issue.”

Essentially proportionality-test demands that the gravity of blameworthiness and seriousness of the harm inflicted by the offender should be proportionate to the punishment.

Therefore, in exercising discretion to impose sentence the court has the duty to factor in the prospect of rehabilitation, the past antecedents and character of the offender, any previous characters or records, aggravating and mitigation factors as a basis for the punishment.

It is my position that the court’s jurisdiction in sentencing an offender should strike a balance of competing interest of the convict, society and the victim of crime within the provisions of the Constitution under Article 50, 2(p), (6)(a)(b) of the constitution and respective provisions prescribing sentences options applicable to a convicted person.

The final outcome should reflect the letter and spirit of the Law. That on the face of it, the sentence imposed principally should not be too lenient or so severe defeating the principles in sentencing.

The crux of this was succinctly state in the case of **R v Nkhoma Confirmation Case No. 3 of 1996** where **South African Court** held:

“It is not proper that the court, to achieve any of the purpose of sentencing, retribution, deterrence, incapacitation, reformation and rehabilitation should comprise principles of sentencing. Principles of sentencing are different from the purpose of sentencing. Normally, the purpose of sentencing do not assist the court in arriving at the appropriate quartering a sentence. An appropriate sentence must achieve proportionality, equality and restraint. The sentence must be equal to the crime committed, ensure that offenders of equal culpability are treated alike and must not connote vengeance.”

In determining this petition, the above principles and the following issues are up for considerations. As already captured in the Judgments of the superior courts under this homicide, the petitioner was armed with a dangerous weapon namely a knife which he used to inflict serious stab wounds against the deceased. In causing death, the petitioner targeted the vulnerable abdominal part of the deceased body to inflict penetrative stab wound.

The worst culpability was the feature of inflicting serious harm to a defenceless and innocent victim when he least expected that in attending the funeral of a fellow fisherman his own death was imminent. The possession of the knife before the actual assault tends to support pre-

meditation on the part of the petitioner.

The killing of the deceased by the petitioner stands out as an unjustified and inexcusable act of omission, thus in contravention of the right to life under Article 26 of the Constitution.

On the other hand, the petitioner has put forth spirited submissions on mitigations comprising of vocational skills during period of incarceration and underlying anxiety of the need to join the family. The petitioner also alludes to regret of his actions.

As far as the petitioner is concerned, he is now aged about forty-eight (48) years. He has already spent cumulatively nine (9) years and three months in prison custody.

The Law is settled that in the event, this court exercises discretion to impose an alternative sentence in substitution of the death penalty, this period would be taken into account so as not to deny the petitioner fair trial right on sentencing.

The germane issue is whether the reasons for this textual petition leads to entitle the petitioner a different scheme of sentence besides the death penalty. In my view the answer is yes. The only regret the petitioner has failed to meet the legal threshold that significantly would offer him his hope and aspirations to be fairly released from custody on the basis that the nine (9) years period served is proportionate to the crime.

Juxtaposing the mitigations by the petitioner and the aggravating factors, its reasonably justifiable to vary the death penalty with that of a custodial sentence. The only rider being to take notice that the aggravating factors in this case outweighs mitigation offered by the petitioner.

That invariably if the penal measure in Kenya was to be based on a score card indicator, in relation to aggravating and mitigation factors, to determine appropriate punishment, the degree of culpability is far too much higher than any mitigation for the offence.

That the interest of the public, the victim impact and the gravity of the crime of murder as convicted is disproportionate to the mitigation by the petitioner.

In accordance with the petition, and substantial grounds advanced by the petitioner and rational exercise of discretion pursuant to the principles in **Muruatetu case** the petition is allowed to the extent of substituting the death penalty with twenty-five (25) years imprisonment with effect from 2.12.2011.

It is so ordered.

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

R. NYAKUNDI

JUDGE