



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: A.K NDUNG'U J.

CONSTITUTIONAL PETITION NO. 45 OF 2019

CALEB ONCHONGA AMENYAAPPLICANT

VERSUS

REPUBLIC THROUGH ODPP RESPONDENT

RULING

1. Caleb Onchonga Amenia, the applicant was charged before this court with the offence of Murder contrary to **section 203** as read with **section 204** of the **Penal Code**.
2. He was tried, found guilty and convicted in a judgement dated 18/4/2013 and sentenced to death (Sitati J).
3. Dissatisfied with the conviction and sentence, he appealed to the Court of Appeal. In a judgement dated 23/10/2015 the appeal was dismissed.
4. The applicant has now moved this court vide a petition dated 5/4/2019 for a revision of the sentence passed against him on grounds that the death sentence was unconstitutional, inhumane and degrading. He relied on the Supreme Court ruling (which I suppose is the Muruatetu Case) he does not state so.
5. At the hearing he orally sought for the revision of the sentence.
6. Mr. Otieno for DPP urged that the court could proceed to resentence the applicant.
7. In this matter while sentencing the applicant, the court stated;

“In view of the fact that only one sentence is prescribed for the offence of murder, I sentence the accused to suffer death as by Law provided. Right of Appeal is 14 days.”
8. This sentence, it is noted, was passed before the Supreme Court’s decision in Muruatetu Case.
9. The Supreme Court in **Francis Karioko Muruatetu & Another –vs- Republic** pronounced itself as follows;

“(51) The dignity of the person is ignored if the death sentence, which is final and irrevocable, is imposed without the individual having any chance to mitigate. We say so because we cannot shut our eyes to the distinct possibility of the differing culpability of different murderers. Such differential culpability can be addressed in Kenya by allowing judicial discretion when considering whether or not to impose a death sentence. To our minds a formal equal penalty for unequally wicked crimes and criminals is not in keeping with the tenets of fair trial.”
10. From the foregoing, the death sentence meted mandatorily on the applicant and affirmed by the High Court and the Court of Appeal is unconstitutional. As held by the Supreme Court this deprived the courts the opportunity of issuing sentences depending on the peculiar circumstances of each case which goes to the very core of a fair trial whose outcome will be just.
11. In exercising my discretion of the appropriate sentence, I must look at the circumstances of the case including any mitigating factors.

12. The Court of Appeal in Daniel Gichimu Githinji & Another –vs- Republic [2018]eKLR interfered with a sentence of death where the violence meted out on the victim was minimal and item robbed was recovered. The court stated;

“In the instant appeal, we find that both appellants stated in their mitigation before the trial court that they were first offenders, a fact not disputed by the prosecution. We also take note of the fact that the infliction of violence on PW 1 was minimal and the item robbed from her was also recovered. In our view, a sentence of fifteen years imprisonment would suffice in the circumstances. We therefore find it prudent to interfere with the sentence affirmed by the first appellate court, set it aside and substitute it with one of fifteen years’ imprisonment to run from the date of the arrest of the appellants. To that extent only does the appeal succeed.”

13. A similar approach was deployed in Charles Mwinzi –Vs- Republic [2019] eKLR where the Court of Appeal substituted the death sentence on robbery with violence with a 10 years sentence due to the minimal amount of injury inflicted on the complainant.

14. In our instant case, it is apparent that the violence meted out on the deceased leading to her death was enormous. The post mortem examination revealed that the deceased in addition to the physical injuries which suggested she had been sexually molested died as a result of cardiac respiratory arrest due to asphyxia or strangling. It is worthy to note that the deceased was an ailing person who suffered from epilepsy.

15. I acknowledge this court’s discretion in sentencing within the principle in Muruatetu Case. In the circumstances of this case, I am persuaded that the sentence of death should be revised. I proceed to set aside the sentence of death (now commuted to life) passed on the applicant and substitute thereof a sentence of 40 years imprisonment to run from the date of sentence by this court on 9/5/2013.

Dated, Signed and delivered at Kisii this 25th day of February, 2020.

A.K NDUNG’U

JUDGE

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions for the respondent.

Applicant in person.