



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**CRIMINAL PETITION NO.1A OF 2018**

**EDWIN NYAMBIGE NYANDIKA .....1<sup>ST</sup> PETITIONER**

**CHARLES MAMBOLEO ONYANDO....2<sup>ND</sup> PETITIONER**

**EVANS MACHUKA BENARD.....3<sup>RD</sup> PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**SENTENCE REVIEW RULING**

1. Before me is a petition dated 15<sup>th</sup> October for review of the death sentence imposed in Kericho High Court Criminal Case No.37 of 2008 Republic – vs – Edwin Nyambige Nyandika, Charles Mamboleo Onyando, and Evans Machuka Benard, and Criminal Appeal No.265 of 2009 – Court of Appeal Nakuru.

2. The petition filed by S. M Sagwe & Company Advocates for the petitioner’s seeks one order –

“that the honourable court re-hears the petitioners for re-sentencing and consider the period they have been in custody since 2008”

3. On the hearing date of the petition, Mr. Ayodo for the State informed the court that they had received both the High Court and the Court of Appeal judgments where in the petitioners had been convicted of murder and handed down the mandatory death sentence.

4. In submissions on the request for review of sentence, Mr. Motanya for the petitioners submitted that the 1<sup>st</sup> petitioner Edwin Nyandika was 27 years old at conviction, married and an orphan with children the eldest being in Standard 7 and the other in Standard 2, and had been in prison for 10 years now within which he had reflected on the crime and was very remorseful and wanted to be given a chance for rehabilitation, and added that this petitioner was sickly.

5. With regard to the 2<sup>nd</sup> petitioner Charles Onyando, counsel submitted that he was 64 years old, married with 8 children the oldest being 40 years old and the youngest 20 years old. He was also orphaned and was very remorseful, asked for rehabilitation, and for leniency.

6. On the 3<sup>rd</sup> petitioner Evans Machuka counsel submitted that he was 30 years old, and 20 years old on conviction. Thus his youthful life had been had been spent in prison and had learnt a lesson and asked to be given a chance to marry.

7. Mr. Ayodo for the State in response relied on pre-sentence reports to be filed by the Probation Officer and left the matter in the discretion of the court.

8. I have seen Probation Officers reports dated 26/02/2020 on each of the three petitioners signed by Obanyi Francis a Probation Officer. All the Pre-sentence reports above filed on 26/02/2020 conclude that each of the petitioners did not admit responsibility for the offence committed, and maintained that they were wrongly implicated. The Probation Officer noted that the family of the deceased had not been visited (by the family of the petitioners) for reconciliation. The recommendations are that the offence was a capital offence and normally required deterrence.

9. Having considered the submissions of counsel and the Probation Reports, I note that the petitioners herein were each convicted of two (2) counts of murder. The mitigation recorded by the trial court indicated that 1<sup>st</sup> petitioner was 24 years old; 2<sup>nd</sup> petitioner 47 years old, and 3<sup>rd</sup> petitioner 20 years old.

10. At the time of their conviction and sentence, the death penalty for those convicted of murder was taken by all courts in Kenya to be mandatory under the provisions of section 204 of the Penal Code (Cap. 63). However in the recent case of **FRANCIS KARIOKO MURUATETU & ANOTHER – VS – REPUBLIC-Petitioner NO. 15 of 2015** the Supreme Court of Kenya held that such mandatory death sentence would be contrary to the principles of fair trial enshrined under Article 25 (c) of the Constitution of Kenya, 2010 in addition to being at variance with the Universal Declaration of Human Rights. The Supreme Court thus declared the mandatory nature of the death penalty to be unconstitutional and ordered that other courts conduct sentence re-hearing for previous cases in which the mandatory death penalty was imposed, and determine appropriate sentences.

11. The three petitioners have thus come to this court for such sentence re-hearing, in which this court as the original trial court can determine an appropriate sentence, and may impose the death penalty or any other appropriate penalty depending on the facts and circumstances of the case.

12. Having considered the mitigation factors put before me and the contents of the pre-sentence reports, I am of the view that the death penalty is not appropriate, as other than the fact that the petitioners still deny committing the offence, which is their right to do, I have not been told of any aggravating circumstances in the case that would justify the death penalty. I will thus set aside the death sentence imposed.

13. The petitioners have now each served more than 10 years imprisonment. Their advocate has also said that they are remorseful and want to make a fresh start in life. Their convictions still stand though they still maintain that they did not commit the offences. In my view taking all the facts and circumstances of the matter, a sentence of 18 years imprisonment from the date on which they were sentenced by the trial court is adequate punishment. I will not sentence them for the 2<sup>nd</sup> offence in which they were convicted, as that would prejudice them, and it was not an issue in contest in this petition.

14. I thus set aside the death sentence imposed on each and order that each of the three petitioners will serve 18 years imprisonment from the date on which they were sentenced by the trial court.

**Dated and delivered at Kericho this 10<sup>th</sup> March 2020.**

**GEORGE DULU**

**JUDGE**