



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE- J.)

PETITION NO. 03 of 2020

BETWEEN

BERNARD OMONDI NYAWARA.....PETITIONER

AND

REPUBLIC.....RESPONDENT

JUDGMENT

1. **BERNARD OMONDI NYAWARA, (Petitioner)** was convicted and sentenced to death for the offence of murder contrary to **Section 203** as read with **Section 204 of the Penal Code** in **Kisumu High Court Criminal Murder Case No. 32 of 2004** on 08th November, 2005. The conviction and sentence was confirmed by the Court of Appeal in **Criminal Appeal no. 12 of 2006**.

2. By a petition filed on 19th December, 2019, the Petitioner has petitioned this court for resentencing on the main ground that the death sentence imposed on him is unconstitutional.

3. Ms. Gathu, Senior Prosecution Counsel for the state proposed that Petitioner who is 34 years and has served 16 years be resentenced to 20 years' imprisonment.

Analysis and Determination

4. At the time of the Petitioner's conviction, death was the only available sentence for murder.

5. The Supreme Court decision in ***Francis Kariuki Muruatetu & Another v Republic & 5 others [2016] eKLR*** declaring the mandatory death sentence unconstitutional has necessitated resentencing of all persons previously sentenced to the mandatory death sentence.

6. I have considered ***The Sentencing Policy Guidelines, 2016*** and its application which is intended to promote transparency, consistency and fairness in sentencing (See ***Michael Kathewa Laichena & another v Republic [2018] eKLR***).

7. Under the proviso to **section 333(2)** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***, the court in resentencing a Petitioner is entitled to take into account the period the petitioner has spent in custody in determining the sentence and mitigating and aggravating circumstances.

8. The court record shows that the Petitioner was in custody for 1 year and 8 months during trial and has served 15 years and 3 months. During his stay in prison, the Petitioner has not various diplomas and certificates as a means of reformation.

9. This court requested for the Petitioner's home report and Victim Impact Assessment report for its consideration during resentence. The home report discloses that the Petitioner who is now 35 years old was not married at the time of his arrest. Both the deceased's family and Petitioner's family have moved on and have no grudge against the Petitioner.

10. I have considered that the Petitioner has not undertaken several courses and I have come to the conclusion that he has the potential for productive life outside prison. I therefore re-sentence him to **20 years'** imprisonment from date **of** the date of his sentence on 08th November, 2005.

DATED AND SIGNED IN KISUMU THIS 05th DAY OF March, 2020

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Amondi & Okodoi

Petitioner - Present in person

For the State - Ms. Gathu