**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION**

**CONSTITUTIONAL PETITION NO 38 OF 2019**

**IN THE MATTER OF FUNDAMENTAL RIGHTS AS PROVIDED UNDER THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF ARTICLES 22 (1), 23 (1), 27, 50(2), 25 (C) AND 165 (1) AND (3) OF THE CONSTITUTION OF KENYA**

**BEING A CONSTITUTIONAL PETITION ARISING FROM ORIGINAL CASE NO 12 OF 1991 AT ELDORET**

**BETWEEN**

**ERIC KIPSANG KANGOGO.................................................................. PETITIONER**

**VERSUS**

**REPUBLIC ...............................................................................................RESPONDENT**

**JUDGMENT**

1. The applicant **(ERIC KIPSANG KANGOGO)** was convicted on a charge of murder contrary to **section 203 as read with section 204 of the Penal Code,** the particulars being that on 14th June 1998, at **BIRETWA village, KAPCHEMUTWA location in KEIYO district, of the RIFT VALLEY PROVINCE,** he murdered **PHILOMENA LUKA.** He pleaded not guilty, and after trial was found guilty and sentenced to death (which was a mandatory sentence)

2. Following the Supreme Court of Kenya's pronouncements in the landmark case of FRANCIS KARIOKO MURUATETU AND ANOTHER VERSUS REPUBLIC [2017] eKLR, he urges this court to find that the death sentence meted out on him is a harsh and degrading form of punishment. He implores this court to be guided by the Sentencing Policy Guidelines 2016, and impose another appropriate sentence.

3. He gives an expose of the court's constitutional powers to bolster his arguments with regards to his fundamental rights and freedoms, saying the death sentence is unlawful, and a gross violation to his constitutional right to life

4. That had the trial court considered his plea in mitigation, then he would have been subjected to a different kind of punishment He further points out that the incident happened in 1998, and he was arrested, and from that date, has spent half of his life in prison, and has paid his debt to the society. He also draws to this court's attention that he is now a reformed individual whose conduct and behaviour has been considered by the prison authorities, and who have now categorized him as a reformed prisoner. That for the 20 years that he has been in prison, he has enrolled in various rehabilitation programmes with a vision to living a meaningful life, when accorded such opportunity.

5. He assures this court that he is not a threat to his family relatives or the community as a whole, and even the probation officer's report speaks well of him, and the record shows he was a first offender

6. **Miss OKOK** on behalf of the DPP did not oppose the application and acknowledged that the applicant had spent 21 years in prison, and had a favourable report both from the Probation Officer as well as the Prison authorities.

7. From the proceedings, the deceased was the applicant's sister-in-law, and in a confession to the police he confirmed killing the deceased using a panga, and the Court of Appeal was satisfied that the charge and caution was properly administered. The trial court had found that the motive behind the killing was a debt which the deceased owed the applicant, coupled with the fact that the deceased and the accused had previously had close liaisons including spending the night together, and the deceased had now threatened that he would die from a disease he had contracted from her.

8. Upon conviction, he does not seem to have been given an opportunity to say anything in mitigation, although from the record it is not clear whether this was by design on the part of the applicant, or an omission by the trial court. I suppose in those days, a plea in mitigation would make no difference in the sentence, as the trial court pointed out, there was only one sentence prescribed, that is **DEATH**.

9. The emerging jurisprudence from the **Muruatetu** case is **NOT** that the death sentence is illegal or unconstitutional, rather, that the mandatory nature of the sentence takes away the court's discretion. Judicial discretion is the exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law.

10. Indeed, in various jurisdictions, the trend observable is that the courts are granted some leeway to exercise jurisdiction with regard to mandatory sentences. The most prevalent mandatory sentences are applied to capital offences. The nature of the sentencing is such that it is geared towards punishing repeat offenders in a progressively harsher manner but must weigh the circumstances under which the offence takes place.

11. The *ratio decidendi* in the **Muruatetu** case is that sentencing in itself is a judicial function, and the courts serve the purpose of interrogating each case differently and determining the punishment based on the particulars and the circumstances of each case. Thus to adhere to a sentence set by the legislature is tantamount to allowing the legislature perform a sentencing function and results in a breach of the doctrine of separation of powers.

12. I think the major concern with mandatory sentences, is that they have the effect of disregarding mitigation and thereby depriving the court of its discretionary powers. Consequently, it renders the accused person condemned unheard as the diverse character of the circumstances, the convicts and the crime cannot be considered by the court in making a decision on sentencing. The Supreme Court of Kenya further stated that ***'…. we cannot shut our eyes to the distinct possibility of the differing culpability of different murderers"***. The learned judges went on to propose that judicial discretion be allowed when considering whether to impose a death sentence.

13. I therefore consider the circumstances under which the incident took place, the period that the accused has been incarcerated (he has paid with his productive life), as well as the very favourable probation officer's report dated 28th February 2012 which confirms that the victim's family have no ill feelings. There is also the progress report signed by the officer in charge of **Shimo la Tewa Prison** showing that the applicant has attained the highest levels of skills due to hard work, discipline and teamwork.

14. I am thus persuaded that the applicant has been adequately punished and the 21 years spent in prison is sufficient punishment. Consequently, I set aside the death sentence meted out and substitute it with an imprisonment term of 21 years which shall run from the date of his arrest. He shall thus be set at liberty forthwith unless otherwise lawfully held

**Delivered and dated this 29th day of July 2020 at Eldoret**

**H.A. OMONDI**

**JUDGE**