



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

PETITION 8 OF 2019

DAVID KIPNGETICH.....1ST PETITIONER

JOSEPH KIPNGENO TEMBUR.....2ND PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING ON RE-SENTENCING

1. The two petitioners in this case DAVID KIPNGETICH ROTICH and JOSEPH KIPNGENO TEMBUR filed this petition seeking resentencing pursuant to the Supreme Court decision in the case of FRANCIS KARIOKO MURUATETU & Another vs Republic [2017]eKLR.
2. The two petitioners were charged with murder c/s 203 as read with section 204 of Penal Code with others in CR. CASE NO.24 of 1997 and they were sentenced to death.
3. The particulars of the case were that on 29th August 1997 at Keben village Kericho District the two petitioners with others not before court murdered JANE NGENY.
4. The prosecution evidence in summary was that the deceased JANE NGENY was accosted by a group of people and she was dragged out of her house and lynched on the suspicion that she was a witch.
5. The two petitioners were identified by the key witness as having been among the mob that beat up the deceased and demanded that she gives them the charms she was using to bewitch people.
6. The deceased was taken to her house where a search was done but the charms were not recovered. She was then removed from the house a second time and a tyre was put around her waist and she was doused with paraffin and set ablaze.
7. The petitioners said they came to the scene drunk and they found the deceased had been lynched. The court found the two petitioners guilty as charged and sentenced them to death on 25/06/1999.
8. The petitioners appealed to the court of Appeal but the appeal was dismissed and now they are seeking resentencing following the supreme case decision in the case of MURUATETU (supra) where the court held as follows;

“The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows:

“Sentences are imposed to meet the following objectives:

- 1. Retribution: To punish the offender for his/her criminal conduct in a just manner.**
- 2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.**
- 3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.**

4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.

5. Community protection: To protect the community by incapacitating the offender.

6. Denunciation: To communicate the community's condemnation of the criminal conduct."

9. I also rely on the case of **JONATHAN LEMISO OLE KINI VS REPUBLIC [2018]eKLR** where the Court of Appeal stated as follows;

"This court is bound by the decision made by the Supreme Court in FRANCIS KARIOKO MURUATETU & ANOTHER VS REPUBLIC (supra)"

10. The Supreme Court in the MURUATETU case(supra) declared the death sentence unconstitutional in the following words:

"The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of the Constitution."

11. However, on the issue of the life sentence, they gave the following recommendation;

"We therefore recommend that Attorney General and Parliament commence an enquiry and develop legislation on the definition of 'what constitutes a life sentence'; this may include a minimum number of years to be served before a prisoner is considered for parole or remission, or provision for prisoners under specific circumstances to serve whole life sentences. This will be in tandem with the objectives of sentencing".

12. The petitioners are currently serving life sentences. There is no legislation in place as yet on the definition of what constitutes life imprisonment.

13. In the current case, prison authorities have said the petitioners have now reformed. The Judge who sentenced the Appellants stated that the two Appellants took the law into their hand and tortured an innocent and helpless woman on the suspicion that the deceased was a witch.

14. The Judge further said that the Appellants burnt the deceased to death when she was still alive. He said the Appellants should be told that witchcraft is only a belief.

15. I find that the Appellants together with the others not before court killed an innocent woman in cold blood while her children watched helplessly. The deceased was a widow and the action by the Appellants and the mob that was with them rendered the children of the deceased total orphans.

16. The state through the prosecutor Miss Fundi opposed the petition and asked the court to dismiss the petition on the ground that there is no evidence that the petitioners have reformed since they claim to have been drunk when they committed the offence.

17. The court called for pre-sentence reports which were filed on 6/5/2020. This court has considered the said reports and it is noted that the family members of the petitioners are ready to receive them in the respective families.

18. I find that the long period the petitioners have been in jail is sufficient to deter any one who may be tempted to emulate them. The petitioners have also said they have reformed and there are letters from the officer in charge Naivasha Maximum prison stating that the petitioners have taken full advantage of the rehabilitation programs offered in the institution. The Supreme Court further stated as follows in the **MURUATETU** case (supra):

"We also acknowledge that in Kenya and internationally, sentencing should not only be used for the purpose of retribution, it is also for the rehabilitation of the prisoner as well as for the protection of civilians who may be harmed by some prisoners. We find the comparative jurisprudence with regard to the indeterminate life sentence is compelling. We find that a life sentence should not necessarily mean the natural life of the prisoner; it could also mean a certain minimum or maximum time to be set by the relevant judicial officer along established parameters of criminal responsibility, retribution, rehabilitation and recidivism."

19. The death sentence imposed upon the Petitioners was well deserved. However, the petitioners have been in jail for over twenty years and taking into account the mitigating circumstances and the fact that both petitioners were first offenders and further that they had been in custody since they were arrested in March 1996 and June 1997 respectively; I hereby resentence the petitioners to 21 years imprisonment each.

20. The time of the sentence will start to run from 25th June 1999 when the petitioners were sentenced to death.

21. Since the petitioners have served more than 21 years in jail, I order that both petitioners be set free forthwith unless lawfully held for any other reason.

Delivered, signed and dated at Kericho this 27th day of July 2020.

A. N. ONGERI

JUDGE