



**REPUBLIC OF KENYA**

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

**PETITION NO 66 OF 2014**

**PETER ESIYEN AROTO.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. **PETER ESIYEN AROTO** (the petitioner) has approached this court under the provisions of section 216 and 329 of what he refers to as the general provisions seeking resentencing following his conviction on 3<sup>rd</sup> February 2003 where he was sentenced to death for the offence of murder contrary to section 203 of the Penal Code as read with section 204 of the same Act. He had pleaded guilty to the offence

2. The prosecutor narrated that on 13/01/2002 at 3.00pm, the deceased and his family were at home, where they were joined by neighbours D2 and PETER EKAI. A quarrel erupted between D2 and D3 over some domestic affair, and D2 demanded her property from D3 (her husband) while the quarrel was in progress. The applicant arrived and sided with D3, claiming that D2 was a prostitute. The four people then left, heading towards D3's house, with D2 and D3 still quarrelling.

3. The petitioner's companion turned his anger at the deceased's wife, removed his shoe and threw it at the deceased's wife, but it hit the child. The deceased intervened to save his wife from the petitioner's companion who was fighting, and it was then that the petitioner punched the deceased who fell down. In turn, the applicant's companion picked a stone and hit the deceased on the head. The deceased was rushed to hospital, but his condition deteriorated, and he succumbed. A post-mortem was conducted, and it was established that the cause of death was blunt trauma on the head, depressed skull fracture. The petitioner confirmed to the trial court that the facts were correct.

4. No mitigation was offered and the trial court pointed out that the law provided only one penalty for the offence. While acknowledging that sentence is at the discretion of the trial court, the petitioner urges this court to be guided by the emerging jurisprudence pronounced in the case of **FRANCIS KARIOKO MURUATETU AND ANOR V R [2017] eKLR** which basically stated that sentencing in a criminal trial is part of the judicial process, yet mandatory sentences takes away the independence of the judiciary, reducing it to a rubber stamp yet a court should have power to control proceedings to the very final conclusion. This decision gave the courts the latitude to tinker with sentences even where the legislation provides for a mandatory sentenced.

5. The petitioner points out in his written submissions that he has spent 18 years in prison, having been arrested in February 2002 and he remained in prison custody, as at that time, the law made capital offences unavailable. He explains that during his stay in prison he has taken maximum advantage of the rehabilitation programme offered in the facility, and has undergone various courses where he has attained certificates and diplomas (which are annexed to the petition), and has also become a gospel artiste who has even produced a music album. He is ready to be integrated into the community and be a productive member, if given a chance. The petitioner expresses remorse for what happened, and has learnt to take responsibility for his own actions

6. In response, Miss Okok on behalf of the DPP acknowledged the period the petitioner has spent in prison and his achievements and records in prison which are favourable, and she was not opposed to the prayer for re-sentence

**ANALYSIS AND DETERMINATION**

7. Mandatory sentences are not only restricted to maximum sentences; some statutes provide for a mandatory minimum sentence, which means a minimum period of time a convicted person must serve and the court may, depending on several considerations enhance beyond the minimum sentence given. In Kenya there are various mandatory sentences that are provided, more specifically by the Penal Code where the most prevalent mandatory sentences are applied to capital offences. 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.

8. The rationale behind sentencing is for:

- Retribution-eye for an eye principle you deserve to be punished (Sentence must be Proportionate to the Gravity of the offence)

- Deterrence - which operates on the notion that everyone understands that certain conduct constitutes a crime which carries a severe penalty, and that because of this the public will desist from the targeted conduct
- Rehabilitation
- Incapacitation
- Denunciation
- Restoration

9. Of course in meting out sentence, the court needs to take into account:

- Age of the offender
- Past record of the offender's conduct
- Value of the item,
- Manner in which the act was carried out- nature of the violence
- Culpability- reckless, negligent, Knowingly-acted he/she understands the consequences of the act

10. Prior to the **Muruatetu** decision "***My hands are tied***" was the judicial refrain whenever a court was passing out the death sentence!! That position made a mockery of **Article 14 (5) of ICCPR (International Covenant on Civil and Political Rights)** which relates to the right to have sentence reviewed by a higher court as the minimum mandatory substantially prevents that.

11. In the present case, if it is retribution, taking into account the gravity of the offence, then I think 17 years is an adequate price already paid. Also the circumstances under which the offence occurred does not suggest malice, although the petitioner's actions and that of his companion resulted in the death. His conduct within the prison and his achievements bespeak of an individual who has now developed his skills and realises the folly of irrational/uncontrolled behaviour. I think the petitioner has been adequately punished and I re-sentence him to the period already served. He shall be set at liberty forthwith, unless otherwise lawfully held.

**E-delivered and dated this 26<sup>th</sup> Day of August 2020 at Eldoret**

**H. A. OMONDI**

**JUDGE**