



**REPUBLIC OF KENYA**

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

**CONSTITUTION PETITION NO. 99 OF 2019.**

**CHARLES TATIRO IRESA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. **Charles Tatiro Iresa** the petitioner/ applicant herein has filed a petition seeking that he be re-sentenced in the interest of justice. He was charged and sentenced to death for the offence of murder vide HCCR No. 95 of 2010. His death sentence was later commuted to life imprisonment by the President in 2016. He states that he was in custody for 5 years from the time he was arrested.

2. Mr. Otieno for the State did not oppose the petitioner's application. Mr. Otieno submitted that the Court can resentence the applicant.

3. In *AOO and 6 Others v Attorney General and Another* NRB Petition No. 570 of 2015 [2017]eKLR Justice Mativo held as follows;

*The constitution being the supreme law of the land separates the powers of the legislature, the executive and the judiciary. Judicial power is reserved to the judiciary. The imposition of a punishment in a criminal matter which includes the assessment of its severity is an integral part of the administration of justice and is therefore the exercise of judicial, not executive, power. In so far as section 25 (2) & (3) of the Penal Code[38] allows a person aged below 18 years to be detained at the presidents pleasure, thereby granting the president powers to determine sentence or when to release the person and requires a judicial officer to forward notes to the president, in my view it offends the principle of separation of powers and Article 160 (1) of the constitution of Kenya 2010. [Emphasis mine]*

4. In *Browne v The Queen* [2000] 1 AC 45, the Privy Council held that *a sentence of detention at the Governor-General's pleasure was contrary to the Constitution of Saint Christopher and Nevis because it constituted a deprivation of liberty otherwise than in execution of an order or sentence of the court. It held that since the Governor-General was part of the executive and since the selection of punishment was an integral part of the administration of justice, a sentence which depended on the pleasure of the Governor-General was not compatible with the constitutional separation of powers.*

5. In my view being held at the president's pleasure connotes an indefinite period and is unconstitutional. I find that this court can revisit the sentence imposed and resentence the applicant.

6. I have read the judgment dated 2<sup>nd</sup> July 2015. The petitioner caused the death of a man whom he waylaid on his way home. He used a panga to cause injuries on the deceased's legs and head. The petitioner has asked this court to consider that he has been in jail from 2010 and that it has been way over 10 years.

7. I have considered the period the petitioner has been in jail. He was charged on the 8<sup>th</sup> November 2010. He was sentenced by the High Court on the 23<sup>rd</sup> November 2015. He was in custody for about 5 years before he was sentenced. He has been in jail for a period of about 5 years. Taking into account the circumstances of the case, that a life was lost, the period he has served, I set aside the death sentence, and the order commuting his sentence to a life sentence and resentence **Charles Tatiro Iresa** to a period of **30 years'imprisonment** to run from the **23<sup>rd</sup> November 2015.**

**Dated, signed and delivered at KISII this 4<sup>th</sup> day of August 2020.**

**R.E OUGO**

**JUDGE**

**In the presence of:**

**Charles Tatiro Iresa   Petitioner**

**Mr. Otieno               Senior Prosecution Counsel Office of DPP**

**Ms. Rael                 Court Clerk**