



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 54 OF 2019

KAZUNGU KATANA NGOAPETITIONER

VERSUS

REPUBLIC RESPONDENT

Coram: Hon. Justice R. Nyakundi

Petitioner in person

Mr. Alenga for the state

RE-SENTENCING

The instant petition for re-sentencing has been brought in terms of the Supreme Court decision in **Francis Karioko Muruatetu & Another –Vs- Republic Petition No. 15 of 2015 (2017) eKLR** whereby the mandatory death sentence for the offence of murder was declared unconstitutional. We have also seen in **William Okungu Kittiny –Vs- Republic Kisumu Criminal Appeal No. 56 of 2013 (2018) eKLR**, the Court of Appeal applied the **Muruatetu decision Mutatis Mutandis** to the provisions of Section 296 (2) of the Penal Code which imposes a mandatory death penalty for the offence of robbery with violence. The same principles have also been extended to apply in defilement cases as seen in the case of **Christopher Ochieng v Republic (2019) eKLR**.

The petitioner was charged, convicted after a full trial and sentenced to death for the offence of murder contrary to section 203 as read with 204 of the Penal Code. The sentence was later was later commuted to life imprisonment by administrative fiat. The factual matrix of the matter at trial disclosed that the petitioner murdered **Katana Ngoa Saro** on the 7th day of December 2010 at Kabokoni II Village, Konjora Sub-location within Kilifi County. The petitioner is seeking that the life imprisonment sentence imposed on him be set aside and for the court to impose an appropriate sentence.

Sentencing

The right to life is jealously protected in terms of Article 26 of the Constitution of Kenya, 2010. It is provided that:

26. Right to life

(1) Every person has the right to life.

(2) The life of a person begins at conception.

(3) A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law.

(4) Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.

Initially, the offence of murder is criminalised in terms of section 203 as read with 204 of the Penal Code, Laws of Kenya. The sentence prescribed is mandatory death sentence. The said sections provide as follows:

203. Murder

Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

204. Punishment of murder

Any person convicted of murder shall be sentenced to death.

However, the landmark decision in **Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015 (2019) eKLR**, brought about a paradigm shift as far as the aforementioned mandatory minimum sentences are concerned. The aforesaid case declared mandatory death penalty (cited above) and its commutation to life imprisonment by an administrative fiat, unconstitutional, null and void. This emerging jurisprudence equips the judge with some measure of discretion in determining appropriate sentences which are proportional to the individual circumstances of the case at hand.

By nullifying the death penalty, the Supreme Court seems to suggest that it is only the mandatory minimum nature which was discarded. However, in appropriate cases, death sentence remains unconstitutional and may be imposed only on a person convicted of murder committed in aggravating circumstances. By the same token the court is also equipped with discretion to vacate the death penalty in cases whose factual matrix exhibits extenuating circumstances or justifies the same.

In assessing an appropriate sentence, the court has to take into consideration the totality of mitigatory factors and sought to weigh them vis-a-vis the aggravatory factors at the same time seeking to strike a balance on the nature of the offence, murder with malice aforethought and the offender, his personal circumstances and societal interest, that justice must not only be done but must be seen to be done.

While the court is entitled to refer to the evidence in order to determine whether there existed aggravating circumstances or otherwise for the purpose of meting out the sentence, it is not proper for the court to set out to analyze the evidence as if it is meant to arrive at a decision on the guilt of the accused.

According to **Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015**:

“[71] To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

- (a) age of the offender;***
- (b) being a first offender;***
- (c) whether the offender pleaded guilty;***
- (d) character and record of the offender;***
- (e) commission of the offence in response to gender-based violence;***
- (f) remorsefulness of the offender;***
- (g) the possibility of reform and social re-adaptation of the offender;***
- (h) any other factor that the Court considers relevant.***

In Kenya, many courts have highlighted the principles of sentencing. One such case is the High Court criminal appeal decision in **Dahir Hussein v. Republic Criminal Appeal No. 1 of 2015; [2015] eKLR**, where the High Court held that the objectives include:

“deterrence, rehabilitation, accountability for one’s actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim.”

I now proceed to marry the foregoing principles with the facts of the case. The matter brings to the force the adverse effect of this deep-rooted belief in witchcraft by a myriad of communities in our nation. I must confess this belief is extremely controversial and as a court I cannot claim to have a solution to the impact of this system which dates back to the creation of mankind.

I am obliged as a court to accentuate the sanctity of human life wherever the life of an individual is snatched by the evil hand of another human being. The life that we live demand that it be respected because the tragedy is that once lost it cannot be recovered.

In aggravation, the taking of the deceased’s life was done in the most heinous fashion. The Petitioner executed his murderous intentions in broad daylight. He butchered his father using a wine-tapper’s knife. He then embarked on a campaign to silence potential witnesses by threatening them with death.

It is of utmost importance that cultural and religious beliefs must respect life and must be practiced in line with the Bill of Rights. I cannot overlook the fact that an innocent life was deliberately and needlessly done to death. The victim gave no provocation. He committed no wrong to the accused persons. The allegation that he was a witch was not given an opportunity to be substantiated. The accused persons

usurped and derogated the duties of the traditional leaders, prosecution, judge and the executioner as well as violation the deceased fundamental rights and freedoms.

There are scattered throughout this country, local and traditional leaders whose duty is to deal with cases like the one which confronted the accused persons. The accused persons had no right to take the law into their own hands because there are not competent to handle the situation that they attempted to resolve.

The life of the deceased was not so cheap to be ended in the way it did and the accused persons were expected to contain their beliefs no matter how strong they may have been. Chaos and anarchy would enslave this country if those of the mind of the accused persons are not adequately punished for their conduct. It must not be that easy to terminate one's life. Every one of us must learn to respect life for what it is.

Sentence

In spite of that, the petitioner with malice aforethought killed the deceased in this case. The manner in which the offence was committed outweighs any mitigation that there is to consider to mete out a lesser lenient sentence.

All in all, the justice of the crime demands, if anything a long custodial sentence of 40 (forty) years imprisonment inclusive of the period spent in remand custody pending trial in terms of Section 333 (2) of the Criminal Procedure Code do replace the commutation of life imprisonment. In the event the convict is aggrieved with the sentence he is at liberty to file an appeal to the Court of Appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF OCTOBER 2020

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R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Alenga for the state
2. The petitioner