



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 20 OF 2019

FLORENCE NTHENYA MUTUA.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Petitioner in person

Mr. Alenga for the state

RULING

The petitioner herein was initially charged, convicted and sentenced to death for the offence of murder contrary to section 203 as read as read with 204 of the Penal Code.

The instant petition for re-sentencing has been necessitated by the Supreme Court decision in **Francis Karioko Muruatetu & Another vs Republic (2017) eKLR** whereby the mandatory death sentence for the offence of murder was declared unconstitutional. The petitioner is seeking that the life imprisonment sentence meted out on her be set aside and for the court to impose an appropriate sentence.

The Court is informed that the record of the trial proceedings cannot be located and the facts extract of the factual matrix of the case is unavailable. I have noted that spirited and extensive efforts to trace the trial record were made, but the file has not been found.

As observed in the Malawian Case of **Mtambo & Others v. The Republic, MSCA Criminal Appeal No.1 of 2012** (unreported), which I am inclined to associate myself with, the mere fact that the whole record is missing ought not to deprive an applicant of an opportunity of the hearing of the sentence re-hearing in respect of that convict. The petitioner's petition is therefore allowed despite the lack of the record of proceedings.

In sentencing an offender, the sentence meted out on an accused person must commensurate to the moral blameworthiness of the offender and that the court should look at the facts and the circumstances of the case in its entirety before settling for any given sentence. (See **Ambani Vs R**). The Court of Appeal **Thomas Mwambu Wenyi Vs Republic (2017) eKLR** cited the decision of the Supreme Court of India in **Alister Anthony Pereira Vs State of Mahareashtra** at paragraph 70-71 where the court held the following on sentencing:-

“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.”

In **Francis Karioko Muruatetu & Another –Vs- R (Supra)** the Supreme Court stated the following guidelines as mitigating factors 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 and*
- (h) any other factor that the court considers relevant.*

These factors are also applicable in a re-sentencing for the offence of robbery with violence. The Judiciary Sentencing Policy Guidelines lists the objectives of sentencing at page 15 paragraph 4.1 as follows:

- 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 demand 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.**

The petitioner has been behind bars for approximately 10 years for the offence of murder. I have had occasion to go through the several cases reviewed by several judges of the high court on sentencing and re-sentencing in murder cases, which affords meaningful guidance as to the sentencing trends in cases such as the one at hand.

In **Elizabeth Mwiyaithi Syengo v Republic [2019] eKLR** where the petitioner strangled with her bare hands the deceased who was pregnant **Kimei J.** substituted the life imprisonment with 20 years imprisonment. In **Nelson Mwiti Gikunda & 2 others v Republic [2018] eKLR** where the petitioners were a gang that assaulted the deceased before kidnapping her and killing her by beating her to death with sticks, rungs and whips, **Majanja J.** substituted the death sentence with 25 years imprisonment. In **Republic v Muema Makali [2019] eKLR** the Petitioner killed three people before burning their bodies and attempting to commit suicide. **Odunga J.** substituted the death sentence with 40 years.

In **Benson Ochieng & France Kibe -Vs- R (2018) eKLR**, **Joel Ngugi J.** re-sentenced the petitioners to 20 years imprisonment upon considering that the offence was aggravated by the use of multiple guns by an organized gang to commit armed robbery.

The petitioner has been in prison for approximately 10 years. Having compared the petitioner's case with other matters of the same nature, I hereby set aside the life imprisonment imposed upon her and substitute it with a sentence of 30 years from the date of arrest to cover the period spent in remand custody. I think to that extent the petition has merit for me to exercise discretion to grant the substantive reliefs in her favour

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 21ST DAY OF DECEMBER 2020

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R. NYAKUNDI

JUDGE