



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL PETITION NO. 62 OF 2019**

**KARISA CHARO CHULA.....PETITIONER**

**VERSUS**

**DIRECTOR PUBLIC PROSECUTION.....RESPONDENT**

**Coram: Hon. Justice R. Nyakundi**

**Petitioner in person**

**Mr. Alenga for the state**

**RULING**

This is a petition against the decision of the Court of Appeal confirming the death sentence imposed by the High in which the petitioner had been convicted of the offence of murder contrary to Section 203 and 204 of the Penal Code.

**Determination**

The petition raises a substantial point of Law concerning the death penalty having regard to the **Supreme Court decision in Francis K. Muruatetu v R {2017} eKLR** which held interalia that:

***“for purposes of serving a mandatory death sentence is deemed to be unconstitutional. This legal point taken up and decided by the Supreme Court assumes predominant principle of greater jurisprudence direction in Kenya.”***

Prior to the landmark case of **Francis Muruatetu v R (supra)** within the purview of Article 50 (6) (a) and (b) of the Constitution a person convicted of a criminal offence may petition the High Court for a new trial if:

***(a). The person’s appeal, if any, has been dismissed by the Highest Court to which the person is entitled to appeal, or the person did not appeal and***

***(b). new and compelling evidence has become available.***

In addition, Article 50 (2) (p) provides that the accused has a right to the benefit of the least severe of the sentence prescribed pursuant of an offence, if the presumed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.

One thing is very clear on the basis of **Muruatetu case** the death penalty perse is not unconstitutional save it’s a preserve of the rarest of crimes of murder. Therefore, upon conviction of an offender under Section 203 of the Penal Code, the trial Court would be at liberty in determining the appropriate sentence with any aggravating and mitigatory factors to warrant imposition of a death penalty. Regarding the case under consideration the petitioner has invited the Court to take note of the mitigating factors and that he is an old man who has been in prison since the year 2008.

From the factual matrix of the offence, the petitioner on 27.1.2008 killed the deceased in a gruesome and aggravating circumstances. This included the killing of the deceased in a brutal and reckless manner culminating in the missing of her body within the vicinity of the crime. Thereafter, a search carried out discovered a badly mutilated body with several panga cuts on the head and other parts of the body.

A post-mortem performed by the pathologists confirmed the deceased body was decomposed into a skeleton with no skin. In the instant case there are numerous circumstances justifying the passing of the death penalty as the aggravating factors outweigh the mitigation pleaded by

the petitioner.

Nonetheless, it cannot be overemphasized that the scope and conceptual framework of execution of the sentence by the executive remains in the realm of unknown. The policy of hanging murderers has never been the norm or for the common good for them to take a step to sign that executive order.

Therefore, in my view convicted murderers pursuant to **Muruatetu decision** remain to be sentenced to either life imprisonment and other long custodial sentences and the death penalty remains to be the exception. Given the above prevailing policy considerations the death penalty for the petitioner may not be the best option or ideal.

As mentioned, in the instant case the offence of murder was committed with malice aforethought and involved extreme brutality and exceptional depravity. The approach I take is re-sentence the petitioner to a custodial sentence that would carry with it his reformation and rehabilitation for one cannot rule out the probability of the petitioner re-offending and being a threat to society.

A balance sheet of mitigating factors alluded to by the petitioner fall short of the threshold when weighted together with the aggravating factors about the crime of murder committed against the deceased. In the circumstances, I sentence the petitioner to 40 years imprisonment with effect from 26.9.2008.

That is the order of the Court.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 16<sup>TH</sup> DAY OF DECEMBER 2020**

.....

**R. NYAKUNDI**

**JUDGE**