

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL MISC. APPLICATION NO. 74 OF 2018

MWENDE MUTISYA.....1ST APPLICANT

NZINWA MAVINDI.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

1. **Mwende Mutisya** (1st Applicant) and **Nzinwa Mavindi** (2nd Applicant) were convicted of the offence of murder on the **31st day of March, 2016**, and ultimately sentenced to suffer death.

2. In their respective Applications, they seek re-sentencing pursuant to the decision of the Supreme Court in **Petition No. 15 and 16 of 2015 Francis Muruatetu and Another vs. Republic**.

3. It was urged by the 1st Applicant that death sentence having been declared unconstitutional he is ready and willing to abide with the law by leading a more productive life as he had been rehabilitated. He sought to be released forthwith. He mitigated that he had trained and acquired skills in tailoring. He has a family of one wife and four (4) children who live with their maternal grandparents since his parents died at an early age.

4. The 2nd Appellant emphasized the fact that he has a right to be re-sentenced since the mandatory death sentence was declared unconstitutional. That the duty of the Court is to protect, promote, preserve and bring into reality the values and principles enshrined in the Constitution.

5. The Applicants having been sentenced to death which is unconstitutional I am duty bound to re-sentence. In meting out a sentence the Court must consider *inter alia*, the remorsefulness of the offenders if any, the character and record of the offence.

6. The offence herein was a serious one that attracts a sentence upto the one that was meted out. Looking at the circumstances in which the offence was committed, the Deceased was injured on the head. There were fractures of the head amongst other injuries that caused the death. In perpetuation of their malicious action the Applicants concealed the body by interring it in a cowshed. These are circumstances that should not be overlooked.

7. The Applicants were arraigned in Court on the **8th July, 2002** and remained in custody until **31st March, 2006** when they were convicted. I do take into consideration that duration and the period they have been in custody of **thirteen years**. Pursuant to the decision of **Muruatetu Case** (supra) I set aside the sentence imposed and substitute it with **40 years imprisonment** to be effective from the date of conviction.

8. It is so ordered.

Dated, Signed and Delivered at Kitui this 24th day of April, 2019.

L. N. MUTENDE

JUDGE