



**REPUBLIC OF KENYA**

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

**MISC. CRIMINAL APPLICATION NO.1 OF 2016**

*(Arising from Court of Appeal No.130 of 2009 at Nakuru*

*Original Criminal Case No.44 of 2005 at Kericho High Court)*

**IN THE MATTER OF ARTICLE 22 (1), 258 (2), 259 (1), 23**

**(3), 25 ( C ), 27, 28, 48, 49 (G), 50 (1), 50 (2) (Q), 50 (2) (O), 165 (3) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF SECTION 203 AS READ WITH**

**SECTION 204 OF THE PENAL CODE CAP 63 LAWS OF KENYA**

**BETWEEN**

**GEOFFREY KIPKORIR TONU.....1<sup>ST</sup> PETITIONER/APPLICANT**

**BENARD KIPLANGAT TONU.....2<sup>ND</sup> PETITIONER/APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**SENTENCE RE-HEARING RULING**

1. This matter arose from a murder case which was heard and determined in Kericho High Court Criminal Case No.44 of 2005. The two applicants herein were tried and convicted of murder, and sentenced to suffer death. They appealed to the Court of Appeal in Nakuru Criminal Appeal No.130 of 2009, and 10<sup>th</sup> June 2011 the Court of Appeal – Bosire, Onyango Otieno and Visram JJA dismissed their appeal.
2. The matter has again come back to this court under a Miscellaneous Application, following the decision of the Supreme Court in the case of **Francis Karioko Mumatetu & Another vs Republic – Supreme Court Petition No.15 of 2015** in which the Supreme Court declared the mandatory nature of the death sentence to be unconstitutional and directed sentence re-hearing of previous similar cases where mandatory death sentence was imposed by the other courts.
3. The present Miscellaneous application was brought to this court through a petition filed by counsel Onesmus Langat & Company Advocates for the two applicants, who are brothers, for sentence rehearing in line with the Supreme Court decision.
4. Counsel for the applicants and the Assistant Director of Public Prosecutions made submissions before me, and the court thereafter ordered the filing of pre-sentence reports and the Probation Officer, Kericho Francis Obayi filed a report on each of the two applicants. I have perused and considered the two reports, which suggest non-custodial sentences.
5. I note that bot convicts (applicants) are first offenders, and that there is a common position taken by the applicants’ counsel and the State that the family of the accused persons (who are brothers), and the family of the deceased person have now reconciled. I appreciate that the accused were sentenced in June 2009, more than 10 years now, and were actually in custody since October 2005 when they were charged in court.
6. The two convicts are still convicts for murder not the lesser offence of manslaughter, and I am told by the Assistant Director of Public Prosecutions that the death sentences have already been commuted to life imprisonment. Though I appreciate that reconciliation between the

families has taken place, in my view a non-custodial sentence proposed by the Probation Officer is not appropriate. The accused persons having now served a period of ten (10) years imprisonment, I set aside the existing sentence, and order that they each serve a period of fifteen (15) years imprisonment from the date they were sentenced by the trial court. The above prison sentence is subject to any remissions that are applicable at the disposal of the Prison authorities.

**Dated and delivered at Kericho this 29<sup>th</sup> day of October 2019.**

**George Dulu**

**JUDGE**