



**REPUBLIC OF KENYA**

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

**MISC. CRIMINAL APP. NO. 01 OF 2019**

**HAMIDA DARA .....PETITIONER**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(From the Judgment of the Court of Appeal in Malindi C.A No. 190 of 2010, Bosire, Waki and Visram, JJJA, on 6<sup>th</sup> October 2011 Mombasa)*

**CORAM: Hon. Justice R. Nyakundi**

**Appellant in person**

**Ms. Sombo for the state**

**RE-SENTENCING**

The petitioner **Hamida Dara** filed application in court dated 12.9.2019 in terms of the supervisory and protection of fundamental right and freedom of the individual under the constitution.

**Background**

The petitioner was on 17.4.2008 arrested and charged with the offence of murder contrary to Section 203 as punishable under Section 204 of the Penal Code. Upon a full trial on 12.10.2010 the petitioner was convicted and sentenced to suffer death.

The petitioner preferred as an appeal to the Court of Appeal. On consideration of the matter the appeal court varied and set aside the conviction on the offence of murder substituting it with a lesser charge of manslaughter contrary to Section 202, punishable under Section 205 of the Penal Code. The effect of the substitution rendered the petitioner to be liable for a custodial sentence of 18 years imprisonment for the substituted charge of manslaughter.

In the new petition to this court the petitioner applied for a fresh review of the 18 years imprisonment imposed by the Court of Appeal on the following grounds:

- 1. That this court does invoke Article 50 (2) (p) of the constitution.***
- 2. That the period of 2 years in pretrial custody in remand was never considered by the Court of Appeal when imposing a custodial sentence of 18 years imprisonment.***
- 3. That this court takes into consideration the mitigation, character and personal antecedents of the petitioner to grant her remission in reviewing the sentence.***
- 4. That the petitioner is remorseful and regrets the offence, since her arrest and indictment with the initial offence of murder which later was to be substituted with manslaughter.***
- 5. That she is ready for community based rehabilitation and be part of the family which she very much cared for prior to this unfortunate incident.***
- 6. That there are compelling reasons of personal health where the petitioner suffers from spinal code dislocation.***

Secondly, the probation officer filed a post-conviction pre-sentence report dated 11.10.2019 with a detailed evaluation of the petitioner with

a recommendation that she is ready to be re-integrated back to the community and her family. That since the conviction and imprisonment the petitioner has reformed and ready to open a new chapter in her life.

**Determination**

I have considered the petition in its entirety, submissions by the petitioner and the social inquiry report by the probation officer filed in court in support of re-sentencing. In the land mark case of the Supreme Court in **Francis K. Muruatetu v R [2017] eKLR** the courts dicta on the imposition of the death sentence by trial courts as the only mandatory punishment for the offence of murder. Under Section 204 of the Penal Code without any lee way for exercise of discretion was found to be unconstitutional. The negative effect of the decision has been a stream of petitions and counter petitions by convicts from all correctional facilities to our courts seeking resentencing of their respective sentences.

Pursuant to the new jurisprudential dawn, the petitioner also sought leave of the court to have her sentence evaluated and reviewed so that she can benefit for a remission. The emerging body case law since the **Muruatetu** decision reflects the dynamism of constitutional interpretation marking an increasingly robust fiducially in the enforcement of the dominant principle in the **Muruatetu case** that has yielded redress for affected convicts.

One of the consequences of the reason that now Judges and Magistrates have the power to exercise discretion in the sentencing more specifically where the legislature import to the statute the mandatory aspect in a sentence to be imposed against a particular offence. The courts therefore, have taken an approach that the mandatory nature of any prescribed sentence which oust the jurisdiction of the courts to exercise discretion will be considered unconstitutional. Be that has it may be the death penalty remains and still is a lawful sentence in Kenya.

In the instant petition I have taken the liberty to trace the facts of the case both at the trial court and before the Court of Appeal. The concerns remain to be whether every lawful custodial sentence however short or long should be brought within the ambit of **Muruatetu case (supra)**. Speaking of myself I do not think so, that the case was to establish a true north principal necessary to have every sentence imposed on the merits reviewed and a new sentence re-ordered just on an account of an aggravating and mitigating factors of the case.

Despite the petitioner referring me to the supremacy of the constitution; the mitigating factors and post-conviction pre-sentence report to a reasonable degree her case is incompatible with the principle in the **Muruatetu case (supra)**.

In addition, there are no new extenuating and compelling circumstances to warrant this court to exercise jurisdiction over the superior court's decision which substituted the offence of murder to that of manslaughter and subsequently imposed an 18 year imprisonment.

I am of the conceded view that such petitions on review should expressly be dealt with by the same superior court in the context that an inferior court lacks jurisdiction to entertain any order or decision from a superior court unless, there is a specific reference from that same court donating any such jurisdiction.

Accordingly, to set aside the sentence of 18 years imprisonment of the Court of Appeal I would be acting in excess of jurisdiction. For the foregoing reasons the petition is dismissed for want of jurisdiction.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 23<sup>RD</sup> DAY OF OCTOBER 2019.**

.....

**R. NYAKUNDI**

**JUDGE**