



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
CONSTITUTIONAL PETITION NO. 42, 53 & OF 2018 (CONSOLIDATED)
IN THE MATTER OF ARTICLE 22(i) OF THE CONSTITUTION

AND

IN THE MATTER OF ARTICLES 19, 20, 21, 22, 23, 24, 25, 27, 28, 50, 258 AND 259 OF THE CONSTITUTION

BETWEEN

KATANA KAZUNGU NGALA.....1ST PETITIONER

HINZANO NGONYO NZOMBA.....2ND PETITIONER

HAMISI KATANA MWAMBEGU.....3RD PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Ms Sombo for DPP

RULING

The Petitioners were charged with three counts of robbery with violence contrary to Section 263(2) of the Penal code and one count of Gang Rape contrary to Section 10 of the Sexual Offences Act. They all pleaded not guilty to all charges and were convicted of robbery with violence in respect of count one to three and acquitted of count four after a full trial. The Learned trial magistrate sentenced all the Petitioners to suffer death. It is noteworthy that at the time the Petitioners were sentenced, death sentence was the only punishment prescribed by the law for the offence of robbery with violence.

The Petitioners appealed to both the High Court and the Court of Appeal and the same was dismissed on both occasions, respectively. They have now approached this Court pursuant to the decision of **Francis Muruatetu & Another v Republic (2017) eKLR** which declared mandatory death sentence for murder and the commutation of that sentence by an administrative fiat to life imprisonment unconstitutional. The rationale is that the mandatory nature of death sentence as provided for in section 204 of the penal code deprives judges' discretion to take into account aggravating and mitigating circumstances which enable the court to arrive to an appropriate sentence based on the peculiar circumstances of each case. Furthermore, mandatory minimum sentences were considered not to be in tandem with the tenets of fair trial that accrue to the accused person in terms of Article 25 of the Constitution of Kenya.

The Petitioner's main contention is that in view of the Supreme Court decision in **Francis Kariuko Muruatetu & Another vs Republic (supra)** the court should consider the sentence. I'm agreement with the Petitioner that the Supreme Court in **Muruatetu Case** declared the mandatory death sentence unconstitutional. Thus, death sentence remains legal but it's no longer mandatory. In **Muruatetu Case (supra)**, the Supreme Court stated as follows:

“The mandatory nature of the death sentence as provided for under section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of the Constitution.”`

The **Muruatetu Case** has necessitated re-sentencing of all persons who were previously sentenced to mandatory death sentence. In that case the court further addressed itself as follows:

(111) "...For the avoidance of doubt, the sentencing re-hearing we have allowed, applies only for the two petitioners herein. In the meantime, existing or intending Petitioners with similar cases ought not approach the Supreme Court directly but await appropriate guidelines for disposal of the same. (emphasis mine) The Attorney General is directed to urgently set up a framework to deal with sentence re-hearing of cases relating to the mandatory nature of the death sentence - which is similar to that of the petitioners in this case.

(112) (c) The Attorney General, the Director of Public Prosecutions and other relevant agencies shall prepare a detailed professional review in the context of this Judgment and Order made with a view to setting up a framework to deal with sentence re-hearing cases similar to that of the petitioners herein. The Attorney General is hereby granted twelve (12) months from the date of this Judgment to give a progress report to this Court on the same.

I'm alive to the fact that pursuant to the Supreme Court's directive, the Hon. Attorney General was required to appoint a Taskforce on the Review of the Mandatory Death Sentence under Section 204 of the Penal Code Act and the same was done vide Gazette Notice No. 2160 dated 15th March 2018. It seems that the Supreme Court decision requires that the petitioner and all those in a similar position should wait a sentence re-hearing framework from the Attorney General and the taskforce. However, the Court of Appeal in **William Okungu Kittiny v R [2018] eKLR** expressed itself as follows;

"The decision of the Supreme Court only discouraged persons from filing petitions to the Supreme Court but the decision does not prohibit courts below it from ordering sentence re-hearing in a matter pending before those courts. By Article 163 (7) of the Constitution, the decision of the Supreme Court has immediate and binding effect on all other courts. The decision of the Supreme Court opened the door for review of death sentences even in finalized cases."

In view of the above provisions, it is abundantly clear that this court was clothed with jurisdiction to re-hear and resentence those that were convicted with capital offences whose sentence was mandatory death sentence. This is because the Muruatetu case outlawed mandatory death sentence in Kenya. In passing the sentence the court will not lose sight of the pre-trial and during trial incarceration period of 3 years. The court is alive to the fact that prison life is not easy for the obvious infringement of dignity and freedom.

I have carefully looked at the Petition, the written submission on mitigation, the three judgements by the learned magistrate and judges and the law pertaining to re-sentencing. The Petitioner were in gang of more than four persons who raided the complainants' home. They demanded for money and they left with several items and some cash. The manner in which the Petitioners' executed the offence put the victims in great deal of fear and the none recovery of the stolen items aggravated the offence.

The fact that they were numerous people involved in the crime armed with pangas, denotes premeditation and planning; there were actual assaults, sexual abuses (whose liability was not imposed on any of the Petitioners) and the victim were put in much anxiety. One can only imagine the trauma and the anguish that the victims went through. This aggravates the offence.

In mitigation, I have considered the trauma and pain the Petitioners suffered of having been on death row which was later commuted to life imprisonment by admin fiat. This is because from the time of the commission of the offence in 2006, the Petitioners have suffered anxiety over uncertainty as regards their fate with a death sentence hovering over their heads. In passing the sentence I have also taken into account the time they have already spent in custody, that is a total of about 13 years. I have also taken in mitigation that the Petitioners were first offenders and the claim to have reformed. I note that even though the crime involved actual violence, it did not result in loss of life.

The appropriate sentence that reflects society's disapproval of their actions but also takes into account their mitigation is one of 13 years imprisonment from the date of arrest. The period of imprisonment be substituted with the already served.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF OCTOBER, 2019.

R. NYAKUNDI

JUDGE