



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISC. CRIMINAL APP. NO. 16 OF 2018

SAFARI KOMBE.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Appellant in person

Ms. Sombo for the State

RULING

The petitioner was tried by the High Court at Malindi for the offence of murder contrary to Section 203 of the Penal Code. He was found guilty of the charge and convicted to suffer death as punishment under Section 204 of the Penal Code.

Being aggrieved with conviction and sentence, he preferred an appeal to the Court of Appeal and in the Judgment of the Court dated 30.10.2015, the appeal on both conviction and sentence was found to be unmeritorious.

This petition is on re-sentencing pursuant to the decision by the Supreme Court in **Francis Muruatetu v R {2017} eKLR**. The Supreme Court inter alia stated that the mandatory nature of the death penalty requirement in terms of Section 204 of the Penal Code was unconstitutional. The court further ordered that a task force under the auspices of the office of the Attorney General to develop a network directed at the past convicts sentenced to suffer the death penalty under Section 204 of the Penal Code.

In the midst of all that the High Court was faced with a valiant of petitions over the mandatory nature of the death penalty. Recognizing the legitimate expectation by the petitioners. There was virtual unanimous opinion that applying the test in **Francis Muruatetu** dicta reference be made to specific circumstances of the case as outlined by the Supreme Court to impose a particular type of punishment besides the death penalty.

The purpose of this petition is therefore to take the broad approach as summarized in the **Muruatetu case** to address the issues raised by the petitioner.

Brief Background

The petitioner in this case as deduced from the Judgment of the trial court and Court of Appeal on the 8.3.2012 at Majenjeni village while armed with a stick he struck the deceased on the head before fleeing with his purse but he was pursued by the members of the public who managed to apprehend him and later escorted him to Kilifi Police Station for further investigations.

The deceased in the meantime soon after succumbed to death due to the said injuries on the same night. As part of the mitigation offered by the petitioner, he is a first offender who regrets the commission of the offence.

Further the petitioner urged this court to consider that he is not beyond reformation and rehabilitation.

In addition, the following aggravating factors are relevant as a component of re-sentencing.

- 1. The gravity of the offence and deprivation of the right to life protected under Article 26 of the Constitution.***

2. That the trial Magistrate Court found that the petitioner unlawfully committed the offence with malice aforethought.

3. The clear evidence supported the charge of murder contrary to Section 203 of the Penal Code.

4. The relevance of this petition in the context of society and the victim family and circumstances of the offence are exclusively documented in the probation officers report dated 23.9.2019.

On this analysis and in respect of the fundamental principles in **Muruatetu case** there are no extenuating factors why the deceased died a cruel and painful death in the hands of the petitioner.

Whereas the petitioner submits that he is now a reformed person ready to be reintegrated back to the community and his family cumulatively the aggravating factors outweigh the mitigation offered with respect to the circumstances of the offence.

The prima facie in **Muruatetu case** is not meant to provide a soft landing in favour of murder convicts. The burden is on the petitioner to convince the court that there are substantial and extenuating factors that will qualify for imposition of less services punishment.

In my view doing the best in the circumstances and on the facts of the case, I needless to say that the right of life sanctioned by the constitution must be jealously preserved by every person and citizen within the Republic of Kenya.

The consequence is that the petitioner's petition, finds merit to the extent of substituting the death penalty with a prison sentence of twenty (25) years imprisonment with effect from the date of Judgment of the trial court dated 21.10.2014.

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

.....

R. NYAKUNDI

JUDGE

In the presence of:

1. Ms. Sombo for the DPP

2. The Petitioner