



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

PETITION NO.80 OF 2018

CORAM: CHERERE- J.

BETWEEN

FRANCIS OCHIENG' NDEGE.....PETITIONER

AND

REPUBLIC.....RESPONDENT

JUDGMENT

Introduction

1. **FRANCIS OCHIENG' NDEGE**, (hereinafter referred to as the petitioner) was on 3rd December, 2007 convicted and sentenced to death for murder contrary to section 203 as read with **Section 204** of the **Penal Code**. Petitioner did not lodge an appeal with the Court of Appeal.
2. By a petition filed on 18th October, 2018, the petitioner has petitioned this court for resentencing.
3. Mr. Muia, learned counsel for the state proposed that the petitioner be sentenced to an imprisonment term of 20 years.

Analysis and Determination

4. At the time of the petitioner's conviction, death was the only available sentence for the offence of murder.
5. The Supreme Court decision in *Francis Kariuki Muruatetu & Another v Republic & 5 Others [2016] eKLR* declaring the mandatory death sentence unconstitutional has necessitated resentencing of all persons previously sentenced to the mandatory death sentence.
6. In the case of *Michael Kathewa Laichena & another v Republic [2018] eKLR*, Majanja J, précised the procedure that a court considering resentencing should take and stated as follows:

“The Sentencing Policy Guidelines, 2016 (“the Guidelines”) published by the Kenya Judiciary provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. Since the Guidelines did not take into account the fact that the death penalty would be declared unconstitutional, the Court in the Muruatetu Case (Supra, para. 71), considered that in re-sentencing in a case of murder, the following mitigating factors would be applicable;

(a) age of the offender;

(b) being a first offender;

(c) whether the offender pleaded guilty;

(d) character and record of the offender;

(e) commission of the offence in response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender;

(h) any other factor that the Court considers relevant.

7. The court further stated that the **Guidelines** do not replace judicial discretion but are intended to promote transparency, consistency and fairness in sentencing.

8. The mitigating circumstances in this case are that the petitioner could be considered a first offender. The aggravating circumstances in this case are that the victim of the murder was defenceless 12 year old boy who died of fracture to the skull and spine.

9. Under the proviso to **section 333(2)** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**, the court is entitled to take into account the period the petitioner has spent in custody in determining the sentence. The court record shows that the petitioner was arraigned before the court on 1st February, 2001 and was sentenced on 3rd December, 2007. He was in custody for close to 6 years during the trial and has served 11 years from the date of his conviction.

10. The use of guideline judgments of Superior Courts has also been underlined to ensure consistency and fairness. In the case of **Godfrey Ngotho Mutiso V Republic – Criminal Appeal No. 17 of 2008**, the *ratio decidendi* of the **Muruatetu's** case is at **paragraph 69** where the Supreme Court stated:

“Consequently, we find that Section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides the mandatory death sentence for murder. For avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment.”

11. After considering all the mitigating and aggravating factors, and the fact that the petitioner has been in custody for a cumulative 17 years, I re-sentence him an imprisonment term of **20 years** from date of conviction which is 3rd December, 2007.

DATED AND SIGNED IN KISUMU THIS 20th...DAY OF.....December.....2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Petitioner - Present

For the State - Mr Muia