



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 47 OF 2019

ALFRED NASSOR CHIRIBA.....PETITIONER

VERSUS

REPUBLICRESPONDENT

CORAM:Hon. Justice R. Nyakundi

The Petitioner

Ms. Sombo for state

RE-SENTENCING

The Petitioner was initially charged, tried, convicted and sentence to death for two counts of murder contrary to section 204 of the Penal Code. He murdered **Nassoro Chiriba Mramba** and **Kang’ombe Nassoro Chiriba** on the 4th of December, 2010.

The petitioner has now brought the instant petition in terms of the Supreme Court decision in **Francis Muruatetu & Another v Republic (2017) eKLR**. It is the decision which declared the mandatory nature of death sentence unconstitutional, null and void. The commutation of the same to life imprisonment by an administrative fiat was also declared null and void in the same aforementioned decision. The Landmark decision clothed judicial officers with the discretion to mete out sentences in according to the individual circumstances of each case. Thus, a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution.

Prior to the decision in **Muruatetu (supra)**, all the Honourable Magistrate or Judge had to do was merely to pluck out from the section, the prescribed minimum mandatory sentence and plant it in her own judgement without regard to the individual circumstances of the case. **Muruatetu Case** marked the beginning of a paradigm shift as far as sentencing of offenders is concerned.

It can also be said that **Muruatetu Case (Supra)** necessitated re-sentencing of all persons who were previously sentenced to a mandatory minimum 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.”

Nevertheless, the task force report on review of the mandatory death sentence under Section 204 was duly presented to the Attorney General on October 2019.

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. I now turn to the **Sentencing Policy Guidelines, 2016 (“the Guidelines”)**; published by the Kenya Judiciary, the sentence imposed must meet the following objectives in totality;

- a) Retribution: To punish the offender for his/her criminal conduct in a just manner.*
- b) Deterrence: To deter the offender from committing a similar offence subsequently as well as discourage other people from committing similar offences.*
- c) Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.*
- d) Restorative justice: To address the needs arising from criminal conduct such as loss and damages.*
- e) Community protection: To protect the community by incapacitating the offender.*
- f) Denunciation: To communicate the community’s condemnation of the criminal conduct.*

In light of the forgoing, Hon C. Kariuki in Stephen Kimanthi Mutunga v Republic [2019] eKLR, stated as follows:

“23. The guidelines were published when the mandatory death sentence was still legal and as such, they did not provide for mitigating circumstances for offences which attracted the mandatory death sentence.

24. To avoid a lacuna, the Supreme Court in the Muruatetu case gave guidelines with regard to applicable mitigating factors during sentence re-hearing in a murder charge. Since the mandatory death sentence was also applicable to convicts of robbery with violence, the Supreme Court guidelines are also applicable to such cases. They are;

- 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.”*

The Supreme Court in the **Muruatetu Case** however clarified that the guidelines did not in any way replace judicial discretion and are geared towards promoting consistency and transparency in sentencing hearings. They are also geared towards the promotion of public understanding of the sentencing process.

Mitigation

The Petitioner was a youthful man when he committed the murder. He was about 27 years. He has stayed in custody for approximately 10 years having been arrested on 11/12/2010. He begs for a chance to rejoin the society. He is a first offender and he was not a serial offender and ought to have been treated as such.

He asserted that the first trial court did not have the discretion to take into account the Petitioner's mitigation circumstances at the conclusion of the trial proceedings as the death sentence was the only one prescribed by the law. He submitted that there is no legal research has shown that capital offenders cannot reform.

He also asserted that industrial and vocational training. He claims to have exhibited good conduct and higher degree of discipline to both the prison authorities and his fellow inmates throughout this period. Further, he claimed that he had undergone correctional trainings offered to interested prisoners, such as Diploma (Discover Bible School Lessons) 2018. He believes that the said certificate is an indication that the

petitioner is a reformed and rehabilitated.

He prays that substitute the death sentence and order the release of the petitioner from the prison custody and any other order this Honourable Court may deem fit to grant.

Analysis

The Petitioner was involved in a witchcraft-related murder. He accused the deceased persons of being witches following the death of the one of the family members. He caused his deceased persons' death by striking them on the head with machete.

It is noteworthy that when passing a sentence the court must look at the objective to be achieved. Whether deterrence, public protection or reformation is the objective, courts must first of all have regard to the nature and circumstances of the offence, the offender, the victim and the public interest. In simple terms, courts look at the aggravating and the mitigating factors of the offence as well of the offender. The sentencing court must therefore weigh the two and come to an informed conclusion as to the type of sentence to impose.

I have considered the circumstances and the sequence of events that culminated in the deceased's death. The crime was well-planned and pre-mediated. The defenseless old man and women lost their lives in a cruel, violent and callous manner. I take note of the vulnerable organ, to wit, the head which the accused mercilessly hit with a machete knowing that death could culminate. Clearly, the accused used disproportionate and excessive force by his own act to inflict grievous bodily harm on the deceased persons.

Their lives were ended in a cold blooded murder and the weapon used to carry out the crime was undoubtedly dangerous. The deceased persons died a painful death. The fact that the Petitioner went on to threaten other people with death if they disclose information pertaining to the commission of the offence and also by maintaining a lie from the beginning to the end of the trial shows that he lacked remorsefulness for the murder. One would only conclude that the Petitioner is a menace to the society and he ought to be quarantined. The witnesses who testified should be protected until the Petitioner has completely rehabilitated.

I have not seen an extenuating circumstances in this matter. There is need to send a strong message to the society that violence against other persons is strongly condemned. Society abhors this kind of gratuitous violence where individuals take the law into their own hands over perceived wrongs committed by fellow citizens.

As I have mentioned elsewhere in this mater, the court is alive to the fact that the decision in **Muruatetu** did not do away with death sentence but rather its mandatory nature. It is my considered view that the sentence befitting the aggravating nature of the circumstances of this matter is death by any manner allowed by law. However, the petitioner is still serving life imprisonment so be it.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 14TH DAY OF APRIL 2020

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REUBEN NYAKUNDI

JUDGE