



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 24 OF 2019**

**FRANCIS CHARO BAYA.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**Coram: Hon. Justice R. Nyakundi**

**The Petitioner**

**Ms. Sombo for the state**

**RE-SENTENCING**

In the instant petition, the Petitioner seeks resentencing following the Supreme Court of Kenya's decision in **Francis Karioko Muruatetu & Another vs Republic, Petition No. 15 & 16 of (2017) eKLR** declared the mandatory nature of the deaths sentence and the commutation of that sentence by an administration fiat to life imprisonment unconstitutional and therefore null and void.

The rationale is that the mandatory nature of death sentence as provided for under section 204 of the penal code deprived trial courts judicial discretion to consider aggravating and mitigating circumstances to enable the court to impose an appropriate sentence based on the peculiar 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.

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 foregoing, 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.

I have considered the Petitioner's mitigation that he is a first offender with no prior criminal record, he is remorseful, he has the right to benefit from the list severe of the prescribed punishment, he has reformed and been rehabilitated during the time he has been behind bars. I have also complied with the provisions of Section 333(1) which states that:

*“subject to the provisions of section 38 of the penal code which states, every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this code, provided that were the person is sentenced under section (1) has, prior to such sentence, been held in custody, the sentence shall take into account the period spent in custody.”*

I have noted that the Petitioner has been in custody for approximately five years including pre-trial custody. I also note that he was not released on bail or bond terms during his trial. He remained in custody from his arrest up until the time of conviction.

The deceased died as a result of mob justice. Mob justice is not justice. Mob justice is not justiciable in law. He was accused of having robbed the 4<sup>th</sup> accused of his motor cycle the night prior the gruesome murder. The deceased undoubtedly died a very painful death in the hands of the mob. The pain that his family must be feeling due to the regrettable incident is imaginable.

Suppose the allegation was true, that could not justify the killing of the deceased. Kenya is a country which is governed by the rule law. The matter had been reported to the police. It could have been wise that the Petitioner and his colleagues informed the police that the deceased was one of the robbers. Even if it was true that the deceased had stolen the motorcycle, the same cannot suffice to be taken as provocation to commit the heinous crime.

The Petitioner was driven by euphoria and not by proration. It is a fundamental principle that no man is allowed to take the law into his own hands as such conduct cannot be condoned. The mind boggles as to why our people readily resort to violence at the slightest provocation or at no provocation at all.

I find that the Petitioner and his colleagues unnecessarily resorted to violence as a way of resolving a dispute acted barbaric manner occasioning the death of the deceased. Sacred human life was lost and the court frowns at such violent criminal conduct.

We should show displeasure at such violent conduct leading to loss of life by the corresponding sentences imposed. The offence warrants to serve deterrent sentence out of the community. Society abhors this kind of gratuitous violence where individuals take the law into their own hands over perceived wrongs committed by fellow citizens. The aggravating factors herein outweigh the extenuating factors and the sentence befitting the crime herein remains 15 years' imprisonment from the date of arrest. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MALINDI THE DAY OF 14<sup>TH</sup> APRIL 2020.**

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**R. NYAKUNDI**

**JUDGE**