



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**(CORAM: CHERERE- J.)**

**PETITION NO. 62 OF 2019**

**BETWEEN**

**LUCAS OCHIENG MWALO.....PETITIONER**

**AND**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. **LUCAS OCHIENG MWALO, (Petitioner)** was on 05<sup>th</sup> October, 2016 convicted and sentenced to death for the offence of murder contrary to **Section 203** as read with **Section 204 of the Penal Code** in **Kisumu High Court Criminal Murder Case No. 32 of 2004** on 05<sup>th</sup> October, 2016. The Petitioner did not prefer an appeal to the Court of Appeal.

2. By a petition filed on 28<sup>th</sup> October, 2019, the Petitioner has petitioned this court for resentencing on the main ground that the death sentence imposed on him is unconstitutional. He pleaded for leniency and stated that he was arrested in 2011 and was convicted in 2016 after having spent over 5 years in custody.

3. Ms. Gathu, Senior Prosecution Counsel for the state submitted that the Petitioner attacked the deceased with an axe cutting her on the head and legs resulting in a painful death. It was also submitted that the offence was committed in the presence of other persons that were greatly traumatized. The state proposed that Petitioner be resented to 25 years' imprisonment.

**Analysis and Determination**

4. At the time of the Petitioner's conviction, death was the only available sentence for 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. I have considered **The Sentencing Policy Guidelines, 2016** and its application which is intended to promote transparency, consistency and fairness in sentencing (See **Michael Kathewa Laichena & another v Republic [2018] eKLR**).

7. Under the proviso to **section 333(2)** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**, the court in resentencing a Petitioner is entitled to take into account the period the petitioner has spent in custody in determining the sentence and mitigating and aggravating circumstances.

8. The court record shows that the Petitioner was in custody for about 5 years during trial and has served 4 years and 5 months. As a means of reformation, the Petitioner has during his stay in prison obtained various diplomas and certificates among them Grade III in wielding.

9. This court requested for the Petitioner's home report and Victim Impact Assessment report for consideration during resentence. The home report discloses that the Petitioner who is now 26 years old was not married at the time of his arrest. Both the deceased's family and Petitioner's family have moved on and have no grudge against the Petitioner.

10. The evidence on record demonstrates that the attack on the deceased was unprovoked. The injuries sustained by the deceased leave this court in no doubt that she died a painful death for which the Petitioner ought to be penalized for. I therefore re-sentence him to **20 years'** imprisonment from date of the date of his sentence on **05<sup>th</sup> October, 2016**.

DATED THIS 14<sup>th</sup> DAY OF April 2020

T. W. CHERERE

JUDGE

Court Assistants - Ms. Amondi/Ms. Okodoi

Petitioner - Present

For the State - Mr. Onanda

Order

This judgment has been delivered to the parties via video conferencing (skype) due to measures restricting court operations due to the COVID -19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March, 2019.