



**REPUBLIC OF KENYA**

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

**(CORAM: CHERERE-J)**

**CRIMINAL PETITION NO. 47 OF 2019**

**BETWEEN**

**PAUL OMONDI ODIPO.....1ST PETITIONER**

**DAVID OMONDI ACHAYO.....2ND PETITIONER**

**CHARLES ODUOR AKINYI OGAJA.....3RD PETITIONER**

**JOSEPH ONYANGO WERE ODUMA.....4TH PETITIONER**

**HEZBON OTIENO OKOTH.....5TH PETITIONER**

**AND**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

**Introduction**

1. On 11<sup>th</sup> October, 2016, 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Petitioners were sentenced and convicted to suffer death 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. 12 of 2006**. The 2<sup>nd</sup> Petitioner who was at the time of conviction found to be laboring from a serious mental disorder was ordered to be detained at the President's Pleasure. The conviction and sentence was confirmed by the Court of Appeal in **Criminal Appeal no. 12 of 2006**.

2. The Petitioners have petitioned this court for resentencing on the main ground that the sentences imposed on them are unconstitutional.

3. Ms. Gathu, Senior Prosecution Counsel for the state submitted that the Petitioners had only served 3 years which was not adequate for rehabilitation and proposed that Petitioners be resented to 30 years' imprisonment.

**Analysis and Determination**

4. At the time of the Petitioners' conviction, death was the only available sentence for murder. The 2<sup>nd</sup> Petitioner has since recovered from his mental disorder.

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 Petitioners were in custody for about 10 years during trial and have served 3 years and 5 months. During

their stay in prison, the 2<sup>nd</sup> Petitioner has obtained a certificate in bible studies, 3<sup>rd</sup> Petitioner has passed Grade II test in tailoring and 5<sup>th</sup> Petitioner has a diploma in bible studies. The 1<sup>st</sup> and 4<sup>th</sup> Petitioners have not undertaken any training as a means of reformation.

9. This court requested for the Petitioners' home reports and Victim Impact Assessment report for consideration during resentence. The home reports disclose that the Petitioners families recommend resentence whereas the victim's widow and children are content with the log terms of sentence imposed on the Petitioners who for no justifiable cause killed the deceased who was their sole bread winner.

10. I have considered that the Petitioners attack on the deceased was unprovoked and that he died a painful death when they set upon him with jembes and sticks in the presence of his wife as a result of which he died. The Petitioners ought to be penalized for the heinous crime they committed. Since the Petitioners were in custody for 10 years during the trial, I resentence them to **20 years'** imprisonment from date of the date of his sentence on **11<sup>th</sup> October, 2016**.

**DELIVERED THIS 14<sup>th</sup> DAY OF April, 2020**

**T. W. CHERERE**

**JUDGE**

**Court Assistants - Ms. Amondi/Ms. Okodoi**

**Petitioners 1-5 - 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.**