



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CONSTITUTIONAL PETITION NO. 60 OF 2019**

**SALIM GALGALO HUSSEIN..... PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**Coram: Hon. Justice R. NyakundiThe Petitioner**

**Ms. Sombo for the state**

**RE-SENTENCING**

Before me is a petition for re-sentencing pursuant to the Supreme Court of Kenya's directive in **Francis Karioko Muruatetu & Another v Republic (2017) eKLR**. In the said Landmark decision, the apex court declared the mandatory nature of death sentence and its commutation by the executive fiat to life imprisonment unconstitutional and therefore null and void.

The rationale behind the Supreme Court decision is that mandatory sentences deprive the courts the requisite judicial discretion to take into account individual circumstances of each case when sentencing offenders. Prior to the decision in **Muruatetu**, all what judicial officers had to do was merely to pluck out the mandatory sentence from the section and plant it in their own judgements without regard to the individual circumstances of the case.

I should also add that lack in discretion to consider mitigating or extenuating and aggravating circumstances impede judges from assessing appropriate sentence befitting the unique circumstances of each individual case. The principle in **Muruatetu** has also been extended to apply in robbery with violence, defilement cases among other offences with which minimum mandatory sentences are prescribed.

In passing a sentence, it is important to consider first, all those factors which reduce the moral blameworthiness of the accused. If, in the opinion of the court, the facts so warrant, it should find that extenuating circumstances exist. The approach at this stage is largely subjective in character. The court will then proceed to consider all aggravating features, including the brutality of the crime and all those objective factors which would assist in the determination of the sentence. The court may well then decide whether, despite the extenuating circumstances, they are outweighed by the aggravating circumstances.

The Petitioner was charged with murder contrary to section 203 of the Penal Code as read with Section 204 of the same code. The particulars of the offence were that on 24<sup>th</sup> January 2010 at Maweni village in Malindi location within Malindi district, murdered Daniel Mitzanse Baya. He was found guilty as charged and sentenced to serve death sentence which was later commuted to life imprisonment by an administrative fiat.

In his petition, the Petitioner implores for an acquittal on the basis that he is seriously sick due to the mandatory sentence imposed upon him. He asserted that this has caused a great deal of psychological torture to him. He contends that the imposition of death sentence on him was arbitrary, unconstitutional and its application on him denied him the right to a fair trial.

In aggravation, the murder was quite egregious. The deceased had multiple stabs on various body parts especially on the chest which houses lungs and heart, and abdomen which is the home to the liver. In my view, the Petitioner intended the attack not only to cause grievous harm to the deceased but to certainly end his life. The viciousness of the attack was not only demonstrated by the multiplicity of the wounds but also by the depth and extent of the wounds which the doctor described as deep penetrating, asseverating,

In assessing an appropriate sentence, the court has taken into consideration the totality of mitigatory factors and sought to weigh them *vis-a-vis* the aggravatory factors at the same time seeking to strike a balance on the nature of the offence, murder with malice aforethought and the offender, his personal circumstances and societal interest, that justice must not only be done but must be seen to be done.

The Petitioner stands convicted of a brutal murder. Society on the other hand requires protection from dangerous criminals like him and in fact the society looks up to the court to do justice not condone crime in a manner which would intrigue society into losing confidence in the whole justice delivery system.

The Petitioner by unnecessarily resorting to violence as a way of resolving a dispute acted in a barbaric manner occasioning the death of the deceased. Sacred human being was killed 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 deserves custodial sentence of the Petitioner as a deterrent and rehabilitation measure for the petitioner.

In passing sentence, the court will not lose sight of the pre-trial and during trial, incarceration period pursuant to section 333 of Criminal Procedure Code. The pre-sentence time of incarceration will be taken as part of punishment already served and suffered. The Petitioner was arraigned in court in January 2010 and his case was concluded and a conviction was preferred on the 31<sup>st</sup> of May, 2011. Which means that he was in custody for a year and four months prior to his conviction and sentencing. The court is alive to the fact that from his time of arresting to this date, the Petitioner has been in prison for about 10 years.

The murder was heinous, the Petitioner was not remorseful regarding the offence he committed, and he did not take steps to reconcile with the family with the deceased. The pain that the victim's family is feeling is unimaginable. In his Petition and mitigation, the Petitioner did not make an attempt to show remorse or care towards the victim's family and the society at large. I have no doubt the aggravating circumstances in this case outweigh the extenuating circumstances. The sentencing befitting the gravity of the offence herein is 30 years imprisonment.

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

.....

**R. NYAKUNDI**

**JUDGE**