**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 36 OF 2018**

**MOSES KADENGE DADU..... PETITIONER**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**RE-SENTENCING**

The petition before me was brought 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.

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."***

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.

Sentencing is a notoriously problematic exercise. It is a balancing act. From time to time jurists have espoused brilliant philosophies around it. Guidelines have been developed. The legislature sometimes weighs in with mandatory minimum sentences for certain offences. There are certain basics. The penalty must fit the crime. The interests of the offender must be balanced against those of justice. It is not right that someone who has offended society should go scot free, or escape with a trivial sentence. But at the same time he should not be penalized

beyond what his misdeed befits. As a matter of principle, punishment should be less retributive and more rehabilitative.

There are more such philosophies or ideologies. But at the end of the day, after everything else has been considered and said, the judicial officer comes down to the hard facts before him; to the individual circumstances of the people before him – the offender and the victim. He cannot be dogmatic about anything. There is no room for an approach that is purely mathematical. A slavish adherence to precedence is manifestly injudicious. In sentencing, the ages of the accused and the victim are relevant. The younger the victim the harsher the sentence, and the older the accused the harsher the sentence.

In mitigation, the appellant is a first offender, thus, he does not have a previous criminal record. He asked the court to consider the period already spend in remand custody. That he maintained good character during the period he has been in prison and that he has taken part in reform programs and he believes has been rehabilitated. The appellant is fairly young, he is approximately 30 years of age. The presentence report recommended that the appellant be released.

In aggravation, the murder was quite brutal. The Petitioner came out of his house with a panga and grabbed S threw her onto the ground and slit her throat and cut her head using the panga. The sacrosanct life of an innocent minor was unnecessarily lost. Apparently, the aggravating factors in the instant case outweigh the mitigating circumstances raised by the Petitioner. The sentencing principle applicable herein is that of deterrence. There is no evidence to interfere with life imprisonment.

14 days right of appeal explained.

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

**.....**

***R. NYAKUNDI***

***JUDGE***