

REPUBLIC OF KENYA

CONSTITUTION PETITION NO.100 OF 2019

HIGH COURT OF KENYA AT KISII

MOO.....PETITIONER/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. **MOO** the petitioner/ ('the applicant') was charged with the offence of murder and was convicted and sentenced to death. His appeal to the court of appeal was dismissed and the High Court sentence was affirmed and upheld.
2. By a petition filed on the 11/11/2019 the applicant states that after his appeal to the Court of Appeal was dismissed he is being held at the *President's pleasure* under section 25 (2) of the Penal Code. He claims that this is unconditional and inconsistent with Article 53 (1) (f) of the Constitution. He seeks that he be re-sentenced. He relies further on Articles 25 (c), 27 (1)(2) 28 and 50 (2)(p) of the Constitution.
3. Mr. Otieno for the State did not oppose the petitioner's application. Mr. Otieno submitted that the Court can resentence the applicant. That the applicant was below the age of 18 when he committed the murder. He relied on Petition No. 570 of 2015.
4. In *AOO and 6 Others v Attorney General and Another NRB Petition No. 570 of 2015 [2017]eKLR* Justice Mativo held as follows;

The constitution being the supreme law of the land separates the powers of the legislature, the executive and the judiciary. Judicial power is reserved to the judiciary. The imposition of a punishment in a criminal matter which includes the assessment of its severity is an integral part of the administration of justice and is therefore the exercise of judicial, not executive, power. In so far as section 25 (2) & (3) of the Penal Code [38] allows a person aged below 18 years to be detained at the president's pleasure, thereby granting the president powers to determine sentence or when to release the person and requires a judicial officer to forward notes to the president, in my view it offends the principle of separation of powers and Article 160 (1) of the constitution of Kenya 2010.

5. In *Browne v The Queen [2000] 1 AC 45*, the Privy Council held that *a sentence of detention at the Governor-General's pleasure was contrary to the Constitution of Saint Christopher and Nevis because it constituted a deprivation of liberty otherwise than in execution of an order or sentence of the court. It held that since the Governor-General was part of the executive and since the selection of punishment was an integral part of the administration of justice, a sentence which depended on the pleasure of the Governor-General was not compatible with the constitutional separation of powers.*
6. In my view being held at the president's pleasure connotes an indefinite period and is unconstitutional. I find that this court can revisit the sentence imposed and resentence the applicant.
7. I have considered the facts of the case. The appellant was convicted of murdering one DO and after the murder he buried the deceased inside the house where he was staying and fled. The post-mortem revealed that the deceased had a deep cut wound on the left head and the eye globe was extended. She also had a deep cut wound on the left shoulder joint which severed the ligaments. That the lung had collapsed and there was bleeding on the left lung which indicated lack of oxygen. The doctor concluded that the cause of death was due to strangulation and also due to loss of blood from the cut wounds. What a painful way to die! The petitioner was sentenced to death. The court noted he was between 18 years when he committed the offence. The Supreme Court in the case of *Francis Karioko Mururatetu & Another vs Republic [2017] eKLR* held that the death sentence is unconstitutional.
8. I have considered the period the petitioner has been in jail. He was charged on the 13th January 2004. He was sentenced by the High Court on the 30th March 2007. He was in custody for about 3 years before he was sentenced. He has been in jail for a period of about 13 years. Taking into account the circumstances of the case, that a life was lost, the period he has served, I set aside the death sentence and resentence **MOO** to a period of **35 years imprisonment** to run from the **30th March 2007** when the trial court imposed the sentence.

Dated, signed and delivered at Kisii this 11th day of June 2020.

R.E. OUGO

JUDGE

In the presence of:

Applicant In person

Mr. Otieno Senior Prosecution Counsel Office of the DPP

Ms Rael Court Assistant.