



**REPUBLIC OF KENYA**

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

**MISC.APPLICATION NO. 58 OF 2018 FROM**

**ORIGINAL PETITION NO.7 AND 8 OF THE 2018**

**GEORGE NG'ANG'A MAINA.....1<sup>ST</sup> PETITIONER**

**RAPHAEL GURU MAINA.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**THE DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT**

**RE-SENTENCING**

What is before me is a ruling on re-sentence for the offence of murder contrary to **Section 203** as read with **204** of the Penal Code following the conviction of the petitioners after a full trial. The petitioners were charged, tried and convicted of murder contrary to Section 203 as punishable under Section 204 of the Penal Code. Upon conviction, each one of them was sentenced to suffer death on 4.7.2007.

Being aggrieved with the conviction and sentence, both of them preferred an appeal to the Court of Appeal and on 24.7.2009 the appeal was dismissed on its entirety for lack of merit. This time round, the petitioners have approached the High Court under Article 50 (2) (q) (20), (4) (23) (1), (3), 259 (1), (3) of the Constitution.

During the re-sentence hearing the Court in reaching an appropriate sentence, the Court called for mitigation from the petitioner, the post-conviction re-sentence report by that Department in accordance with section 1371 of the CPC. Seeking for the setting aside the life imprisonment which was subsequently converted in place of the death penalty for being arbitrary, excessive and disproportionate to the offence.

During the re-sentencing hearing, the court considered all these information and material in support of the petition. The analysis of the decision on sentence includes Section 1371 of the Criminal Procedure Code which provides as follows:

- (1) Upon conviction, the court may invite the parties to address it on the issue of sentencing in accordance with section 216.***
- (2) In passing a sentence, the court shall take into account—***
  - (a) the period during which the accused person has been in custody;***
  - (b) a victim impact statement, if any, made in accordance with section 329C;***
  - (c) the stage in the proceedings at which the accused person indicated his intention to enter into a plea agreement and the circumstances in which this indication was given;***
  - (d) the nature and amount of any restitution or compensation agreed to be made by the accused person.***
- (3) Where necessary and desirable, the court may in passing a sentence, take into account a probation officer's report.”***

In **Republic v. Philip Muthiani Kathiwa, Machakos High Court Criminal Case No. 14 of 2015**, the Court considered the issue of appropriate sentence in a case of manslaughter upon a plea of guilty and said:

**“The Principles**

3. *The objects of a sentence is, primarily, to punish for an offence and to reform the accused in such manner as to, as appropriate in the circumstances of the case, deter the repetition of the offence by the accused and others taking into account the moral blame-worthiness of the accused, the prevalence of the crime and the situation of the accused himself.*

4. *Section 17 of the Penal Code provides that criminal responsibility for the use of force in the defence of person or property shall be determined in accordance with principles of English Common Law. The question in every case is whether the force used by the accused in self-defence is, in the circumstances of the case, excessive. See Mokwa v. R (1976-1980) KLR 1337. The accused herein acted on self-defence when he tried to defend himself and others who the deceased while drunk had attacked by with a panga. The use of the poisoned arrow on the deceased, in the circumstances if this case, was excessive force, and the accused was guilty of Manslaughter.*

5. *In considering the appropriate sentence, same offences should attract similar consistent penalties. In Andrew v. R (1976-1980) KLR 1688, in a case where the appellant and his co-accused had in a fight started by them the deceased was stabbed, the Court of Appeal found manifestly excessive and reduced a sentence of imprisonment for 11 ½ years to imprisonment for a term of 5 years. In Orwochi v. R(1976-1980) KLR 1638, the Court of Appeal reduced as manifestly excessive the sentence of 4 years imprisonment for an appellant who, in circumstances similar to this case, had in self-defence during an ensuing struggle stabbed the deceased using the panga by which the deceased had attacked him, to such sentence as ensured the immediate release of eh appellant a young man aged 25 who had been in custody for 15 months before the sentence in the trial court and six months before appeal was heard and determined.*

6. *The decision of the Court of Appeal in Muoki v. R (1985) KLR 323 (Madan, Kneller JJA. & Platt, Ag. JA) is relevant. The Court approved a sentence of 3 ½ years for manslaughter as not being manifestly excessive as to warrant interference by the Court of Appeal and also approved the practice, then, of courts taking into account the period that the accused had been in remand in considering what term of imprisonment to impose. The practice of accounting for time spent in custody was given statutory backing in the 2007 amendment to section 333 (2) of the Criminal Procedure Code (Act No. 7 of 2007) which inserted a proviso that;*

*“Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”*

#### **Findings of the Court**

In the case of **Francis Karioko Muruatetu v R {2017} eKLR** the Supreme Court declared the mandatory death penalty as provided for under Section 204 of the Penal code for the offence of murder unconstitutional and the imposition of it amounted to torture, cruel and inhuman treatment.

In the Judgment the mandatory nature of the sentence was varied to allow trial courts exercise discretion in imposition of sentence proportionate to the circumstances and facts of the case.

As a result of the decision, certain factors were considered relevant in the course of exercising discretion to arrive at an appropriate, fair and just sentence that is:

- (a). The age of the offender*
- (b). The gravity of the offence*
- (c). Being a first offender*
- (d). Whether the offender pleaded guilty*
- (e). Character and record of the offender*
- (f). Remorsefulness of the offender*
- (g). Remorsefulness of the offence*
- (h). The possibility of reform and social re-adaptation of the offender*

Any other factor that the court may consider relevant. In the instant petition its contended by the petitioner that though death penalty was committed to life imprisonment.

It remains to be unconstitutional, therefore arbitrary and incompatible with the reasoning of the Supreme Court decision in **Francis Muruatetu (supra)**. What the petitioner is imploring this court more importantly is to consider that sentencing ought to be discretionary taking into account individual circumstances of the offender and the offence.

According to the petitioner, in reaching the decision of convicting the death penalty without due process and opportunity for him to mitigate violates right to a fair trial.

In the instant petition, I have taken into account the ages of the convicts, that since conviction and sentenced to death penalty, they have spent quite considerable period of time in prison custody.

Throughout petitioners were on death row awaiting execution of the sentence. That period is of significance in imposing any other punishment against the petitioners.

Further from the record, the specific facts and circumstances of the offence demonstrates that the murder was committed with malice aforethought.

Needless to say that, the aggravating factors for the offence outweighs the mitigation offered by the petitioners. In arriving at an appropriate sentence, I take into account all these factors and do sentence the petitioners to a term imprisonment of eighteen (18) years imprisonment from the date of arrest.

**Dated, delivered and signed in open court at Malindi this 17<sup>th</sup> day of July 2019.**

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**R. NYAKUNDI**

**JUDGE**