



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 31 OF 2018**

**IN THE MATTER OF ARTICLE 22 (1) & 23 (1) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF ARTICLE 19, 20, 21, 24, 25, 27, 28, 48, 50; 258 AND 259 OF THE CONSTITUTION**

**BETWEEN**

**MOHAMED IDDI OMAR.....PETITIONER**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**CORAM: Hon. Justice R. Nyakundi**

**Mohamed Iddi Omar the Appellant**

**Miss. Sombo for the Respondent**

**JUDGMENT**

This petition has been brought pursuant to the Supreme Court of Kenya's land mark decision in **Francis Karioko Muruatetu**. The court in that matter declared death sentence and its commutation by an administration fiat to life imprisonment unconstitutional and therefore null and void. This move was a condemnation of the mandatory nature of death sentence as encapsulated in terms of the penal code noting that it deprives the courts of the requisite discretion to take into account the aggravating and mitigating factors to a proportion just and appropriate sentence.

It is noteworthy that what the Supreme Court declared unconstitutional the mandatory nature of death sentence. This, death sentence remains legal but its no longer mandatory. In other words, a death sentence can still be imposed where the circumstances of the case invites the court to do so depending on the circumstances of each case.

In view of the above principles in Muruatetu case (supra), it is abundantly clear that this court was clothed with the jurisdiction to re-hear and re-sentence offender convicted of capital offences whose sentence was mandatory death sentence. Be that as it may, it must be remembered that not all minimum sentences are harsh, excessive and disproportionate. It is possible for a minimum sentence to be harsh or excessive and/or too lenient in some cases. Thus in my view, the principle in **Muruatetu case** of allowing judges to taking into account the aggravating factors , mitigation, personal circumstances of the convict or accused and the victim impact statement or any other extenuating circumstances remain to be valid factors in exercise of discretion to impose any other sentence than the death penalty.

**The Petition**

It is at this juncture that I endeavor to consider whether the relief sought by the petitioner herein is available for him. Petitioner was initially charged with the offence of murder in Criminal Case No. 12 of 2006. He was tried, found guilty, convicted and sentenced to suffer death. The finding of the trial judge was that the deceased returned home late and the accused was not pleased. He attacked her, hitting her on the head as a result of with she went into comma and eventually died. It was due to the injury suffered and the fact that the force was, aimed at the head, that the Learned trial Judge concluded that the accused intended to cause grievous harm to the deceased. He was therefore found guilty of murder as charged and convicted accordingly.

I have looked at the petition and the mitigation tendered, by the petitioner. He urged the court to consider that he is a first offender, that he is reformed and very remorseful for what transpired. He also avers that during the 13 years he has been behind bars. He peacefully lived with his fellow inmates and that the prison administration attests to the fact that he is completely rehabilitated and transformed. He says that he has become a useful member of the society and if given a chance to re-join the society, it will duly benefit from his services.

Additionally, he stated that he has undertaken several rehabilitation programs both spiritual and commercial. He asked the court consider that the period already served should be considered enough and vowed that he will not repeat the offence.

### **Re-sentencing Report**

I have also considered the re-sentencing report template filed. The report affirms the petitioner's claim that has been of good behavior while in custody. He is in fact presented as the most disciplined and hardworking individual with zeal to change himself for the better. It is indicated that he admits his inadequacies at the time of committing the offence and adds that he regrets his actions and had learnt his lesson the hard way. Further that he is looking forward to engage in peaceful reconciliations in future. In Section 5 of the report, it is indicated that the petitioner has undergone several rehabilitation programs while in prison and has furthered his education through training and skills acquisitions. These are held to include alternative to violence programme, Islamic spiritual course and he is planning to undertake a carpentry course when available.

It is also indicated the petitioner is currently a counselor on alternative to violence and has also attained one of the highest hierarchical stages of prisoners in terms of trust and responsibilities. In conclusion, it is indicated that the petitioner has so far served a total of 14 years including 3 years of remand. It is indicated that he is a first time offender with no prior criminal inclinations or history. On recommendations, the probation officer recommends a reduced sentence to the period already served. He added that this recommendation is informed by the inquiry that there is no threat to the community if the petitioner is released.

### **Sentencing**

It is fundamental to recognize that sentencing is a complex exercise undertaken by court by balancing the competing interest involving the offender, the victim and society at large.

According to **Muruatetu case** the following guidelines were set for a re-hearing sentence for the conviction of a murder charge:

- (a). age of offender;*
- (b). being a first offender;*
- (c). whether the offender pleaded guilty;*
- (d). character and record of the offender;*
- (e). commission of the offence in response to gender-based violence;*
- (f). remorsefulness of the offender;*
- (g). the possibility of reform and social re-adaptation of the offender;*
- (h) Any other factor that the court considers relevant.*

Useful guidance on sentencing can also be adopted in the persuasive case of **Spence vs The Queen; (Spence & Hughes) (unreported, 2<sup>nd</sup> April 2001) (Byron CJ)** where the Privy Council of the view that:

***“In order to be exercised in a rational and non-arbitrary manner, the sentencing discretion should be guided by legislative or judicially-prescribed principles and standards, and should be subject to effective judicial review, all with a view to ensuring that the death penalty imposed is only the most exceptional and appropriate circumstances. There should be a requirement for individualized sentencing in implementing the death sentence.”***

The petitioner herein was found guilty of murder, convicted and sentenced to suffer. Murder is one of the most serious offences in the Criminal Justice System of Kenya. As it stands and pursuant to **Muruatetu case**, its penalty goes up to death penalty if the court decides that there are aggravating circumstances which warrant imposition of the same. The ones of proving whether or not the death penalty or any other sentence should or should not be imposed shifts to the state.

In assessing an appropriate, the court has taken into account the totality of mitigation factors and sought to weight them vis-à-vis the aggravating factors at the same time seeking to strike a balance on the nature of the offence the offender, his personal circumstances and societal interest, that justice must not only be done but must be seen to be done. The appellant was relatively young when he committed the murder but however he was a mature adult of about 39 years.

In aggravation is the fact that precious human life was lost. Untimely, and the same denied the deceased the opportunity to live life to its fullness. The lost human life can never be replaced. In any event no amount of compensation can bring back lost life. It is in this regard that

this court will not lose sight of the sanctity of human life.

On the other hand, I have also noted several or mitigating circumstances. Extenuating circumstances refers to factors reducing moral blameworthiness of the appellant albeit not the criminal liability of the accused. These factors ought to be considered cumulatively. In mitigation/extenuation is that fact that there is credible evidence that both the appellant and his deceased wife were having violent fights regularly which might have culminated into this tragedy. The re-sentencing report has it that the murder was caused by intoxication, violent fights and mistrust. Thus proof of lack of motive for the murder.

It is also in extenuation/mitigation the appellant has not been given as a repeat offender at least no such submissions were made to the extent that it can be taken it is his first fliriting of the law. This means he lived as a law abiding citizen for 39 years without having committed any offence. Thus, his chances of recidivism are very low. It was a onetime unfortunate omission or mistake.

Further in mitigation/extenuation, the court is satisfied that the appellant has been totally rehabilitated. In resentencing report, he has been described as the most disciplined and hardworking individual. He is even working as counsellor. I have also taken into account the traumatic experience that will haunt the petitioner for the rest of his life for having murdered his wife. Further the psychological trauma and pain that the petitioner had suffered of being death row for a period of over 13 years awaiting for execution of the death penalty.

Lastly, in mitigation, the members of the society particularly his village also think that the petitioner has equally paid for his iniquities and that he is ready to be reintegrated with them. They are also willing to be part of his rehabilitation and reform. It is this court's view that there is no threat to the community if the appellant is released as per the re-sentencing report's recommendations on condition that he proceeds to serve three years' probation sentence for the directorate and after care services to participate in the re-integration programme of the petitioner.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 20<sup>th</sup> DAY OF SEPTEMBER 2019.**

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**R. NYAKUNDI**

**JUDGE**