REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

PETITION NO. 58 OF 2018

KENGA FOTO MANGI.....................................PETITIONER

VERSUS

REPUBLIC...RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Petitioner in person

Ms. Sombo for the State

RE-SENTENCING

The petitioner was charged and convicted of the offence of murder contrary to Section 203 as punishable in Section 204 of the Penal Code with the death penalty in **Criminal Case No. 11 of 2003 at Malindi High Court.**

Being aggrieved with both conviction and sentence, he preferred an appeal to the Court of Appeal which on full consideration of the Appeal on 19.1.2007 dismissed it for lack of merits in its entirety.

He has been on death row since the confirmation of the Judgment by the Court of Appeal. Factoring the decision in Francis **Karioko Muruatetu v R [2017] eKLR** by the Supreme Court rendered the mandatory nature of the death penalty under Section 204 unconstitutional. The Apex Court in this locus classicus case on the subject of the death penalty extensively delved into the constitutionality issue on the, mandatory death penalty. Further the court found that the mandatory death sentence for the offence of murder violated Article 27, on equality and freedom from discrimination before the law, the right to human dignity and to have that dignity respected under Article 28. The right not to be subjected to torture in any manner whether physical or psychological or treated or punished in a cruel, inhumane or degrading manner (see Article 29 of the Constitution).

The petition by **Francis K. Muruatetu** decision became a watershed and completely reformed the jurisprudential trajectory in sentencing capital offenders in the country. The outcome of the Supreme Court decision has witnessed an avalanche of petitions being filed across the country seeking a review and resentencing of the convicts afresh within the framework embodied in the textual guideline of the case.

The Law as of now is settled that the mandatory death penalty is unconstitutional though it remains to be recognized as the maximum sentence for the offence of murder contrary to Section 203 of the Penal Code. Central to this petition, therefore is to subject the decision to the prescribed principles in the **Muruatetu case**.

An important principle underlying the approach to sentencing in **Muruatetu** set out the following guidelines with regard to factors to take into account during re-sentencing:

a). Age of the 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 adaptation of the offender.

h). Any other factors that the court considers relevant.

In sum the court went further to state the underlying objectives of sentencing provided for in the 2016 judiciary of Kenya sentencing policy document should form part of the considerations to draw from with regard to sentence. According to the guidelines the sentence ought to meet the following objectives:

1). Retribution – to punish the offender for his/her criminal conduct in a just manner.

2). Deterrence to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

3). Rehabilitation to enable the offender reform from his criminal disposition and become a law abiding person.

4). Restorative justice.

To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims and society harm whereby punishment is seen as a form of justice.

Basically, in the words of the Supreme Court it seems clear that the constitutional powers of courts to adjudicate on matters and exercise discretion to factor in the various aspects of the offence to individualize an appropriate sentence.

Thus when the petitioner challenged the death penalty its associated with lack of discretion by the trial court to consider, mitigation, personal antecedents, previous record, aggravating factors and circumstances of the crime.

In the instant petition, the petitioner argued that has been in custody for the last 17 years. That during the period under review, he has reformed in terms of behavior, attitude and character while in custody.

That he has undergone basic training courses on spirituality and skills on commercial enterprise which if released could be applicable to bring him to contribute to his personal and nation building.

The inquiry conducted by the probation officer dated 26.8.2019 asserts that the petitioner is no longer a threat to society and his family is willing to accommodate him back and assist in his reintegration.

From the record, the following aggravating factors stand out. The killing of the deceased was one of those not justified within the constitution and statute Law. As viewed by the trial court and Court of Appeal, consideration of the detailed facts and circumstances showed a pre-meditated murder where the petitioner armed himself with a dangerous knife which he used to inflict fatal harm.

Thirdly, provocation was ruled out by both courts as a defence to the murder of the deceased under Section 208 of the Penal Code. The courts took into account the reasonable circumstances that existed as might have affected the applicant to bring himself within the meaning of provocation. The test having failed, then the petitioner killed the deceased with malice aforethought.

Fourth, the murder victim was a defenceless person and the motive of the murder remains unclear. It must be recognized that whether the deceased had an intimate relationship with the sister-in-law of the petitioner cannot be a vital reason to kill on behalf of his brother to the extent that such crime was committed without due regard to human life. This malice aforethought deprived the deceased's right to life under Article 26 of the Constitution.

The issue is whether considering the aggravating factors, mitigation and circumstances of the commission of the offence, the petitioner has met the threshold of reviewing the death penalty to any other sentence.

Having considered the aggravating and mitigation factors, I take pertinent view of the petition in consonant with the principles in **Muruatetu case** that the petitioner was denied pre-conviction mitigation and due process at the sentencing phrase.

By making the death penalty mandatory for murder, Section 333 (2) of the Criminal Procedure Code which provides that the period in remand custody be taken into account on the whole in computing sentence, is automatically impermissible.

The petitioner has therefore been on death row under the mandatory death penalty. The effect of it is the predictability of when an execution would ever take place, is always in abeyance. This is constitutional imperative where courts continue imposing the death penalty but the executive on the other hand seemed to have **'frozen'** executions.

The justice of the matter therefore demands a determination of this petition under the scope of **Francis Muruatetu case** principles. Speaking to the issues raised by the petitioner, his age, personal circumstances, mitigation factors and the significance aspect of aggravating factors I come to the conclusion that the death penalty against the petitioner be reviewed and substituted with twenty five (25) years imprisonment with effect from 8.9.2003. This is the path I have taken, and as a consequence the petition on sentence partially succeeds.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 3RD DAY OF DECEMBER 2019.

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R. NYAKUNDI

JUDGE