



**REPUBLIC OF KENYA**

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

**PETITION NO. 47 OF 2018**

**CORAM: D.S. MAJANJA J**

**BETWEEN**

**NELSON MWITI GIKUNDA.....1<sup>ST</sup> PETITIONER**

**GEOFFREY MUTWIRI GIKUNDA.....2<sup>ND</sup> PETITIONER**

**JOHN KIMONYE KINOTI.....3<sup>RD</sup> PETITIONER**

**AND**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The matter before the court is a petition for resentencing necessitated by the Supreme Court decision in *Francis Karioko Muruateru & Another v Republic* SCK Pet. No. 15 OF 2015 [2017] eKLR declaring the mandatory death sentence of the offence of murder unconstitutional.

2. The petitioners, **NELSON MWITI GIKUNDA**, **GEOFFREY MUTWIRI GIKUNDA** and **JOHN KIMONYE KINOTI** were charged, convicted and sentenced to death for the offence of murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)* at a trial before the High Court at Meru in *Criminal Case No. 50 of 2003*. They appealed against the conviction and sentence to the Court of Appeal in *Nyeri Criminal Appeal No. 65 of 2011*. The appeal was dismissed on 31<sup>st</sup> October 2008.

3. According to record, the petitioners together with other accused persons, were part of a gang who murdered Stella Kinya on 5<sup>th</sup> November 2002 at Kararene Sub-location, Kiamogo Location of Meru Central District, Meru County. On 23<sup>rd</sup> October 2002 at about 1.00 a.m. Kendi (PW 1) was woken up by people banging on her door. She recognized some of the accused persons and other people including the deceased who had a baby. PW 1 and her sister Nkirote (PW 3) covered the baby with a piece of cloth but these people started assaulting the deceased and Nkirote. Then on 5<sup>th</sup> November, 2002 at about 1.00 pm. a group of people arrived at her home. These people were armed with whips, sticks and rungun. They took the deceased and her husband towards the chief's camp but when they reached near a swamp they set upon the deceased with all manner of weapons which led to her death. Kinya's husband, Nteere (PW 2), testified that on the 23<sup>rd</sup> October 2002 at about midnight he was asleep when he was woken up by people knocking on the door and when he opened he saw the accused persons who were armed with sticks, whips and rungun. They demanded for the deceased as they wanted to take her to the chief. They took the deceased and PW 3 but the following morning the deceased came back. On 5<sup>th</sup> November, 2002 at about 12.30 p.m. the same group and others came to the home of PW 2 and took him and the deceased away. The group set upon PW2 and the deceased but PW2 managed to escape and went to report at Kiiroa police station. On coming back from the police station, PW2 found that his wife had died as a result of the beatings inflicted on her by the gang. The post mortem report revealed that the deceased had injuries on the shoulder, face, arms, legs, external genitalia and neck. The doctor concluded that she died as a result of strangulation.

4. The petitioners urged the court in resentencing to consider the fact that they had been in custody since they were charged as the trial took 5 years. They admitted the offence and prayed for leniency. Counsel for the respondent submitted that the death penalty was still available and should be considered.

5. I wish to emphasise that the petition is one for resentencing not clemency. The petitioners have already had the benefit of their respective death sentences commuted to life imprisonment by His Excellency the President under the Power of Mercy conferred under **Article 133** of the Constitution. In this case, the court is being called upon to re-consider the facts as they existed at the time of sentencing and impose an appropriate sentence in light of the fact that the mandatory death penalty has been declared unconstitutional.

6. The *Sentencing Policy Guidelines, 2016* ("the *Guidelines*") published by the Kenya Judiciary provide a four tier methodology for

determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. Since the *Guidelines* did not take into account the fact that the death penalty would be declared unconstitutional, the Court in the *Murutetu Case (Supra, para. 71)*, considered that in re-sentencing in a case of murder, the following mitigating factors would be applicable;

- (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 re-adaptation of the offender;
- (h) any other factor that the Court considers relevant.

7. The Supreme Court emphasized that the *Guidelines* do not replace judicial discretion. They are intended to promote transparency, consistency and fairness in sentencing. In addition, the court noted the importance of guideline judgments of superior courts which promote an understanding of the process of sentencing.

8. I now turn to the sentence to be imposed on the petitioners. The starting point of this inquiry is that although the mandatory death penalty has been declared unconstitutional, the death penalty still exists as the maximum sentence for murder under **section 202** of the *Penal Code*, a fact emphasized by counsel for the respondent.

9. The Court of Appeal noted that the facts of the case were rather, “*disturbing and distressing.*” The petitioners were part of a gang that not only assaulted the deceased once but went again to kidnap her in broad daylight before murdering her in the most inhuman and callous manner. Their actions disclosed deliberate planning by one of the accused and executed by amongst others, the petitioners. Although they were first offenders and would benefit from leniency on that account, their wicked acts deserve severe punishment.

10. The petitioners were arraigned in court in 2003 and remained in custody until 2007 when they were sentenced to death, a period of 4 years. I am entitled to take this into account in light of the proviso to **section 333(2)** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*.

11. As stated elsewhere, the Supreme Court and the *Guidelines* (para. 25) underline the importance of decisions of superior courts. In *John Ndede Ochodho alias Obago v Republic KSM CA Criminal Appeal No. 120 of 2014 [2018] eKLR*, the Court of Appeal upheld a sentence of 25 years in a case of murder where the appellant assaulted the deceased several times. In *Jonathan Lemiso Ole Keni v Republic NRB CA Criminal Appeal No. 51 of 2016 [2018] eKLR* where the appellant shot a person without any provocation, the court imposed a sentence of 30 years’ imprisonment.

12. I have taken into account the mitigating and aggravating factors and giving credit to the time served, I therefore re-sentence the petitioners to **25 years’ imprisonment** commencing the date of sentencing before the trial court on **25<sup>th</sup> June 2007**.

**SIGNED AT KISII**

**D.S. MAJANJA**

**JUDGE**

**DATED and DELIVERED at MERU this 12<sup>th</sup> day of July 2018.**

**A. MABEYA**

**JUDGE**

Petitioners in person.

Mr Kiarie, Prosecution Counsel, instructed by the Director of Public Prosecutions for the Respondent.