Case Number:	Constitutional Petition 39 of 2018
Date Delivered:	23 Dec 2019
Case Class:	Criminal
Court:	High Court at Malindi
Case Action:	Ruling
Judge:	Reuben Nyambati Nyakundi
Citation:	Borris Ken Solomon v Republic [2019] eKLR
Advocates:	Ms Sombo for the State
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Kilifi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Petitioner set free
History County:	-
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CONSTITUTIONAL PETITION NO. 39 OF 2018

BORRIS KEN SOLOMON.........PETITIONER

VERSUS

REPUBLIC..RESPONDENT

Coram: Hon. Justice R. Nyakundi

Ms Sombo for the State

RULING

The applicant's challenge of death penalty is anchored on the Supreme Court decision of **Francis K. Muruatetu v R 2017 eKLR**. Following this decision the court unanimously held that the mandatory nature of the death sentence for the offence of murder under Section 204 of the Penal Code negated the constitutional guarantees under the Bill of Rights. More fundamentally, right to a fair hearing under Article 50, right against inhuman treatment and degrading punishment, the acknowledgement that the courts limitation on discretionary power to apply various factors before arriving at a fair and just sentence for the offence. The element of mitigation as one of the key factor echoed by the Supreme Court was also restated in the persuasive case of **Muruatetu** is the case of **Reyes v The Queen 2002 2 AC 235** where it was held that:

"To deny the offender the opportunity before sentence has been paused to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate to treat him as no human being should be treated and thus to deny his basic humanity, the core right."

Henceforth it is clear that the principle in **Muruatetu case** from a functional perspective, the defining scope of mandatory death sentence has been outlawed but courts have the latitude to exercise discretion in sentencing leaving death penalties to be maximum sentence for murder.

There are a number of offences previously under the regime of mandatory sentences which are now considered unconstitutional by virtue of the principle in **Muruatetu case**. In particular, robbery with violence contrary to Section 296 (2) of the Penal Code and defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act. It is now currently possible to temper with the mandatory death sentence under Section 296(2) of the Penal Code and life imprisonment in Section 8(2) of the Sexual Offences Act to deliberately alter the sentence within the legal scheme in **Muruatetu ratio decidendi**.

It is precisely the position this petition before me is grounded and argued by the petitioner. Given that the trial court ordered that the petitioner suffer death for the offence and the subsequent appeals to the High Court and Court of Appeal consistently affirmed the conviction and sentence.

Considering this petition there is merit to apply the principles in **Muruatetu case** amongst the circumstances to take into account are:

1. The age of the petitioner

2. The personal circumstances and past antecedents.

3. The gravity of the offence.

4. The mitigating factors.

5. The aggravating factors

The above factors must then be weighed with the main objectives in sentencing now settled to be deterrence, prevention, reformation, and retribution. It is also necessary to refocus attention in re-sentencing whether there are reasonable prospects of reoffending or that the offender has absolutely transformed and can reintegrate back to society as a law abiding citizen.

Thus in the instant case the petitioner was charged, tried and convicted of the offence of robbery with violence contrary to Section 296(2) of the Penal Code.

The only particulars are that on the 2nd June, 2008 at Kaachonjo area, Mombasa district he jointly with others not before court and while armed with dangerous weapons, namely rungus, bows and arrows, robbed Joseph Muthiani three tyres valued at Kss.40,000 and at immediately before or immediately after such robbery injured the said Joseph Muthiani. From those facts and evidence adduced by the prosecution, the petitioner was sentenced to suffer death.

He exercised his right of appeal to the Appex-Court of Appeal on such matters as prescribed in the Constitution. His appeals were dismissed appropriately.

The relevant question now is to consider whether to permit the death sentence to apply or have it altered and substituted with any other sentence in conformity with the principles in (**Muruatetu case**).

I have taken into account that the petitioner was arrested and pleaded not guilty to the charge on 6th June, 2008. He remained in remand custody until the conclusion of the trial and delivery of judgement on 30th December, 2008.

Pursuant to Section 333(2) of the CPC, that period of about 6 months ought to be factored to the constitutional sentence in any event.

The necessary range of mitigating factors favourable to the petitioner are his age, he has no previous conviction, and that during the period on death row he is remorseful, has undergone the various skills, counseled and the long period in custody forms part of his transformation.

On aggravating factors there is the gravity of the offence though the degree of culpability of the offence due to the nature physical harm to the victim is minimal. The petitioner was not armed with dangerous weapon so to speak in the same sense of the definition.

In this connection one has to strike the balance between aggravating factors, his mitigation and the public interest with legitimate expectation that crimes once committed ought to be punished appropriately.

However, in the circumstances of this case, the petitioner's death penalty was at the higher scale of the pendrum. I am reminded of the fact that the decision to vary or alter sentence, also the petitioner has to exhaust his right of appeal. But I also take view that the principle in **Muruatetu** empowers this court to re-sentence the petitioner afresh. I bear in mind that before the **Muruatetu** decision it was the only sentence for the offence of robbery with violence contrary to Section 296(2) of the Penal Code.

From the prevailing jurisprudence, death penalty is now a reserve of the rarest cases under the recognized offences until it's outlawed by the Kenyan people through their representatives in parliament referendum.

As for now in this petition I consider the mitigation, circumstances of the offences outweigh any aggravating factors to vary the death sentence with the custodial sentence of 12 years effective from 6th June, 2008. In terms of computation of time that shows the petitioner has already served 12 years imprisonment.

Unfortunately based on the circumstances the conviction against the offence is reaffirmed the death sentence so substituted with the custodial sentence of 12 years renders the petitioner to be released by virtue that all period is commensurate and proportionate to the offence committed.

Accordingly the petitioner shall be set free unless otherwise lawfully held. It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF DECEMBER, 2019.

....

R. NYAKUNDI

JUDGE

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