



**Wachira v Republic (Criminal Petition 11 of 2019)
[2024] KEHC 10063 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 10063 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL PETITION 11 OF 2019
RM MWONGO, J
JULY 31, 2024**

BETWEEN

JANE KARIMI WACHIRA PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Petitioner was charged with the offence of Murder Contrary to Section 203 as read together with Section 204 of the *Penal Code*. Upon being convicted she was sentenced to death on 24.5.2017.
2. Following the decision of the Supreme Court in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR the petitioner seeks to have the mandatory maximum sentence imposed upon her on 24th May 2017 reviewed as the same has been declared unconstitutional.
3. The applicant submits that she has been in custody for well over 8 years and in her mitigation deposed that she is remorseful and regrets her actions. Further, that she was young at the time of the commission of the offence and has since taken advantage of the rehabilitative programs offered at the correctional facility to acquire some skills that will help her in her future endeavors.
4. She urges this Court to consider the period she has been incarcerated for more than 8 years since she was arrested. She also prays that this Court consider the Prison Report on her conduct and industry together with the Probation report filed on 24th March 2023. That this honourable court be persuaded to consider the Applicant's mitigating factors.
5. The state's position is that the Muruatetu decision did not declare the death penalty unconstitutional. Instead, it merely found that the mandatory nature of the death sentence was unconstitutional as it deprives the court its discretion to freely mete sentence.



6. Consequently, the *Muruatetu decision* obliges courts to consider mitigation in death sentence where mitigation was not considered. Accordingly, the courts can re-sentence the accused.
7. The respondent also submits that this court can invoke its original jurisdiction bequeathed to it in Article 165(a) and (b) of the *Constitution* to re-sentence persons on death row who were sentenced pursuant to the mandatory death penalty provisions which have been declared unconstitutional.
8. The issue for determination is what sentence should be imposed on the accused.
9. The supreme Court decision in the *Muruatetu Case* provided for guidelines on the mitigating circumstances to be considered before sentencing. These include:
 - 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. The manner in which the offence was committed on the victim;
 - g. The physical and psychological effect of the offence on the victim's family;
 - h. Remorsefulness of the offender;
 - i. The possibility of reform and social re-adaptation of the offender;
 - j. Any other factor that the Court considers relevant.
10. The applicant submitted that she has been in custody for well over 8 years and in her mitigation deposed that she is remorseful and regrets her actions.
11. The Probation Service Sentence Review Report gives details on the petitioner's background and recommends that the petitioner be released under a Community Service Order programme.
12. The Prison Service Report dated 28th November, 2023 indicates that the Petitioner has undergone various recreation and rehabilitation programs. She has gained skills in organic farming, tailoring and soap making, and she is an active member of the Protestant Church.
13. In *Mwei v Republic* (Criminal Petition 104 of 2020) [2022] KEHC 13045 (KLR) (21 September 2022) (Judgment) Ogola J held:

“It is my view that once the sentence imposed on an accused has met the objectives of retribution, deterrence, rehabilitation, restorative justice, community protection and denunciation, it is no longer necessary or desirable to continue holding the accused in incarceration. In this case, it would seem that the learned trial magistrate's decision on sentencing was informed mainly by the gravity of the offence.”
14. The law requires courts, while sentencing, to take into account the period the accused spent in custody pursuant to Section 333(2) of the *Criminal Procedure Code*. Thus, the period of 7 years spent in custody by the Petitioner since sentencing must be taken into account in re-sentencing. I have also perused the record of proceedings and note that the Petitioner was first remanded in custody on



29.5.2014. She remained in custody throughout the hearing and was never released on bail. Thus, she has spent 10 years and 2 months in custody.

15. In *Sabastian Okwero Mrefu v Republic* [2014] eKLR, it was found as follows:

“The petitioner has been serving his sentence since 20.6.2006. He has been in custody from the time he was charged in court on the 29.12.2003. In essence therefore the petitioner has been in custody for over 11 years. I do find that period to be enough punishment. I will substitute the death sentence and replace it with the period the petitioner has served in prison which is over 8 years’ excluding the period of about 3 years he was in remand. The petition is merited and is hereby allowed. The petitioner has served enough punishment and he shall be set at liberty unless otherwise lawfully held.”

16. I also take into account that the murder occurred as a result of a fight that erupted when the Petitioner and her in laws were involved in a fight. The Petitioner hit the deceased with a stick and he eventually succumbed and died.

17. Taking all these matters into account I hereby review the Petitioners Death Sentence and impose a sentence of eighteen (18) years with effect from the date of her first incarceration.

18. The balance of her sentence, if any, may be served as a non-custodial sentence under supervision of the Probation Officer.

19. Orders accordingly.

DATED AT KERUGOYA THIS 31ST DAY OF JULY, 2024

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R. MWONGO

JUDGE

Delivered in the presence of:

1. Jane Karimi Wachira - Petitioner Present at Langata Women
2. Maari for the State
3. Murage - Court Assistant

