Kihara v Republic (Miscellaneous Criminal Application 23 of 2020)
[2024] KEHC 10359 (KLR) (Crim) (22 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10359 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

MISCELLANEOUS CRIMINAL APPLICATION 23 OF 2020

K KIMONDO, J

AUGUST 22, 2024

BETWEEN

JOHANA GITHII KIHARA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. On 3rd May 2004, Johana Gathii Kihara (hereafter the applicant) and his co-accused, Peter Kariuki Kihara, were convicted for murder by the High Court (Rawal J, as she then was) in Criminal Case No. 7 of 2004.

2. The learned judge found that her "hands were tied" by the mandatory sentence provided under section 204 of the *Penal Code* and accordingly sentenced them to suffer death.

3. Their appeals to Court of Appeal in Criminal Appeal No. 242 of 2006 on both sentence and conviction was unsuccessful.

4. Following the momentous decision by the Supreme Court in *Francis Karioko Muruatetu & another v Republic*, Petition No 15 of 2015 (consolidated with Petition 16 of 2015 [2017] eKLR, the two lodged the present application on 20th July 2020 praying for re-sentencing.

5. However, at the time of hearing this matter, Peter Kariuki Kihara, had been released by the President on the recommendation of the Advisory Committee on the Power of Mercy. Accordingly, this ruling only affects the applicant, Johana Gathii Kihara. I should add that the sentence of death for the applicant has since been commuted to life.

6. The entire application is a plea for clemency. The applicant is now an old man of over 70 years having been born in the year 1950. He states that he is remorseful and regrets the death of the deceased.

He blames his conduct on intoxication. He has been in prison now for 21 years and claims to have undergone reform and become a devout Christian. There is annexed a letter dated 28th August 2018 from Naivasha Maximum Prison as well as some certificates confirming that matter.

7. At the hearing, he relied wholly on the chamber summons aforementioned, the deposition annexed as well as a document titled Mitigation Submissions filed on 24th November 2022.

8. The application is not opposed by the Director of Public Prosecutions. In his submissions filed on 18th July 2022, the only caveat issued by the DPP is that the Court should take into account "both aggravating and mitigating factors".

9. I take the following view of the matter. I have taken into account the mitigation by the applicant. The pre-sentencing report filed on 5th April 2022 under the hand of Andrew Kanyutu, Probation Officer recommends a non-custodial sentence.

10. In *Muruatetu's* Case [*supra*], the Supreme Court held that the mandatory nature of the death sentence was unconstitutional. The decision opened an opportunity for re-sentencing by the High Court. It is however instructive that the Supreme Court did not outlaw the death penalty.

11. I have then carefully studied the decision by the Court of Appeal on the applicant's sentence in Criminal Appeal No. 242 of 2006. In the penultimate paragraph at page 20 of the judgment, the learned judges held as follows-

> As regards sentence, this Court recently held in the case of Godfrey Ngotho Mutiso v Republic, Criminal Appeal No. 17 of 2008, that the mandatory death penalty is unconstitutional as the relevant penal provision allows the court no discretion in the matter. The manner the deceased was killed was brutal, inhuman, and an act which when all is considered would lead a court properly exercising its discretion to mete out the death penalty. In those circumstances, notwithstanding the aforesaid decision, the death penalty is merited. [underlining added]

12. What the above passage means is that at the hearing of the applicant's appeal, the Court of Appeal was alive that the death penalty was not mandatory as per Ngotho's Case [*supra*]. However, the learned judges reached the conclusion that in all the circumstances of this case, the death penalty was merited. I have also stated earlier, that the subsequent decision of the Supreme Court in *Muruatetu's* Case [supra] held that the mandatory nature of the death sentence was unconstitutional but did not outlaw the death penalty.

13. So much so that the Court of Appeal considered that it had discretion on the sentence, considered the merits of the death penalty in this particular case and upheld it. It thus follows that the High Court now lacks jurisdiction to sit on appeal on that finding or to re-sentence the applicant. Jurisdiction is everything; and without it, a court must lay down its tools. See *Motor Vessel Lilian "S" v Caltex Oil* [1989] KLR 1.

14. The upshot is that the entire chamber summons is on a procedural and legal quicksand and is hereby dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF AUGUST 2024.

KANYI KIMONDO

JUDGE

Ruling read virtually on Microsoft Teams in the presence of-

Applicant.

Ms. Awino for the Republic instructed by the Office of the Director of Public Prosecutions.

Mr. Edwin Ombuna, Court Assistant.