



REPUBLIC OF KENYA



**KENYA LAW**  
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**Chemase v Republic (Criminal Petition E107 of 2020)  
[2024] KEHC 10118 (KLR) (12 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10118 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL PETITION E107 OF 2020  
RN NYAKUNDI, J  
AUGUST 12, 2024**

**BETWEEN**

**WILLIAM KIPKALIA CHEMASE ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. William Kipkalia Chemase was charged with the offence of murder, contrary to section 203 as read with section 204 of the Penal code. The particulars of the offence were that on 19<sup>th</sup> November, 2002 at Kimoning farm in Uasin Gishu District of the Rift Valley Province of Kenya he murdered Margaret Jepchumba Kiplagat.
2. The Petitioner pleaded not guilty, was tried, convicted and sentenced to death. Dissatisfied with the conviction and sentence, he lodged an appeal at the Court of Appeal, which appeal was never heard and he opted to have it withdrawn entirely.
3. The Petitioner has since filed an application seeking sentence review pursuant to the ruling by the Supreme Court of Kenya in Petition No. 15 of 2015 Francis Karioko Muruatetu and Anor versus Republic. The applicant averred that he has been in incarceration since 2003 and that he has since served adequate sentence to punish his misdeeds.
4. The Petitioner subsequently filed submissions on mitigation on 2<sup>nd</sup> November, 2023. He submitted that after a thorough soul searching and reflection on the facts adduced during trial, he takes full and responsibility for the crime as charged. He submitted that he has undergone punishment, repression and felt the effects of the offence over the 18 years that he has been in custody. That he is remorseful and greatly repentant for the loss incurred by the victim's family, to the society and fellow Kenyans for creating a sense of insecurity.



5. On the circumstances of the offence, the Petitioner submitted that the commission of the offence was brought about the misuse of alcohol. The applicant and the deceased were both drunk during the commission of the offence. They were married and lived as husband and wife. The applicant had a good relationship with the deceased and had no any sign animosity between them. He submitted that he had no motive to kill the deceased, he regrets his actions and blames alcohol and he promised never to be influenced by alcohol in his life again.
6. The applicant further submitted that the court should consider his criminal record. In doing so he is convinced that the court will find that there is no fear that the applicant would pose a danger to the society if granted an acquittal sentence due to the term served in prison. He urged the court to appreciate the applicant's total behavioral change and gains already made on rehabilitation during the period spent in the correctional facility. He is disciplined, hardworking and God fearing man. He has never had any indiscipline issue with the prison authorities.

### **Determination**

7. Having read through the Petitioner's application and mitigation submissions, the only issue I find for determination is whether the sentence review is merited. The court's ruling in Francis Karioko Muruatetu v Republic was that sentencing is a judicial function and that the mandatory nature of the death penalty for murder was unconstitutional because it took away the courts' discretion to determine a just and proportionate punishment to impose on a convicted person. In its judgment, the court ordered that the judiciary sentencing policy be revised to reflect the court's guidelines on the obligation of courts to listen to the accused's mitigation before sentencing. The court also directed that a framework for sentence rehearing be prepared immediately to allow applicants who had been sentenced in circumstances similar to those of the petitioners to apply for sentence a rehearing from the trial court.
8. In a sentence re-hearing for the charge of murder, both aggravating and mitigating factors such as the following, would guide the court;
  - 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; and,
  - j. Any other factor that the court considered relevant.
9. A glance at the Petitioner's application clearly reveals a re-hearing of the death sentence. The provisions of Article 50(2)(p) as cited by the Petitioner stipulate as follows:

Every accused person has the right to a fair trial, which includes the right—



- p. to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
10. As to the conditions to be satisfied for one to qualify for re-trial, Article 50(6) covers that in speaking in the following terms;
- (6) A person who is convicted of a criminal offence may petition the high court for a new trial if: -
- a. The person's appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and
- b. New and compelling evidence has become available.
11. The aforementioned legal provisions clearly give the Petitioner a second chance to be heard only on sentence. The duty of this court therefore is to have the application considered through the lens of Art. 50(2)(p) and (6) and determine whether the instant application is merited.
12. It is my considered view that the test laid out in the foregoing legal provisions has been met by the applicant to have his sentence reviewed on a new trial, the new evidence being the decision in the Muruatetu case. The applicant therefore ought to benefit from the least prescribed punishment as per the provisions of Article 50(2)(p).
13. There are circumstances under which the court can alter or decline to vary the sentence meted out. That is entirely at the discretion of the court. I have gone through the record of the court's decision in the criminal trial and equally read through the record. The circumstances surrounding the offence have also been considered. The applicant in his application has presented his mitigation, majorly being on the Muruatetu case and the submission filed on 2<sup>nd</sup> November, 2023. In sentencing, mitigation factors ought to count on the sentence imposed. The failure to consider the same is precisely what the Supreme Court called unfair trial since with or without mitigation the court would still impose death penalty.
14. The charge of murder attracts a death penalty. In exercising judicial discretion, this court is required to consider and incorporate the objectives of sentencing in totality together with the factors to be considered as laid in the Muruatetu case.
15. In *R v Bieber* [2009] 1 WLR 223 the Court of Appeal of the United Kingdom had held as follows:
- “The legitimate objects of imprisonment are punishment, deterrence, rehabilitation and protection of the public. Where a mandatory sentence is imposed in respect of a crime, the possibility exists that all the objects of imprisonment may be achieved during the lifetime of the prisoner. He may have served a sufficient term to meet the requirements of punishment and deterrence and rehabilitation may have transformed him into a person who no longer poses any threat to a public. If, despite this, he will remain imprisoned for the rest of his life it is at least arguable that this is inhuman treatment...”
16. The cited authorities give a clear picture of what the courts ought to consider in re-sentencing. Mandatory sentences are clearly unlawful. The death penalty particular is unlawful as it takes away the applicant's life contrary to the provision of Art. 26 of *the Constitution*. Having said so, I have considered The Sentencing Policy Guidelines, 2023 and its application which is intended to promote transparency, consistency and fairness in sentencing. The relevant considerations in the proceeding inter alia, are the penalty law, mitigating or aggravating factors, and the objects of punishments.



17. Following the decision in the case of Francis K Muruatetu 2017 eKLR the Supreme Court found mandatory death sentence to be unconstitutional. On the basis that courts do not have discretion in respect to the offence of murder to individualize the case in tandem with specific circumstances of the offender. As a consequence with Muruatetu decision, the following guidelines were issued with regard to mitigating the factors that are applicable in reviewing the sentence for the conviction of a murder charge.
- 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 for the offender
  - h. Any other factor that the court consider relevant.
18. The categorization of factors which are likely to call for a more severe sentence include:
- a. Evidence of planned, professional, revenge or contract killing
  - b. The killing of a child or a very old or otherwise vulnerable victim
  - c. Evidence of sadism, gratuitous violence, or sexual maltreatment, humiliation or degradation before the killing
  - d. Killing for gain (in the course of burglary, robbery, blackmail, insurance fraud etc
  - e. Multiple killing
  - f. The killing of a witness, or potential witness, to defeat the end of justice
  - g. The killing of those doing their public duty (policemen, prison officers, postmasters, firemen, judges etc, terrorist or politically motivated killing
  - h. The use of firearms or other dangerous weapons, whether carried for defensive or offensive reasons.
  - i. A substantial record of serious violence
  - j. macabre attempts to dismember or conceal the body
19. On the footing of the unconstitutionality of mandatory minimum sentences within the fulcrum of the dicta in Muruatetu the court in S v Toms S V Bruce 1990 2SA 802 (A) expressed the same concerns with regard to minimum sentences as follows: “ it reduces the court’s normal sentencing function to the level of a rubber stamp. It negates the ideal of individualization. The morally just and the morally reprehensible are treated alike. Extenuating and aggravating factors both count for nothing. No consideration, no matter how valid or compelling, can affect the question for sentence. Harsh and inequitable results inevitably flow from such a situation. Consequently, judicial policy is opposed to mandatory sentences as they are detrimental to the proper administration of justice and the image and standing of the courts.



- 20. As noted above, a new legal order of domestic law has emerged as seem from the various jurisprudential decisions which outlaw mandatory minimum sentences paving way for the trial courts to exercise judicial discretion ins sentencing. It has generally been accepted that a decision on sentence which had been passed against a convict or offender which in the dicta of Muruatetu is found to be unconstitutional the same can be viewed pursuant to Article 50 (6) (A) & (B) of *the constitution*. This is a basic approach rooted purely in *the constitution* Bill of Rights. Having said that, I am persuaded to exercise discretion which is underpinned in the guidelines issued in Bernard Kimani Gacheru v R 2002 eKLR and Ogolla s/o V R 1954 ESA 270 to review the death sentence with a substituted custodial sentence of 30 years with effect from the date of arrest in line with Section 333(2) of the CPC which dictates that any such sentence computed be discounted with the period spent in a pre-trial detention.
- 21. Therefore, in sentencing, the gravity of the offence and the consequences of the offence on the victim are relevant factors. I am inclined to interfere with the death sentence imposed and substitute it with a determinable sentence of 30 years’ imprisonment. The application therefore succeeds and in considering the provisions of section 333(2) of the CPC the sentence shall run from the date of his arrest

**DATED SIGNED AND DELIVERED AT ELDORET THIS 12<sup>TH</sup> DAY OF AUGUST, 2024**

.....

**R. NYAKUNDI**  
**JUDGE**

