



REPUBLIC OF KENYA



KENYA LAW
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Mwangi v Director of Public Prosecution (Criminal Miscellaneous Application E315 of 2020) [2023] KEHC 1246 (KLR) (Crim) (21 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1246 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL MISCELLANEOUS APPLICATION E315 OF 2020
LN MUTENDE, J
FEBRUARY 21, 2023

BETWEEN

DUNCAN THUKU MWANGI APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

RULING

1. Duncan Thuku Mwangi, the applicant was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. He was taken through full trial found guilty and sentenced to suffer death in 2016.
2. The applicant now seeks re-sentencing pursuant to the decision of the Supreme Court in *Francis Karioko Muruatetu & another v Republic* (2017) eKLR. In an application, undated but filed on December 2, 2020. He urges the court to reconsider the constitutionality and mandatory nature of the sentence imposed and that or order be granted a retrial to confirm with the Supreme Court directives in Pet No 15 of 2015 (*Francis Karioko Muruatetu v Republic*).
3. In an affidavit in support of the application the applicant deponed that he has exhausted all avenues of appeal and that he has lodged the application for substitution of the death sentence
4. On the January 23, 2023, submissions were filed by Prof Hassan Nandwa for the applicant who urges that the applicant was not given a chance to mitigate; as the law provided for mandatory death penalty; the applicant has reformed; he undertook many rehabilitation courses to enable him earn a lawful income to fend for his family. That the unfortunate offence occurred due to peer pressure and bad company. He prayed to the court to consider the sentence meted out as sufficient.



5. The Supreme Court case of *Francis Karioko Muruatetu v Republic* (2017) eKLR declared the mandatory sentence provided under section 204 of the *Penal Code* unconstitutional. It delivered itself thus:

“On our own assessment of the issue at hand and the material placed before us, we are persuaded, and now so hold, that section 204 of the Penal Code which provides for a mandatory death sentence is antithetical to the constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial. We note that while the Constitution itself recognizes the death penalty as being lawful, it does not say anywhere that when a conviction for murder is recorded, only the death sentence shall be imposed. We declare section 204 shall, to the extent it provides that the death penalty is the only sentence in respect of the crime of murder is inconsistent with the letter and spirit of the Constitution, which as we have said, makes no such mandatory provision.”

6. The order was granted one year after the applicant herein was sentenced. Upon being sentenced the applicant herein who was aggrieved by the judgment of the High Court, proffered an appeal to the Court of Appeal. The applicant had the opportunity of withdrawing the matter from the Court of Appeal to pursue the application as from the year 2017 but he did not.

7. In the case of *Francis Karioko Muruatetu & another v Republic* (2021) eKLR the Supreme Court gave the following guidelines in regard to *Muruatetu* (2017):

- i. The decision of *Muruatetu* and these guidelines apply only in respect to sentences of murder under sections 203 and 204 of the *Penal Code*;
- ii. The Judiciary Sentencing Policy Guidelines to be revised in tandem with the new jurisprudence enunciated in *Muruatetu*;
- iii. All offenders who have been subject to the mandatory death penalty and desire to be heard on sentence will be entitled to re-sentencing hearing.
- iv. Where an appeal is pending before the Court of Appeal, the High Court will entertain an application for re-sentencing upon being satisfied that the appeal has been withdrawn.
- v. In re-sentencing hearing, the court must record the prosecution’s and the appellant’s submissions under section 329 of the *Criminal Procedure Code*, as well as those of the victims before deciding on the suitable sentence.vi.An application for re-sentencing arising from a trial before the High Court can only be entertained by the High Court, which has jurisdiction to do so and not the subordinate court.
- vi. An application for re-sentencing arising from a trial before the High Court can only be entertained by the High Court, which has jurisdiction to do so and not the subordinate court.
- Vii. In re-hearing sentence for the charge of murder, both aggravating and mitigating factors such as the following, will 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) 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.
- viii. Where the appellant has lodged an appeal against sentence alone, the appellate court will proceed to receive submissions on re-sentencing.
- ix. These guidelines will be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals. They will also apply to sentences imposed under section 204 of the *Penal Code* before the decision in Muruatetu.

8. During pendency of the order by the Supreme Court directing petitioners to seek re-hearing in courts that heard them, it did not direct parties to appeal to the Court of Appeal then upon the appeal being dismissed to return to the High Court for re-sentencing.

9. This is a matter where the Court of Appeal delivered judgment on November 6, 2020, while having knowledge of existence of the judgment in Muratetu which found death sentence to be unconstitutional.

10. The Court of Appeal stated that:

“Aggrieved, the appellant has lodged an appeal on 14 grounds challenging both his conviction and sentence (emphasis mine)....

The appeal has no merit and we, accordingly, dismiss it in its entirety. (emphasize added).”

11. In the premises as at November 20, 2020 this court that was bound by orders of a court superior to it cannot purport to unsettle its decision.

12. In the result the application fails and is dismissed.

13. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 21ST DAY OF FEBRUARY, 2023.

L. N. MUTENDE

JUDGE

In The Presence Of:

Applicant present



Prof Nandwa for Applicant

Mr. Kiragu for DPP

Court Assistant - Evance

