



Mwithia v Republic (Petition 44 of 2019) [2023] KEHC 18004 (KLR) (31 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18004 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
PETITION 44 OF 2019**

EM MURIITHI, J

MAY 31, 2023

**IN THE MATTERS IMPUGNED UNDER ARTICLE 23 (1), 165 (3), (B) (D) (I), 50 (2),
25 (C) (D) 51 (1) AND 163 (7) OF THE CONSTITUTION AND SECTION 204 OF THE
PENAL CODE**

BETWEEN

GERISHON KUBAI MWITHIA PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The petitioner herein filed an application dated November 21, 2019 seeking that, “This honorable court be pleased to re-sentence the applicant considering facts; mitigation and sentence pursuant to the Supreme Court’s Judgment dated December 14, 2017 in the Consolidated Petition No 15 And 16 of 2015 Between *Francis Karioko Muruatetu And Another v Republic*.”
2. The application is premised on the grounds that the petitioner was charged and convicted of murder *vide* Meru Cr Case No 50/2005. He then lodged an appeal to the Court of Appeal which was dismissed and the sentence upheld. He has been in incarceration for the last 15 years, during which period he has undergone various rehabilitation programs. He faults the trial court for failing to consider his mitigation due to the mandatory nature of the sentence, which the apex court has declared as unconstitutional.
3. The respondent opposed the application by its submissions filed on 4/10/2022. It urges that the sentence imposed upon the petitioner was lawful and not excessive, taking into account the gravity of the offence. It urges that the petitioner has neither expressed his remorsefulness nor demonstrated that he indeed regrets murdering the deceased. It urges that there are no documents to confirm whether the petitioner has undergone courses in prison. It prays that the petitioner be re-sentenced to life imprisonment.



Analysis and Determination

4. In *Francis Karioko Muruatetu & another v Republic* [2017] eKLR, the Supreme Court held that, “The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of the *Constitution*.”
5. The petitioner, who has been in incarceration for the last 15 years, contends that he has since reformed after successfully taking various courses while in prison, and he is ready to contribute the Nation’s development. There is a re-sentencing report by the probation officer recommending the petitioner’s release back to the community.
6. The evidence on record is that the petitioner, while armed with a sword chased the deceased and he stabbed him once on the right side of his chest. There was no legal justification for the said killing and the extent of the injuries suffered by the deceased was fatal.
7. The petitioner never acted out of any despair, anguish or provocation. It is this court’s considered view, while considering the petitioner’s application, that he deserves a deterrent sentence which should be a lesson to would-be offenders.
8. As such, and in view of the principles set out in Muruatetu case (*Supra*), the objectives of sentencing as laid down in the *Judiciary Sentencing Policy Guidelines*, 2016, and the 15 years the petitioner has been in custody, the court finds a sentence of imprisonment for a period of 30 years, to be fitting in the circumstances.

Orders

9. Accordingly, for avoidance of doubt, and in line with the provisions of section 333 (2) of the *Criminal Procedure Code*, that sentence is inclusive of the 15 years already served by the petitioner.
10. The DPP is at liberty to apply in the event that the period of pre-trial detention is not as indicated by the appellant to be 15 years.

Order accordingly.

DATED AND DELIVERED THIS 31ST DAY OF MAY, 2023.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Mr. Masila State Counsel for D.P.P.

Accused in person.

