



**Kimathi v Republic (Petition (Application) E020 of 2023)
[2023] KEHC 20887 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20887 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
PETITION (APPLICATION) E020 OF 2023**

LW GITARI, J

JULY 27, 2023

BETWEEN

NICHOLAS GITUMA KIMATHI APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The petitioner Nicholas Gituma Kimathi has brought this petition under Articles 2(5) (6) (3) 19 (3) 22, 23 (1) (3) 26, 27 (1) (2) (4), 28 29 (d) (f) 50 (2) (p) and 160 (1) of the constitution and in the matter of Enforcement of Right of fundamental freedoms.

The Background Of The Petition

2. The petitioner was arrested on 27th April 2007 and charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code at Nkubu Law Courts in criminal case No. 1692/2007. The petitioner denied the charge and after a full trial he was sentenced to the mandatory death penalty. He filed his appeal in the High Court at Meru, Criminal appeal No. 92/2015. The appeal was heard by a two judge Bench and was dismissed. The judges observed that the appellants were given the mandatory death sentence as by law provided. That the sentence was therefore lawful and legal.
3. The petitioner has approached the court following the directive of the Supreme Court on 6th July, 2021 in the second Muruatetu decision that other capital offences such as treason and robbery with violence be challenged on the constitutional validity of mandatory death penalty in such cases should be properly filed, presented and fully argued before the High Court and escalated to the Court of Appeal if necessary at which similar outcomes as that in Muruatetu's case should be reached. The petitioner has moved to this court based on this background and on the following grounds-
 1. That, Section 296(2) of the Penal Code deprives the court of the use of judicial discretion in a matter of life and death. That the mandatory nature of the death penalty deprive the



court of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate case under the provisions of Section 216 and Section 329 of the Criminal Procedure Code.

2. That the mandatory death penalty is unjust and unfair as it deprives judges and magistrates the power to exercise judicial discretion and award appropriate sentences after receiving such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed under the provisions of section 216 and 329 of the Criminal Procedure Code.
 3. That, the petitioner having been convicted and sentenced under the provision of Section 296(2) of the Penal Code was entitled to benefit from the least severe of the prescribed punishment under Article 50 (2) (p) of the constitution
 4. That, this Hon. court has the judicial powers under Article 23 (1) of the constitution in accordance to Article 165 (3) (b) of the Constitution to hear and determine applications/ petitions for redress of a denial, violation or infringement of, or threat to a right or fundamental freedom in the bill of rights.
 5. That the petitioner prays for this petition to succeed in its entirety.
4. The petition is basically challenging the mandatory death Penalty under section 296(2) of the Penal Code.

Relief Sought

- (1) That, a declaration be made subject to Section 216 and 329 of the Criminal Procedure Code and Article 50 (2) (p) of Constitution that the petitioner herein be heard on his mitigating factors and appropriate sentence awarded which is commensurate to the offence committed.
5. The petition is supported by the affidavit of the petitioner sworn on 7th March 2023 wherein he has reiterated the above grounds. The respondent has opposed the petition and in his submission dated 31st May, 2023 contends that the sentence imposed upon the petitioner while taking into consideration the gravity of the offence committed by the petitioner was lawful and not at all excessive. He cites section 296(2) of the Penal Code which provides “If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”
6. The respondent has urged the court to find that the manner in which the offence was committed by the petitioner against the victim was indeed very gruesome and with malice aforethought. That the petitioner has not expressed his remorsefulness and he has also not demonstrated that he does indeed regret injuring the complainant. The respondent relies on the Supreme Court of Kenya direction in Francis Karioko Muruatetu & another V- Republic Petition No. 15 & 16 (consolidated) of 2015 where the court stated as follows-;
14. It should be apparent from the foregoing that Muratetu cannot be the authority stating that all provisions of law prescribing mandatory or minimum sentences are inconsistent with the constitution. It bears restating that it was a decision involving the two petitioners who approached the court for specific reliefs. The ultimate determination was confined to the issues presented by the petitioner, and as framed by the court.



15. To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences other than murder we direct in respect of other capital offences such as treason under section 40(3), robbery with violence under Section 296(23) and attempted robbery with violence under section 297 (2) of the *Penal Code*, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High court and escalated to the court of appeal, if necessary, at which a similar outcome as that in this case may be reached. *Murutetu* as it now stands cannot directly be applicable to those cases.
7. The respondent has urged the court to dismiss the petition. I have considered the petition. The issue which arises for determination is whether the mandatory death sentence under Section 296 (2) of the Penal Code is unconstitutional. Section 296(2) of the *Penal Code (Supra)* provides that any person who commits the felony of robbery with violence shall be sentenced to death. There is no dispute that the sentence under section 296(2) supra is a mandatory sentence which has to be imposed on a person who is convicted for robbery with violence. This is the mandatory penalty for the offence of robbery with violence.
8. The petitioner has relied on the Supreme Court decision in Francis Karioko Muruatetu & another V R (*supra*). The Supreme Court in that decision held that mandatory sentence for murder prescribed by Section 204 of the Penal Code is unconstitutional as it stripped the sentencing court of the discretion to determine the appropriate sentence of the crime committed, the individual circumstances of the offence and the environment and the impact on the victims and society. The Court of Appeal in a recent decision in the case of Charles Karai Vs Republic Kisumu Criminal appeal No. 166/2015 at para 25 of the judgment the court stated-⁶

“There is no doubt that the prescriptive ration decidendi in *Murutetu -1-* applies to cases beyond murder. When the Supreme Court reasons that, the mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose. The death sentence in appropriate cases, it applies in equal force to all cases where the mandatory death penalty is imposed.

Similarly, when the Supreme court assails the mandatory death penalty in Section 204 of the Penal Code, as “a mandatory sentence (which) treated the offenders as faceless, undifferentiated mass to be subjected to blind infliction of the penalty of death thereby dehumanizing them” that indicted holds with equal force to both section 204 as well as section 296 of the Penal Code because both sections imposed a mandatory death sentence without individualized sentence hearing. Finally when the Supreme Court held that the dignity of the person is ignored if the death sentence, which is final and irrevocable, is imposed without any chance to mitigate, that holding is true, would be true for all mandatory death sentences not just for murder. It follows therefore, that while the Supreme Court was dealing with the narrow question of the mandatory death sentence for murder in Section 204, of the Penal Code in *Murutetu 1* as the principles of common law require and it could only determine the narrow question before it, its reasoning is applicable in future cases beyond the narrow confines of Section 204 of the Penal Code.”

9. Simply stated, the court of appeal affirmed the Supreme Court of Kenya in *Murutetu* case that the mandatory Death penalty is unconstitutional. The Supreme Court in *Murutetu -1-* had stated as follows in *Murutetu -1* at paragraph 48 – 51 Section 204 of the Penal Code deprives the court the use of Judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives court of their legitimate jurisdiction to exercise discretion to



impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has nonetheless to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial. That accrue to accused person under Articles 25 of *the Constitution*, an absolute right ...

We will add another perspective. Article 25 provides that every person has inherent dignity and the right to have that dignity protected. It is for this court to ensure that all persons enjoy the right to dignity. The dignity of the person is ignored if the death sentence which is final and irrevocable is imposed without the individual having any chance to mitigate. We say so because we cannot shut our eyes to the distinct possibility of the differing culpability of different murderers. Such differential culpability can be addressed in Kenya by allowing judicial discretion when considering whether or not to impose death sentence...”

10. The Supreme Court from this paragraph stated unequivocally that the mandatory death penalty under Section 204 of the Penal is unconstitutional. This applies to the mandatory death penalty under Section 296 of the *Penal code*.
11. The second consideration is whether the court should consider the mitigation and resentence the petitioner. The court of appeal in the above cited decision at para 20 stated:-

“Our understanding of the Supreme Court’s guidelines in Muruatetu – 2 is that it limits the direct applicability of Muruatetu -1- in re-opening cases which had been decided as the law stood before Muruatetu -1- was enunciated differently put. The Supreme Court’s guidelines in Muruatetu – 2 precluded the deployment – 1- in a manner a kin to a cause of action to retroactively apply to cases already decided by different layers of court system at the time of the decision. In our view the Supreme Court guidelines ring-fence the applicability of Muruatetu – 1- retroactively to such cases because Muruatetu -1- not only decided the cases before it...”

12. I have considered this holding and I find that the decision of the Supreme Court in Muruatetu’s can be invoked by the courts to order resentencing proceedings. In this case the petitioner was sentenced to death which is the mandatory sentence provided under the law. The sentence has been declared unconstitutional. I therefore find that the petition has merits. I order as follows
 - 1) The sentence imposed on the appellant is set aside.
 - 2) There shall be a sentencing proceedings.
 - 3) The petitioner shall be given an opportunity to mitigate.

DATED, DELIVERED AND SIGNED AT MERU THIS 27TH DAY OF JULY 2023

IN THE PRESENCE OF

Mr. Gitonga S/C

Appellant

Court assistant – V. Kiragu

Hon. Lady Justice L. Gitari

High Court - Judge

