



**Muthinja v Republic (Criminal Petition E028 of 2022)
[2023] KEHC 21137 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21137 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL PETITION E028 OF 2022**

LW GITARI, J

JULY 27, 2023

BETWEEN

STEPHEN MUTEMBEI MUTHINJA APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The applicant Stephen Mutembei Muthinja filed a notice of motion dated November 24, 2022 seeking an order that the court be pleased to resentence him considering the facts and the mitigation as well as the sentence. The application is brought pursuant to the Supreme Court’s judgment in the now famous case of *Francis Karioko Muruatetu and others v Republic* Petition No 15 and 16 of 2018. The notice of motion is based on the following grounds:-
 - 1) That, I the petitioner was charged and convicted for the offence of murder C/section 203 as read with section 204 of the *Penal Code* and sentenced to suffer death *vide* High Court Criminal case No 20/2008 in the Meru High court and my second and last appeal at Kenya of Court of Appeal at Nyeri was dismissed and sentence upheld *vide* Criminal Appeal No 57 of 2016.
 - 2) That I have been in incarceration for the last (14) fourteen years.
 - 3) That during trial, my mitigating factors were not considered due to the mandatory nature of the sentence under section 204 of the *Penal Code* which the apex court ruled, the mandatory nature of the same is unconstitutional.
 - 4) That, since I was committed to prison, I have rehabilitated and that I have undergone various rehabilitation programs. I will adduce the same at the hearing of this petition.



- 5) That, I have studied in prison for duration of (14) fourteen years, hence I am ready to contribute to the nation's development through legal means.
 - 6) That this petition is grounded upon the annexed affidavit of Stephen Mutembei Muthinja and further grounds to be adduced at the hearing of this petition thereof.”
2. The appellant filed written submissions and contends that the Supreme Court in the case of *Murautetu* (supra) rendered the mandatory nature of the death sentence as spelt in our penal statutory provisions a nullity in as far as they did not afford accused person right to mitigate and for the courts right to consider these mitigation and aggravating factors at arriving at the appropriate sentence. The petitioner submits that he was charged with murder and was subsequently convicted after a full trial and sentenced to death on February 11, 2016. He filed an appeal at the Court of Appeal at Nyeri but the appeal was dismissed. It is the petitioner's submissions that the Supreme Court in the *Murautetu's* case gave guidelines which the court has to consider when sentencing an accused. He has urged court to apply the principles and exercise judicial discretion on the circumstances of the offence the petitioner that he did not intend to kill the deceased. That he regrets what happened and would wish to take full responsibility, and is remorseful.
 3. He further submits that during the 14 years he has been in prison he has undergone counselling, has reformed and has changed his character. On sentencing, the petitioner relies on the judiciary sentencing guidelines and case law which he has cited. He has urged the court to sentence him to a term equivalent to the number of years served. The respondent filed written submissions and urged the court to consider the eight tests to be applied by the courts when sentencing the accused as stated by the Supreme Court in the *Murautetu* judgment at paragraphs 70 – 71. That the list is not exhaustive and includes.
 1. The age of the offender
 2. Being a 1st offender
 3. Whether the offender pleaded guilt
 4. Character and record of the offender
 5. Commission of the offence in response to gender based violence
 6. Remorse of the offender
 7. Possibility of reform and social re-adaptation of the offender
 8. Any other factor that the court considers relevant
 4. The respondent has urged the court to be guided by the judiciary sentencing policy guidelines. It is their contention that since the petitioner has been in custody reform and rehabilitation of the prisoner should form the main basis of determination of the sentence. He has also relied on Misc Cr No 45/2018 High Court at Nakuru. The respondent submits that the court has been given wide discretion in resentencing and urges the court to consider the aggravating factors and the circumstances of this case.
 5. I have considered the application. The appellant was sentenced to the mandatory death penalty provided under section 203 as read with section 204 of the [Penal Code](#). The application for resentencing is therefore merited as the appellant was not given the opportunity to mitigate and the court did not exercise discretion in sentencing as its hands were tied and could only pass the sentence provided under the law. The applicant shot the deceased with a gun which he possessed unlawfully.



This illegal firearm was not recovered and will most probably be within reach of the applicant the day he step out of jail. This must therefore be a major consideration when resentencing the applicant.

6. The sentencing policy guidelines states that the court should consider the impact that the sentence will have on the society, family and the entire judicial system. The sentencing policy must promote restorative justice and values of rehabilitation.
7. This court must therefore mete out a sentence to ensure that the illegal firearm is not used again soon to cause death of innocent members of the society and to achieve full rehabilitation of the appellant.

Conclusion

8. I order as follows-;
 1. I set aside the death sentence imposed on the applicant.
 2. I re-sentence the accused to serve thirty (30) years imprisonment.
 3. The applicant was charged on January 14, 2008. I did not have the benefit of the proceedings before the trial court in order to confirm whether the applicant was in remand throughout the trial. I am however aware that before 2010 the offence of murder was not bailable. In the circumstances I order that the sentence will run from the date he appeared in court for the 1st time that is on January 14, 2008.

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

In presence of

Mr. Gitonga S/c for state

Appellant – present

Court Assistant -V. Kiragu

HON. LADY JUSTICE L. GITARI

HIGH COURT - JUDGE

