**John alias Magoro & 3 others v Republic (Constitutional Petition 3 (E003B) of 2023) [2023] KEHC 27137 (KLR) (19 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27137 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISII**

**CONSTITUTIONAL PETITION 3 (E003B) OF 2023**

**TA ODERA, J**

**DECEMBER 19, 2023**

**BETWEEN**

**FRED OSEKO JOHN ALIAS MAGORO ..... 1ST PETITIONER**

**AMOS BICHANGA ..... 2ND PETITIONER**

**BICHANGA OMWANCHA ..... 3RD PETITIONER**

**DENNIS ASWERA BICHANGA ..... 4TH PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

## JUDGMENT

1. By a Petition dated 6.2.2023 and filed by the Petitioners herein, they seek the following orders:

    1. That the Honourable Court be pleased to award the petitioners definite sentence [Article 50[2][p][q] of the *Constitution* of Kenya.

    2. That the Honourable Court be pleased to invoke the provisions of Section 333[2] i.e. the period spent in remand custody be factored in the sentence to be awarded.

2. The grounds on the face of the Application were that the Petitioners were arrested in 2014 and arraigned in court on 10.3.2014 and charged with the offence of murder. They were convicted and sentenced to death. The Petitioners appealed to the Court of Appeal at Kisumu but they stated that the same had never been heard and hence their application for resentencing. The relied on Article 165[3][b] of the *Constitution* of Kenya that this Court has jurisdiction to hear the matter. They further cited the Supreme Court decision of *Francis Karioko Muruatetu & Anor. v Republic* [2017] eKLR where the Court decreed that the mandatory death sentence was unconstitutional. The death sentence meted out on them was oppressive, arbitrary, inhuman and unconstitutional owing to its mandatory nature. The Petitioners were remorseful of the events of 25.2.2014 and regretted the death of the deceased. They

had used the 7 years spent in custody to reflect on their crime and they had become better people. The families of the Deceased Persons had forgiven the Petitioners and they were, therefore, in good terms.

3. The Application was supported by an Affidavit sworn by the Petitioners on 6.2.2023. They deponed that they sought for sentence rehearing only on account of the Supreme Court Ruling in Petition No. 15 & 16 of 2015.

4. The Respondent objected to the Petition. They Respondent stated that this Honourable Court has no jurisdiction to review a sentence of a Court with concurrent jurisdiction.

**Determination**

5. Sentence rehearing came about after the landmark decision of the Supreme Court in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR. The Court found as follows:

    a) 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* .

    b) This matter is hereby remitted to the High Court for re-hearing on sentence only, on a priority basis and in conformity with this judgment.

    c) ....

    d) ....

6. Subsequently, in *Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 Others (Amicus Curiae)* [2021] eKLR, the Supreme Court issued the following directions:

    18. Having considered all the foregoing, to obviate further delay and avoid confusion, we now issue these guidelines to assist the Courts below us as follows:

        i. The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under section 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.

        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) 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 our 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.

7. *The Sentencing Guidelines* (2023) were enacted vide Gazette Notice No. 11587, dated 1.9.2023. They provide, inter alia, as follows:

4.8.14 All convicts as specified in the relevant instructing instrument.

In the case of murder convicts:

a) All offenders convicted of murder who have been subject to the mandatory death penalty and desire to be heard on sentence as at the time of the Supreme Court's decision (14 December 2017).

b) All offenders sentenced to death for murder after the decision in Muruatetu but without regard to or compliance with the court's declaration (i.e. not taken into account mitigating factors).

8. Turning back to the facts of the present case, the Applicants were found guilty of the offence of murder of two ladies, Clemencia Bonareri Nyamao (first deceased) and Alice Moraa Mokua (second deceased). The 4th Applicant was found in a stupor for which he claimed he had been bewitched by the first and second deceased. The villagers then descended upon the 2 elderly ladies and ultimately torched them to death in the presence of their families. The 1st Applicant descended on the first and second deceased with a machete, the 4th Applicant provided the matchsticks, the 2nd Applicant provided the petrol while 3rd Applicant provided the tyres used to lynch the 2 elderly ladies. The villagers were led by the Applicants herein. Efforts to stop the Applicants by one George William Mabeya were thwarted and he was also assaulted in the process. The first and second deceased died of 65% and 95% body burns, respectively.

9. Looking at the record of High Court at Kisii Criminal (Murder) No. 31 of 2014 *Republic v Dennis Aswera & 3 Others,* I note that after the Applicants herein were convicted, the Trial Court gave them an opportunity to mitigate before sentencing.

10. Indeed, the Applicants, through their Counsel, Mr. Okenye, mitigated. The Trial Court's record indicates that the mitigation was duly considered before sentencing.

11. The 1st Accused (now 4th Applicant in this suit) was said to be a minor at the time. The Court held off sentencing pending age assessment. After assessment, the Trial Court found that he was of age and therefore proceeded to pass down the same sentence as the other 3 Accused Persons, i.e. the death sentence.

12. Being dissatisfied with that decision, the Applicants subsequently appealed vide Court of Appeal at Kisumu Criminal Appeal No. 127 of 2016 *Dennis Aswera Bichanga & Others v Republic*.

13. In the appeal, they cited the decision of the Supreme Court in the Muruatetu Case and stated that the sentence imposed was harsh and excessive in the circumstances. They stated that the death sentence imposed on them was mandatory and therefore ran foul of the Muruatetu Decision. The Trial Court indicated that it imposed the death sentence as prescribed by law. This would create the impression that the sentence was the mandatory punishment for the offence of murder.

14. However, when condemning the macabre and gruesome killing of the first and second deceased, the Court of Appeal held as follows:

> "It is trite that sentencing is a judicial function at the discretion of the court per the now notorious decision of the Supreme Court in *Francis Karioko Muruatetu & Another Vs. Republic & 4 Others* (Supra). The Supreme Court brought to light the unconstitutionality of the mandatory nature of the death sentence as it impedes judicial discretion in the determination of sentences. However, it does not prohibit, deter or limit the imposition of the sentence in deserving cases. And if ever a case deserved the pronouncement of the sentence of death, this one does.
>
> The manner in which the crime was committed is a study in rank malice, premeditation and murderous intent. The appellants worked the mob into a frenzy in an orgy of incendiary violence. They violently attacked the hapless duo without a drop of human kindness or pity. They subjected the victims to torturous and traumatic torture. They also repulsed with the thread of violence any attempt by PW3 to rescue the deceased. Such bold and impetuous conduct threatens the very safety of every member of society. They had no regard for the life of the two women whom they made a bonfire of in the helpless presence of their children. Courts of law must never be seen to condone such a descent to Hobbesian chaos.
>
> We therefore affirm the death sentence. We direct further that in the event that sentence is by common practice commuted to life imprisonment, the appellants must never be released to blight the safety of the happy and the free. They should be held for the remainder of their natural lives with no possibility of parole.
>
> The appeal is devoid of merit and is dismissed in its entirety."

15. The Court of Appeal, without a doubt, considered the guidelines set out in the Muruatetu Case and found the Appellants (Applicants herein) deserving of the death sentence. Indeed, nothing prevents a Court from imposing the death sentence should the circumstances so dictate.

16. In Paragraph 32 of the Muruatetu Decision, the Court held as follows:

> "(32) Two Indian decisions also merit mention. In Mithu v State of Punjab, Criminal Appeal No. 745 of 1980, the Indian Supreme Court held that "a law

that disallowed mitigation and denied a judicial officer discretion in sentencing was harsh, unfair and just (sic)" while in *Bachan Singh v The State of Punjab* (Bachan Singh) Criminal Appeal No. 273 of 1970 AIR (1980) SC 898, it was held that "It is only if the offense is of an exceptionally depraved and heinous character, and constitutes on account of its design and manner of its execution a source of grave danger to the society at large, the Court may impose the death sentence."

17. The Supreme Court in the Muruatetu Decision did not entirely do away with the death sentence. The Apex Court found that the mandatory death sentence was what was unconstitutional. However, in appropriate circumstances, the death sentence could still be imposed. The Court held thus:

    (69) Consequently, we find that Section 204 of the *Penal Code* is inconsistent with the *Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment.

18. Therefore, the Applicants' instant Application is akin to asking this Court to sit on appeal of a superior court's decision which is impossible.

19. Having been handled by the Court of Appeal, the present application is also res judicata and cannot lie. In the case of *John Florence Maritime Services Limited & Anor v Cabinet Secretary, Transport & Infrastructure & Others*, SC Pet. No. 17 of 2015, the Court noted that the doctrine of res judicata applies to criminal matters as well.

20. The Applicants also seek to have Court consider the time spent in custody. I believe that it goes without saying that given the nature of the sentence imposed upon the Applicants, the time spent in custody will not reduce the Applicants sentence.

21. The Petition dated 6.2.2023 lacks merit and I proceed to dismiss it.

22. It is so ordered.

**DATED, DELIVERED AND SIGNED AT KISII THIS 19TH DAY OF DECEMBER 2023.**

**TERESA ODERA**

**JUDGE**

**In the presence of:**

Mr. Ochengo for the State

All the 4 Petitioners in person

Emily Kerubo -Court Assistant