REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J)

CRIMINAL APPEAL NO. 14 OF 2018

DOUGLAS KARIUKI KINYANJUI.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT ON SENTENCE

1. In my judgment dated 8th October, 2020, I set aside the sentence imposed on the Appellant in this matter following appeal. The appellant had been sentenced to life imprisonment for defilement of KNK a child aged eight (8) years.

2. The basis for the setting aside of the judgment was stated in paragraphs 36 -38 of the said judgment which are set out under:

> ***"[36] Having carefully perused the trial court's treatment of sentencing, I also note that in the face of the serious sentence to be meted, the learned magistrate did not seek a pre- sentence probation report to enable it to fully consider the circumstances of the accused.***
>
> ***[37] Taking all the considerations above into account, I am satisfied that the sentence of the accused needs to reflect the current practice where a probation report assists by bringing to the attention of the court the full circumstances of the accused.***
>
> ***[38] Accordingly, the sentence imposed on the accused is hereby set aside, and it is ordered that a probation report be availed to the court within thirty (30) days to enable the court to consider the appropriate substituted sentence to mete in this matter. A sentencing hearing shall be scheduled upon the probation report being availed to court.***

3. The court directed that a fresh sentence will be meted after a Probation Report is filed. The file came up for mention on 22nd July, 2021 and new date was fixed for 11th November, 2021 for sentencing. However, I was transferred from the station before then.

4. Clearly, this court relied on the jurisprudence emanating from the **Muruatetu's case** (**Francis Karioko Muruatetu & Another v Republic [2017] eKLR**). However, since the date of the judgment herein, the Supreme Court in Muruatetu 2 (**Francis Karioko Muruatetu & Another v Republic** and **Katiba Institute & 5 Others (Amicus Curiae) [2021] eKLR**, categorically disallowed the application of the **Muruatetu 1** Principles in defilement cases.

5. In particular the Supreme Court stated at Paragraph 10 - 15 of its decision in **Muruatetu 2** as follows:

> ***"[10] It has been argued in justifying this state of affairs, that, by Paragraph 48 of the Judgment in this matter, or indeed the spirit of the Judgment as a whole, the Court has outlawed all mandatory and minimum sentence provisions; and that although Muruatetu specifically dealt with the mandatory death sentence in respect of murder, the decision's expansive reasoning can be applied to other offenses that prescribe mandatory or minimum sentences. Far from it, In that paragraph, we stated categorically that;***
>
> ***"[48] Section 204 of the Penal Code deprives the Court of 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 the Courts of their legitimate jurisdiction to exercise discretion not 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 persons under Articles 25 of the Constitution; an absolute right".***
>
> ***Reading this paragraph and the Judgment as a whole, at no point is reference made to any provision of any other statute. The***

reference throughout the Judgment is only made to Section 204 of the Penal Code and it is the mandatory nature of death sentence under that section that was said to deprive the "courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases".

[11] The ratio decidendi in the decision was summarized as follows;

> ***"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".***
>
> ***We therefore reiterate that, this Court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the Sexual Offences Act or any other statute.***

[12] ***Likewise, our orders set out in the previous paragraphs specifically directed the Attorney General to prepare a detailed professional review "in the context of this judgment…. with a view to setting up a framework to deal with sentence re-hearing cases similar to that of the petitioners herein", and no other case.***

We stated fairly clearly too, at Paragraph 111 of the Judgment, the extent to which our holding was applicable **as follows:**

> ***"It is prudent for the same Court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners. For the avoidance of doubt, the sentencing re-hearing we have allowed, applies only for the two petitioners herein. In the meantime, existing or intending Petitioners with similar cases ought not approach the Supreme Court directly but await appropriate guidelines for disposal of the same. The Attorney General is directed to urgently set up a framework to deal with sentence re-hearing of cases relating to the mandatory nature of the death sentence - which is similar to that of the petitioners in this case."***

[13] Further, at paragraph 71 of the Judgment, the Court nullified paragraphs 6.4-6.7 of the Judiciary Sentencing Policy Guidelines which were to the effect that courts must impose the death sentence in all capital offences in accordance with the law. In view of our holding in the Judgment in question, those paragraphs were no longer applicable.

[14] It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the 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 Petitioners, 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 such as treason under Section 40 (3), robbery with violence under Section 296 (2), 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. Muruatetu as it now stands cannot directly be applicable to those cases."

6. The Supreme Court in **Muruatetu 1** had set out principles of re-sentencing. They are limited to murder matters. This court was to apply those principles. However, in light of the foregoing, this court clearly has no jurisdiction to apply the **Muruatetu (1) Principles** for re-sentencing in respect of conviction for Sexual offences or robbery with violence offences as it was intent to do.

7. I recently came to the same conclusion in my considered opinion in **Naivasha HCCRA No. 40 of 2019 Paul Mwenji Komu v Republic**. There I reinstated the sentence imposed by the trial court.

8. Accordingly, in this case too the life sentence that was set aside by this court on appeal is therefore hereby reinstated.

9. Orders accordingly.

DATED AND DELIVERED IN NAIVASHA THIS 25TH DAY OF FEBRUARY, 2022.

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R. MWONGO

JUDGE

In the presence of:

1. Ms Maingi for the State

2. Douglas Kariuki Kinyanjui - Appellant in person

3. Court Assistant – Kamau