Muriuku v Republic (Criminal Revision 411 of 2020)
[2022] KEHC 11233 (KLR) (25 May 2022) (Ruling)

Neutral citation: [2022] KEHC 11233 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL REVISION 411 OF 2020

PJO OTIENO, J

MAY 25, 2022

BETWEEN

JOSEPH MURIUKU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The appellant having been convicted of the offence of murder was tried, convicted and sentenced to suffer death. He was aggrieved by both conviction and sentenced and appealed to the court of appeal at Nyeri and the appellate court found no merit in the appeal and dismissed same on the 18/7/2016.

2. He thus exhausted his appellant journey and by a Notice Motion dated 3/8/2020 he now seeks that this court reviews the sentence imposed by the High court and upheld by the court of Appeal.

3. The grounds advanced to merit the court reviewing the sentence are that during the trial, mitigation was not taken into account on account of the mandatory nature of the sentence prescribed by the statute creating the offence. He then adds that he has been incarcerated for a period of 18 years, expresses remorse being the sole bread winner of his family and that while serving his sentence he was involved in a road traffic accident while travelling in a prison vehicle and suffered bodily injuries including dislocated pelvic bone. For those reasons the appellant seeks leniency from the court by being accorded a lesser sentence upon the current sentence being reviewed. He support the plea with documents to show injury and training while in prison both in theology and self-representation in court.

4. The Respondent/Republic did not file any replying affidavit but written submissions. In the submissions the respondent takes the position that the only jurisdiction vested in court to review sentence is only available against the sentences imposed by the subordinate courts and not to review sentences imposed by superior courts especially after the exhaustion of the appellate avenues available.

5. For the appellant the position taken is that having been tried, convicted, sentenced and appeals to the court of Appeal dismissed his request is that he be accorded the benefits of the supreme court decision in *Francis Karioko Muruatetu Vrs Republic* (2017) eKLR by being resentenced by being accorded a proportionate and commensurate sentence in substitution of the death sentence as commuted to life sentence. The appellant stresses his injuries sustained in an accident while in prison and beseeches the court to apply section 333(2) criminal procedure code.

6. Over and above the certificate attained while in prison, there was also a report by the officer, in charge, Meru G.K Prison and another by the probation officer. The report from prison says the appellant has become a staunch Christian after learning the bitter consequences of crime who now counsels other inmates and assists them as a paralegal hence would be a responsible and good productive citizen if allowed to go back and integrate into the society. On the other hand the probation officers report recommends revision of the life sentence downwards because the family of the petitioner relocated away from the locality where the crime occurred and therefore when released there is likelihood of tension or revenge.

7. That the appellant was tried and convicted of offences of murder and that he has had his appeal to the court of Appeal determined fits him within the principles in the decision and directions issued by the Supreme Court in Muruatetu's case. This application must be seen to pursue the jurisprudence by the Supreme Court and should not be confused with the general power of the count on revision as a tool to supervise the subordinate courts under section 362, *Criminal procedure*.

8. I also take the view that the right to undertake resentencing cannot be on the basis of the term already served during the trial and after conviction but rather the consideration is whether the trial court and the court of Appeal appreciated the duty and obligation consider the addresses by the prosecution and the defence before meting out the sentence and whether there was appreciation of the courts duty to impose a sentence upon exercise of judicial discretion without being constrained to impose the indeterminate death sentence.

9. The record availed before the court does not include the proceedings after conviction, the address, if any, on mitigation and the reasons for sentence. It is thus not possible to determine what mitigation was offered and whether the court did take same into the account. That notwithstanding, the decision by the trial court and the court of appeal were made prior to the law enunciated by the Supreme Court.

10. My understanding of the jurisprudence in *Muruatetu's* case is that an applicant who has been convicted and had his right to appeal exhausted, like the instant appellant has a right to approach the High court, as the trial court, for purposes for meeting out an appropriate sentence after taking the address by the prisoner and the prosecution.

11. However not every appellant would be so entitled. I read the authority to say that the right to hearing limited for purposes of sentencing is only available to those whose trial have been declared or deemed unconstitutional on the basis that they were denied the right to offer an address towards mitigation. The supreme court at paragraph 102 of Muruatete's case did say of the remedy;-

> " We find that both petitioners are deserving of a remedy as they were denied a fair trial- a right that accrued to them under to the previous Constitution, and to which they are still entitled under the present Constitution. We have looked at comparative case law to give us guidance as to how this should be done".

12. Here even though the record and the judgment of the High court availed do not reveal what mitigation was put forth, the judgment of the court of appeal did see that record and noted that after conviction

the appellant was sentenced to life sentence. It is also inferable that sentence was never challenged on appeal hence it never arose for determination by the court of Appeal. I make the inference that it was not the subject of appeal.

13. On the basis that I have nothing do conclude that the appellant was denied any aspects of the right to affair trial, the disclosed circumstances of the offence showing the appellant to have acted in a depraved and heinous manner and the fact that the victim's family are still hurting, I find it inappropriate to accede to the request for a lesser sentence.

14. I find no merit in the application which is therefore dismissed.

DATED, SIGNED AND DELIVERED AT KAKAMEGA, ONLINE, THIS 25TH DAY OF MAY 2022.

PATRICK J O OTIENO

JUDGE

In the presence of:

Appellant in person

Ms. Nandwa for the Respondent

Court Assistant: Mwenda