



**Mureithi v Republic (Miscellaneous Criminal Application
E046 of 2021) [2022] KEHC 15314 (KLR) (28 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 15314 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
MISCELLANEOUS CRIMINAL APPLICATION E046 OF 2021**

SN MUTUKU, J

JUNE 28, 2022

**IN THE MATTER OF ARTICLES 27(1) 25(C), 50(2)
(P) OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF THE SUPREME COURT PETITION NO 15
OF 2015 IN FRANCIS KARIOKOR MURUATETU VS REPUBLIC**

AND

IN THE MATTER OF SECTION 203 AS READ WITH SECTION 204 OF THE PENAL CODE

AND

IN THE MATTER OF HIGH COURT CRIMINAL CASE NO 38 OF 2015 AT KAJIADO

AND

**IN THE MATTER OF THE COURT OF APEAL CRIMINAL APPEAL NO 99 OF 2019
IN BENJAMIN KAHINDI CHANGAWA & ANOTHER VS REPUBLIC AT NAIROBI**

AND

IN THE MATTER OF SECTION 333(2) OF THE CRIMINAL PROCEDURE CODE

BETWEEN

GEORGE MWANGI MUREITHI APPLICANT

AND

REPUBLIC RESPONDENT

*(Arising from the judgement in Kajiado High Court Criminal Case No 38
of 2015 at Kajiado dated 29th March, 2017 before Hon. Justice Nyakundi)*



RULING

The Notice of Motion

1. George Mwangi Mureithi, the applicant herein, was charged with the offence of murder contrary to section 203 as read with 204 of the Penal Code in 2015. He was tried, convicted and sentenced to suffer death on March 29, 2017 before Justice Nyakundi sitting at Kajiado High Court in Criminal Case No 38 of 2015.
2. He filed an application dated February 17, 2021 citing article 1(3), 2(4), 10, 25(c), 50(6), 159(c) of the Constitution, section 38 of the Penal Code and section 333(2) of the Criminal Procedure Code. He is seeking the following:
 - i. That this matter be certified as extremely urgent and be heard *ex-parte* in the first instance.
 - ii. That the honourable court be pleased to re-open this case for purposes of resentencing the applicant herein to a lesser sentence or to the period served.
 - iii. That the honourable court be pleased to issue any such further orders/directions that the court may deem fit in the context of the Supreme Court ruling on re-sentencing.
3. The application was supported by an affidavit sworn by the applicant on February 17, 2021. According to his depositions, he was arrested and charged with murder contrary to section 203 as read with section 204 of the Penal Code. He was convicted for murder and sentenced to suffer death. He lodged an appeal at the Court of Appeal but the same had not been heard and determined at the time he filed Misc Criminal Application No 42 of 2019 which was declined on account of the appeal.
4. The applicant has since withdrawn the appeal and preferred this application for re-sentencing. He has cited the jurisprudence in the decision of Francis Karioko Muruatetu & another-vs- Republic Petition No 15 of 2015. He seeks to have the sentence reviewed to take into account the period he has been incarcerated.

Submissions

5. The applicant filed his submissions dated March 29, 2021. It was his submissions that this honourable court has jurisdiction to hear and determine this matter in light of the development of jurisprudence resulting from Supreme Court ruling in Petitions Nos 15 and 16 of 2015 in Francis Muruatetu and another-vs- Republic [2017] eKLR. That the decision declared the mandatory nature of sentences unconstitutional and it is for that reason he has approached this court for resentencing.
6. The applicant has relied on various provisions of the law including the Penal Code and the Criminal Procedure Code as specifically shown on the face of the application and the submissions.
7. He has submitted that he is a first offender and that he is seeking a second chance from this court. He relied on the Court of Appeal decision in Benjamin Kabindi Changawa & another - vs- Republic at Nairobi 99 of 2019. He urged this court to find that the time served sufficient so as to allow the applicant to care for his aging parents and seek reconciliation with his wife. That further the sentence he is currently serving has had a negative effect on his health in a big way as he was diagnosed with chronic bronchitis and peptic ulcers.
8. Counsel for the respondent stated that he is not opposed to the resentencing but asked court to look at the offence in question.



Determination

9. I have looked at the application, the supporting affidavit and the submissions. The applicant bases his application on the Supreme Court decision in *Francis Karioko Muruatetu (supra)*, in which the Supreme Court outlawed mandatory death penalty for murder as unconstitutional.
10. The Supreme Court in *Francis Karioko Muruatetu (supra)* further gave the following guidelines with regard to mitigating factors to be applied in a re-sentencing hearing in respect to a murder charge thus:

"[71] As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

 - (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) remorsefulness of the offender;
 - (g) the possibility of reform and social re-adaptation of the offender;
 - (h) any other factor that the court considers relevant."
11. Supreme Court however, clarified that these guidelines are not meant to replace judicial discretion but are advisory rather than mandatory.
12. I have read the record in Criminal Case No 38 of 2015. The record is clear that similar mitigating factors were presented before the trial court before sentence was pronounced. I note particularly the following statements from the trial court:

“During sentencing I accept the submissions made by the prosecution that you have no previous convictions. I also accept the submissions that in committing this offence there was a significant degree of planning which went into obtaining the pesticides in advance and having V G, the deceased, to your house where you had the opportunity to commit the offence.

I have considered your mitigation as presented on your behalf by Mr Ochieng, learned counsel who has represented you since commencement of this trial. According to Mr Ochieng, you are remorseful and do regret the death of your son. Mr Ochieng also asked this court to consider your personal circumstances of being under intense pressure and psychological stress to which must have impaired your judgment.”
13. After the trial court considered all the mitigating circumstances of this case, the judge sentenced the applicant to death as by law provided.
14. I have considered the arguments of the applicant that the time spent in custody should be taken into consideration and relied on the case of *Titus Ngamau Musila Alias Katitu -vs- Republic* High Court Criminal Case No 78 of 2014. In view of this case he asked this honourable court to consider the



mitigation factors and impose lenient sentence. He also prayed that this court impose a non-custodial sentence preferably probation.

15. The Supreme Court declared the mandatory nature of death sentence unconstitutional. The court, however, did not outlaw the death sentence. It still remains a legal sentence for deserving cases under our legal regime. It is left to each individual judge to consider the circumstances of each case and determine, using judicial discretion, the appropriate sentence. What the Supreme Court did, through the *Muruatetu* decision is to free the courts to exercise their discretion in sentences unfettered by the mandatory nature of the death sentence for murder cases.
16. Having read the detailed judgment of my brother Justice Nyakundi and the reasoning that went behind that judgement, it is my view that every court handling a re-sentencing must exercise utmost caution to avoid a situation that might seem as though one is sitting on appeal of a brother/sister judge with similar jurisdiction.
17. The life lost was innocent. This was a little child whose life was at only 1 ½ years was just starting. It is unfathomable that such an infant could lose life through the hands of those who are supposed to nurture and care of him.
18. I have noted the dilemma the trial court experienced in sentencing the accused to death. The impression I get from the trial judge's pronouncements is that the judge would have opted to give a different sentence had he the discretion to do so. This impression discerned from the following terms:

“In my practice at the bench I have probably not found any offence in the category of capital offences that varies in both degree and character as to what one clearly stipulated to fall within the definition of the offence of murder. This issue has occupied the minds of judges of the superior courts in Kenya as to interpretation as to both the character and moral guilt of an accused person as to the key element of malice under section 203 in comparison with section 202 of the Penal Code on unlawful act without intention. However, case law has provided guidelines on this matter as to when an offence falls under the mandatory sentence of death under section 204 of the Penal Code or within sentencing under section 205 which provides for maximum sentence of life imprisonment. In the latter, the court has a measure of discretion.”
19. It is clear to me that the trial judge would have arrived at a different decision had *Muruatetu* case been decided at that time of the judgment in March 2017 (*Muruatetu* came into being on December 14, 2017).
20. I have considered the notice of motion, the grounds in support of the same, the submissions of the applicant and the state as well as authorities cited, including the *Muruatetu* decision. This was a gruesome act meted on an innocent life who did not deserve to die. Whatever issues the accused had could not have been against such an innocent life. As submitted by the State, there was some degree of planning aimed at killing the child. For these reasons, a stiff sentence is called for.
21. Even though the applicant seeks to have the sentence reduced to time served in custody, this case is not suitable for such a sentence. In my considered view, the applicant ought to serve term in custody. I therefore allow this application and vary the sentence from death sentence to a prison term of 20 years imprisonment taking into account the term already served and the time spent in custody. For the avoidance of doubt, the death sentence imposed on the applicant is hereby varied to 20 years imprisonment.
22. Orders shall issue accordingly.



DATED, SIGNED AND DATED THIS 28TH JUNE, 2022.

S. N. MUTUKU

JUDGE

