



**Mwei v Republic (Criminal Petition 104 of 2020)
[2022] KEHC 13045 (KLR) (21 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13045 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL PETITION 104 OF 2020
EKO OGOLA, J
SEPTEMBER 21, 2022
IN THE MATTER OF RE-SENTENCING HEARING UNDER
ARTICLES 19 (3), 22, 25, 26, 27 (1), 165 (3) (B) OF THE
CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF ARTICLES 2 (1), 25 (C), 259, 1(3),
2(4), 258 OF THE CONSTITUTION OF KENYA, 2010**

BETWEEN

BERNARD KIPTOO MWEI PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Petitioner, Bernard Kiptoo Mwei was tried and convicted of the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code* and was sentenced to death. He is now before this Court for resentencing pursuant to the Supreme Court decision in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR.

Applicant's Submissions

2. The Applicant's case is that in light of the case of *Francis Karioko Muruatetu & Another vs Republic* [2017] eKLR mandatory maximum sentence was declared unconstitutional. The Applicant submitted that he was arrested in the year 2006 and has been incarceration for a period of (14) years.
3. In his mitigation the Applicant deposed that he is remorseful and regret his actions, and further that he is a father of one who needs his care.



4. The Applicant submitted that he has taken full advantage of the rehabilitative programs offered in the correctional facility and has attached a certificate of lamp and light bible correspondences courses, certificate of gospel faith ministry, certificate of financial knowledge for Africa, Kenya Certificate of Secondary Education, course of honour and a letter of admission to Embu College.
5. The Applicant urged Court to consider the period he has been incarcerated for 14 years since the day when he was arrested. He further prayed that he be sentenced for (20) years.

Respondent's Submissions

6. Ms. Okok, learned prosecution Counsel opposed the application and submitted that the Muruatetu decision did not declare the death sentence unconstitutional but only the mandatory nature of it. The Respondent deposed that the same can still be applied in the appropriate circumstances. In the instant case, Ms. Okok argued that, it is evident that the Petitioner killed his own son in the cruellest manner. Ms. Okok further submitted that this was a case that met the threshold for the death penalty and that the death penalty imposed by the trial Court was a sufficient and deterrent sentence in the circumstance.

Determination

7. The Supreme Court on 6/7/2021 issued directions and clear guidelines with regard to the said matters. The said directions were cut clear and in the following terms;

- “ 18. Having considered all the foregoing, to obviate further delay and avoid confusion, we now issue these guidelines to assist the courts below 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 victim 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 respect of 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. Possibility of reform and social adaptation of the offender.
- j. Any other factor the court considers relevant.
- k. Where the appellant has lodged an appeal against sentence alone, the appellate court will proceed to receive submissions on re-sentencing.
- l. 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*.

8. Applying the above legal principles to the facts in question herein, it is clear from the Court's record that the Petitioner mitigated in trial Court and that the Court indeed noted the said mitigation. Nonetheless the Court sentenced the Petitioner to suffer death as provided by the law. The Petitioner's mitigation was to the effect that he was remorseful for the offence and that the same had occurred due to family misunderstanding. In his application and submissions, he reiterated that he is remorseful and that he was rehabilitated while in prison.
9. From the evidence on record, the Petitioner on 29/8/2007 arrived home in a state of intoxication and got into a physical altercation with the wife and in the midst of the fight the Petitioner killed their three-year-old son without any legal justification.
10. I have considered the circumstances in which the offence was committed and the effect of the same on the family and the community. I have also considered the submissions by the accused as well as those by Ms. Okok learned prosecution Counsel.
11. The Petitioner has been in custody since 2007, when he was arrested. The Petitioner has been incarcerated for 15 years now. Whereas this was clearly a gender-based violence crime against the Petitioner's wife that led to the untimely death of their son, it seems that since the Petitioner's incarceration he has reformed and has undergone some rehabilitating steps which have not only reformed him but have also made him a leader in prison. It is clear that the Petitioner has during his



period of their incarceration reformed and has while in prison engaged in attaining skills necessary for him to take care of himself if released from prison.

12. It is my view that once the sentence imposed on an accused has met the objectives of retribution, deterrence, rehabilitation, restorative justice, community protection and denunciation, it is no longer necessary or desirable to continue holding the accused in incarceration. In this case, it would seem that the learned trial magistrate's decision on sentencing was informed mainly by the gravity of the offence.
13. As such, taking into consideration the principles set out in Muruatetu case as to the exercise of discretion in sentencing in murder cases and the guidelines in sentencing, and considering the objectives of sentencing as laid down in the Judiciary Sentencing Policy Guidelines, 2016 and further taking into consideration the circumstances under which the offence was committed, the gravity of the said offence as well as the mitigation by the Petitioner herein, it is my considered view that the Petitioner still deserves a deterrent sentence.
14. In the end, the death sentence is hereby set aside and the same is substituted with 28 years' imprisonment. The said sentence shall run from the date of arrest.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 21ST OF SEPTEMBER 2022.

E. K. OGOLA

JUDGE

