



**Njoroge v Directorate of Prosecution (Miscellaneous Criminal Application
307 of 2018) [2022] KEHC 16866 (KLR) (Crim) (19 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16866 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS CRIMINAL APPLICATION 307 OF 2018
CW GITHUA, J
DECEMBER 19, 2022**

BETWEEN

WILLIAM MUIRURI NJOROGE APPELLANT

AND

DIRECTORATE OF PROSECUTION RESPONDENT

RULING

1. The Petitioner, William Muiruri Njoroge was tried and convicted of the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*.
The particulars supporting the charge were that on 5th day of January 2011 at Dandora Phase Three Estate, Njiru District within Nairobi County, he murdered Kepha Karugu Gatharia.
2. Upon his conviction, he was sentenced to death which was the only sentence then provided by the law for the offence of murder. His appeal to the Court of Appeal against both his conviction and sentence was dismissed on April 27, 2018.
3. The dismissal of the Petitioner's appeal would have marked the end of the road for him were it not for the window opened by the Supreme Court in the case of *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR. In this case, the Supreme Court declared the mandatory death sentence for the offence of murder prescribed under Section 204 of the *Penal Code* unconstitutional to the extent that it deprived the trial court of its discretion to impose an appropriate sentence after taking into account the circumstances of each particular case.

In addition, the Supreme Court held that all persons who had been convicted of the offence of murder and sentenced to death were at liberty to apply to the trial court for resentencing.



4. It is pursuant to the aforesaid decision that the applicant approached this court for resentencing *vide* his petition dated June 19, 2018 filed in court on even date. In the affidavit supporting the petition, the applicant did not state why he felt that he deserved to be considered for resentencing. He only deposed that his death sentence was commuted to life imprisonment by a presidential decree in 2016 and that he had exhausted all appeal processes.
5. At the hearing, the applicant prosecuted the application in person by way of oral submissions in which he implored me to reduce his life sentence to a determinate sentence.
6. The petition is contested by the State. Learned prosecuting counsel Ms. Z. Chege filed grounds of opposition on March 11, 2022. She contended that the applicant's case was not suitable for resentencing since in her view, the offence was aggravated; that the death sentence was merited on account of the extreme violence meted out to the deceased; that the deterrent effect of the sentence will be diluted if the sentence was reduced.
7. During the hearing, learned prosecuting counsel Mr. Kiragu reiterated the grounds of opposition filed on behalf of the respondent and submitted that there was no justification for interference with the life sentence the petitioner was currently serving since it was commensurate with the offence he had committed.
8. I have considered the petition as well as the grounds of opposition filed by the Respondent and the parties oral submissions. I have also read the trial court's record.

The record shows that before passing sentence, the learned trial judge (Hon. Lesiit J, as she then was) gave the petitioner, through his advocate Mrs. Omungala, an opportunity to mitigate. Counsel in her plea in mitigation stated that the applicant was remorseful and that he was intoxicated at the time he committed the offence.
9. These mitigating factors are part of the court record and were before the Court of Appeal when the court considered the petitioner's appeal against his conviction and sentence. As stated earlier, the Court of Appeal upheld the petitioner's conviction and sentence on April 27, 2018. This was after the Supreme Court had made its decision in the first *Muruatetu case* declaring the mandatory death sentence unconstitutional and giving persons already sentenced to death an opportunity for resentencing.
10. The Court of Appeal was obviously aware of this jurisprudence at the time of making its decision and if it was so minded, it would have varied the petitioner's death sentence or substituted his life sentence with a determinate sentence given that at the time the appeal was dismissed, the petitioner's death sentence had already been commuted to life imprisonment. Instead, in its wisdom, the court chose not to interfere with the petitioner's sentence.
11. Considering that the Court of Appeal pronounced itself on the petitioner's sentence post the Muruatetu decision, it is my considered view that this court lacks jurisdiction to resentence the petitioner because doing so would amount to interfering with a decision made by the Court of Appeal.
12. The Court of Appeal is one of the superior courts which ranks higher in the hierarchy of courts than the High Court (See Article 163 of *the Constitution*) and therefore, its decisions cannot be the subject of review by this court. Allowing a resentencing application where the sentence subject matter of the application had been upheld by the Court of Appeal post the Muruatetu decision would in my opinion be tantamount to sitting on appeal on the Court of Appeal's decision which is not permissible in law.
13. Having found as I have above, I am satisfied that the instant petition lacks merit and it is hereby dismissed.



It is so ordered.

DATED, SIGNED AND DELIVERED AT KISII THIS 19TH DAY OF DECEMBER, 2022.

C.W. GITHUA

JUDGE

In the presence of:

The petitioner in person

Ms. Adhiambo for the Respondent

Ms. Karwitha Court Assistant

