



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL PETITION NO E016 OF 2020

ADON JUMA OLUOCH.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

INTRODUCTION

1. The Petitioner herein 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 on 21st December 2012.
2. Being dissatisfied with the said decision, the Petitioner lodged an Appeal in the Court of Appeal **Kisumu Criminal Appeal No 47 of 2013**. In a judgment that was delivered on 19th October 2015, the Court of Appeal affirmed the conviction and sentence and dismissed his Appeal in its entirety.
3. On 16th November 2020, the Petitioner filed an application for review of the sentence. The said application was supported by his Affidavit in which he stated that he had been in custody for the last ten (10) years since the time he was arrested. He added that the mandatory sentence was unconstitutional, inhuman and degrading.
4. He relied on the case of **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR** where the court held that mandatory sentences deprive courts their legitimate jurisdiction to exercise discretion to individualise an appropriate sentence to relevant aspects of character and record of each accused person.
5. He stated that while he was in prison, he had undertaken various transformation programmes in vocational training and life skills. He had also trained in masonry and after being tested by the government testing authority (NITA), he qualified with Grades I, II and III. He added that he had also trained in carpentry and joinery and qualified with Grade III. He also had several certificates in Biblical studies from Nuru Lutheran Ministries and Health Studies from Voice of Prophecy. It was his submission that having gained the skills, he was ready to be integrated into the society.
6. He pleaded with this court to consider that he was aged thirty nine (39) years of age and thus still had time to shape his future and that he was sole breadwinner of a young family and took care of his elderly mother. He added that he was a first offender and was remorseful and that while in prison, he had maintained a high level of discipline and was rated as one of the most disciplined prisoners.
7. On its part, the State was not opposed to the Petitioner's application for review of the sentence. It agreed with him that in the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra), the Supreme Court declared the mandatory sentence for murder unconstitutional. It pointed out that the Supreme Court set out the following as mitigating factors for re-sentencing and that the same were applicable in cases of defilement:-

- a. Age of the offender;**
- b. Whether he was a first offender;**
- c. Whether he had pleaded guilty to the offence;**
- 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 factors the court would consider relevant.

8. It pointed out that he was sentenced to death on 21st December 2012 and that he had already served a prison term of eight (8) years and two (2) months to date. It appreciated that he was forty (40) years of age and had prepared himself for integration with the public. As he had reformed, the State recommended that he be re-sentenced to thirty (30) years imprisonment, taking into account the period that he spent in custody as provided in Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

9. In the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra), the Supreme Court rendered itself as follows:-

(111) "...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. (emphasis court). 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."

10. The Taskforce on the Review of the Mandatory Death Sentence under Section 204 of the Penal Code Act was appointed vide Gazette Notice No. 2160 dated 15th March 2018 but guidelines were yet to be formulated despite the Taskforce having been duly presented to the Attorney General in October 2019.

11. Having said so, in the case of **William Okungu Kittiny v Republic [2018] eKLR**, the Court of Appeal expressed itself as follows;

"The decision of the Supreme Court only discouraged persons from filing petitions to the Supreme Court but the decision does not prohibit courts below it from ordering sentence re-hearing in a matter pending before those courts. By Article 163 (7) of the Constitution, the decision of the Supreme Court has immediate and binding effect on all other courts. The decision of the Supreme Court opened the door for review of death sentences even in finalized cases."

12. This court is thus clothed with jurisdiction to re-hear and re-sentence those that were convicted with capital offences that carried a mandatory death sentence.

13. Bearing in mind the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) and **The Sentencing Policy Guidelines, 2016** of the Judiciary, this court was satisfied that this was a suitable case for it to exercise its discretion to review the mandatory death sentence.

14. This court noted that the deceased suffered greatly for seventeen (17) days before he succumbed to the injuries that were meted on him by the Petitioner. The murder can only be said to have been gruesome. It was so pre-meditated and malicious as the Petitioner waylaid him armed with a panga and shovel after he had thwarted the Petitioner's efforts to rape his sister.

15. A perusal of the affidavit attached to the Petitioner's application for review of sentence did not show a person who was remorseful. He seemed to concentrate on the unconstitutionality of the mandatory death sentence and how inhuman and degrading it was.

16. Having said so, while there is need to send a strong message to the society that violence against other persons is strongly condemned, convicts who have reformed and are remorseful ought to be given a second chance and have a new lease of life.

17. The Petitioner had already spent more than eight (8) years behind bars and had had sufficient time to reflect on his actions. Indeed, vide his letter dated 19th November 2020 and filed in court on 20th November 2020, the officer in charge Kisumu Maximum Prison had vouched for his good conduct.

18. Taking all the factors into consideration, this court came to the firm view that a sentence of thirty five (35) years was fair in the circumstances of the case herein.

DISPOSITION

19. For the foregoing reasons, the court found that the Petitioner's Petition for review of the sentence that was filed on 16th November 2020 was merited and the same be and is hereby allowed. Accordingly, the court upholds the conviction of the Applicant for the offence of murder but reviews the mandatory death sentence to thirty five (35) years with effect from the date of the sentence. The period the Petitioner spent in custody, if at all, shall be taken into account when computing the sentence in accordance with Section 333(2) of the Criminal Procedure Code.

20. It is so ordered.

DATED and DELIVERED at KISUMU this 27th day of April 2021

J. KAMAU

JUDGE