REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISCELLANEOUS CRIMINAL APPLICATION NUMBER 3 OF 2019

EWM.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

1. EWM is a 35 years old woman. She has been in custody from 16th November 2011, two (2) years in Remand custody, nine (9) years in prison.

2. On 23rd September 2011, after a full trial, she was found guilty of **Murder Contrary to Section 203 as read with Section 204 of the Penal Code.** She was found guilty and convicted accordingly.

3. Before sentencing, counsel in her mitigation, told the court that she was a single mother of two children one aged seven (7) years, another aged one (1) year and two (2) months. That the father of the children had deserted them. That she had an elderly mother who was sickly. He pleaded for leniency and sought a non-custodial sentence.

4. The prosecution submitted that she was a first offender.

5. Having considered her mitigation, the trial *Judge W. Ouko J (as he then was)* observed that though the accused was the first offender, and a single mother of two children;

> ***"The deceased was an innocent child who was brutally and repeatedly attacked until she died by the accused person (sic). She is sentenced to serve life imprisonment."***

6. The charge sheet states: *On 13th November 2009 at Mwisho Wa Lami Centre at Mau Narok in Njoro District of Rift Valley Province, she murdered RM.* RM was the accused person's five (5) years old sister.

7. What is before me for consideration is E's Chamber Summons filed on 2nd January 2019 brought under **Article 25, 47, 48, 163(7) of the Constitution and Rule 4(1) of the Mutunga Rules,** citing also the case of **Francis Karioko Muruatetu (2017] eKLR,** and **William Okungu Kittiny -vs- Republic [2018] eKLR.** In the Chambers Summons she seeks orders:-

> *- That this Honourable court be pleased to grant re-sentencing hearing in the decision of the High Court at Nakuru.*
>
> *- That this Honourable Court be pleased to receive mitigation from the applicant for consideration of an appropriate sentence devoid of the mandatory death sentence which has been declared unconstitutional by the Supreme Court of Kenya.*

8. The Chamber Summons is supported by the affidavit of the applicant sworn on 2nd January 2018. In the affidavit she depones that upon her conviction and sentence, she has filed an appeal in the Court of Appeal but had not received any response. That this court is bound by the decision in **Muruatetu** under **Article 165(7) of the Constitution** and could re-hear this case and mete out an appropriate sentence.

9. At the hearing of the application the applicant submitted that she had been in custody for twelve (12) years, that her sentence infinite and she wanted this court on the strength of the **Muruatetu** case to give her a finite sentence. She submitted that she had reformed and was deeply remorseful for what she had done. She urged the court to find that "*Kosa si kosa, kosa ni kurudia kosa.*" That she had learnt skills while in custody she could apply to fend for herself if released; that her mother had forgiven her.

10. In opposing the application, Ms Murunga for the state submitted that the prosecution had proved the charge of **Murder Contrary to Section 203 as read with 204 of the Penal Code.** That by virtue of **Section 204 of the Penal Code** the accused ought to have been sentenced to death but the court in exercise of its discretion sentenced her to imprisonment for life, that the **Muruatetu** case was not applicable to the applicant's case.

The state took the position that the applicant deserved the sentence meted to her as it was proportionate to the manner in which she committed the offence.

11. Counsel further submitted that if this court found that it could grant the orders sought, to consider that the victim was a defenceless five (5) year old child whom the applicant had beaten with sticks. When the sticks broke into pieces she took a piece of wood and beat the child some more. That this happened in the presence of other children who tried to stop her in vain. That the child's offence was delay after being sent to the shops. That even after noting that the child had sustained injuries, the applicant simply washed her and put her in bed. That the mother was affected psychologically by what happened.

12. I sought a re-sentencing report which was filed by Probation and After Care Services, Nakuru County. The report indicated that the deceased aged five years was the accused's step sister, they shared a mother but not the father. When she committed the offence the accused had one child, and was pregnant with her youngest, whom she gave birth to while in prison custody. The report also indicates that her family has forgiven her, her siblings have been visiting her in custody before Covid 19, and that her stepfather *(the biological father to the deceased)* abandoned her mother. That the family are ready to accept her back home.

The issue for determination is whether this court can subject the **life sentence** imposed on applicant to review on the principles set out in the **Muruatetu Case.**

In the **Muruatetu case** the petitioners and others were arraigned before the High Court *(Mbogholi Msagha J.)* for the offence of murder. Upon their conviction, they were sentenced to death as decreed by **Section 204 of the Penal Code**. Their appeal to the Court of Appeal against both that conviction and sentence was dismissed. Aggrieved by that decision, they filed two separate appeals in the Supreme Court which were consolidated. The main ground for petitioners' appeal was that the mandatory death sentence imposed upon them and the commutation of that sentence by an administrative fiat to life imprisonment were both unconstitutional and therefore null and void. This they argued was because the mandatory nature of the death penalty under **Section 204 of the Penal Code** took away the discretion of the trial court by forcing it to hand down a sentence pre-determined by the Legislature in violation of the doctrine of separation of powers. That the mandatory death penalty under **Section 204 of the Penal Code,** violated the right to fair trial as set out in **article 50 (2) of the Constitution** in that it denied the trial Judge discretion in sentencing.

13**.** The Supreme Court agreed with them finding that the mandatory nature of the death sentence was unconstitutional and as a result that the commutation of their death sentence to life imprisonment was equally untenable. For that reason the persons then serving the mandatory death sentence or whose sentences to death had been commuted to life by executive fiat could now petition for rehearing and re-sentencing.

14. Within the same appeal the Supreme Court was asked to look into the sentence of life imprisonment. The Supreme Court framed the issue thus:

> "(c) ***Whether this court should fix a definite number of years of imprisonment subject to remission rules, which would constitute life imprisonment."***

In answering the issue the Supreme Court was of the view that the issue of life imprisonment was not within the jurisdiction of the court to deal with. The court agreed with the view expressed in **Jackson Wangui and Another –vs- Republic [2014] eKLR** where the court observed**:-**

> ***"As submitted by the petitioner, however what amounts to life imprisonment is unclear in our circumstances. It is not, however, for the court to determine what should amount to a life sentence; whether one's natural life or a term of years. In our view, that is also province of legislature...as to what amount, to life imprisonment, this is a matter for the legislative branch of Government. It is not for our courts to determine for the people what should be a sufficient term of years for a person who committed an offence that society finds reprehensible to serve."***

The Supreme Court went on to state at ***Paragraph 95*** that:-

> ***"We also acknowledge that in Kenya and internationally, sentencing should not only be used for the purpose of retribution, it is also for the rehabilitation of the prisoner as well as the protection of civilians who may be harmed by some prisoners. We find the comparative jurisprudence with regard to indeterminate life sentence is compelling. We find that a life sentence should not necessarily mean the natural life of the prisoner; it could also mean a certain minimum or maximum time to be set by the relevance judicial officer along established parameters of criminal responsibilities, retribution, rehabilitation and recidivism."***

15. The court then proceeded to recommend to the Attorney General to develop legislation on what constitutes "life imprisonment." That legislation has not come into force yet. Be that as it may, from the outset it is evident that the applicant's case does not fall within the ambit of the principles set out in the **Muruatetu case** as regards the mandatory nature of the death penalty. Though charged under **Section 203 as read with Section 204 of the Penal Code** carrying that sentence, the trial court did not sentence her to death. The case of **Muruatetu** drew a distinction between the life sentences resulting from the commutation of the death sentence by an act of the executive and, the sentence of life imprisonment meted by a Judge as provided for by law**.**

16. The applicant relies on provisions of **Article 163(7) of the Constitution of Kenya** which provides that all courts are bound by the decisions of the Supreme Court. I am alive to that position and I am bound by the holding of the Supreme Court. However, the applicant's case herein does not fall in the same class as the **Muruatetu Case.**

17. It is evident that to E this sentence of imprisonment to life is no less than a mandatory sentence to death. 1st because she was charged with murder and found guilty and convicted. Secondly, because the totality of the indefinite sentence to life imprisonment is that she is to remain incarcerated for the fullness of her natural life. To E, this is a sentence to death, only stated in other words. And she is right, until the Attorney General comes up with the law on the number of years that amount to life imprisonment, E can expect to die in custody unless that sentence is overturned on appeal, or she gets out on the Power of Mercy of the Executive.

18. I see E's concern here. That Muruatetu and others were charged with the same offence, they were sentenced to death, their sentences were commuted to life but they, and others in similar circumstances got a chance, a short cut so to speak, through sentence rehearing, to get finite sentences, but she cannot have that by dint of the same process. To her that sentence simply tells her that she will remain in prison custody until the end of her natural life on earth. Without the legislative qualification required by the Supreme Court in **Muruatetu** this turns out to be a slow death with psychological implications and implications to rehabilitation programs contrary to the clear dictates of our Constitution on every persons right to dignity, and protection against any form of torture.

19. But more starkly striking is the apparent discrimination, A person sentenced to **death** by virtue of **Section 203 as read with Section 204 of the Penal Code**, and whose sentence is commuted to life stands a chance to get a finite sentence through re-sentencing, his sentence to life imprisonment notwithstanding but not her, having been sentenced to life directly, the distinction notwithstanding. EWM does not understand this, hence her application. And it is time the Attorney General acted on the recommendations made by the Supreme Court.

20. Having said that the applicant has also cited the provisions of the Constitution:

Article 25 which provides that fundamental Rights and freedoms that may not be limited.

> ***Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—***
>
> ***(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;***
>
> ***(b) freedom from slavery or servitude;***
>
> ***(c) the right to a fair trial; and (d) the right to an order of habeas corpus***

Article 47 which provide for fair administrative action

> ***(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***
>
> ***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***
>
> ***(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall— (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and***
>
> ***(b) promote efficient administration.***

Article 48 which provides for Access to justice

> ***The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.***

Rule 4(1) of the **Mutunga Rules** which states:

> ***Where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.***

21. I have carefully considered these provisions of the Constitution in light of E's application before me. The application before me simply seeks re sentence, in the light of the **Muruatetu** case. It therefore follows that the applicant is seeking orders as though she was given the mandatory death sentence, followed by the administrative action of the executive just like in **Muruatetu.** But that is not the case in her case. Hence these provisions are not applicable.

The sentence she is serving was meted by this court *(Ouko J)* as he then was in the exercise of his discretion. Her mitigation was duly considered and it went into her sentence. Her relief for the issue she has does not lie in this court but in a higher court as stated at **Article 50(2) (q) of the Constitution**, ***having been convicted, she is entitled to an appeal to, or review by, a higher court as prescribed by law.***

That law is **section 379 of the Criminal Procedure Code** which provides for appeals from High Court to Court of Appeal:

(1) A person convicted on a trial held by the High Court and sentenced to death, or to imprisonment for a term exceeding twelve months, or to a fine exceeding two thousand shillings, may appeal to the Court of Appeal—

(a) against the conviction, on grounds of law or of fact, or of mixed law and fact;

(b) with the leave of the Court of Appeal, against the sentence, unless the sentence is one fixed by law.

22. Her right to access justice by way of appeal or review remains open. It is in that Superior Court that she will have the opportunity to persuade the court as to the harshness or otherwise of her sentence.

23. Clearly then this application is not tenable here. The applicant to pursue her appeal in the Court of Appeal.

DATED AND DELIVERED VIA ZOOM THIS 27TH DAY OF APRIL, 2021.

MUMBUA T. MATHEKA

JUDGE

In the presence of;

Edna Court Assistant

For state: Ms. Murunga

Applicant present via ZOOM at Nakuru GK Women Prison.

MUMBUA T. MATHEKA

JUDGE