



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL MISCELLANEOUS APPLICATION CASE NO. E293 OF 2019
MARY NJOKI NG'ANG'A.....APPLICANT
VERSUS
REPUBLIC RESPONDENT

RULING

The applicant herein **MARY NJOKI NG'ANG'A** file this application on 3.6.2019. The application basically seeks an order of resentencing hearing. It is based on an affidavit of the applicant sworn on 30.5.2019. the said affidavit states that applicant was originally accused in High Court Criminal Case Number 11 of 20-15 with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. she was convicted of the same and sentenced to death on 13.11.2018. She states that she never lodged and appeal at the Court of Appeal.

At paragraph 5, 6, 7, 8, 9 and 10, the applicant pleads that this application is brought pursuant to the decision in **Francis Karioko Muruatetu and Another Versus Republic (2017)eKLR** on the mandatory nature of death sentence i.e Supreme Court petition No. 15/2015.

Being based on the Muruatetu decision, it is important to consider the finding that the Supreme Court made therein with regard to death sentence generally. Did the Supreme court declare death sentence unconstitutional? I think not. At paragraph 69 of the said decision, the Honourable Judges of the Supreme Court noted;

“Consequently, we find that section 204 of the Penal Code is inconsistent with the constitutional and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment.”

Further, the Supreme court went on to issue some guidelines that the trial court (High Court) may apply in exercising its discretion on sentencing. At paragraph 71, those listed are:-

- **Age of the offender.**
- **Being a first offender.**
- **Whether the offender pleaded, guilty**
- **Character and record of the offender**
- **Commission of the offence in response to gender based violence.**
- **Remorsefulness of the offender.**
- **The possibility of reform and social re-adaptation of the offender.**
- **Any other factor that the court considers relevant.**

The issue therefore, before this court is whether this court can proceed to consider these facts on this sentence re-hearing application of the applicant. In deciding on this, this court has noted the following material circumstances;

i. The decision of the Supreme court in the Muruatetu case was delivered on 14.12.2017. The sentence aggrieved of by the applicant herein was passed on 13.11.2018. In passing the sentence therefore, the Trial Judge was well aware of and took cognizance of the guidelines issued by the Supreme Court (as above) regarding the passing of death sentence.

ii. It is clear from the proceedings that before passing the sentence, the court had on 27.9.2018 taken note of the mitigation of the applicant. All the issues raised in this application were raised and accordingly noted in the mitigation in court on 27.9.2018. These included the fact that she was a first offender, was remorseful, her career engagements, the fact that she was

now a single mother of 2, the orphans she had under her care, period she stayed in custody, and a plea to be accorded a 2nd chance in life.

iii. It is also clear that following the mitigating factors raised by the applicant, the Honourable Trial Judge ordered for and obtained a Probation Officer's Report on the applicant. The report dated 31.10.2018 was duly filed in court and the court gave the same due consideration.

iv. Finally, in the ruling on sentence dated 13.11.2018, the court clearly observed that it had taken into consideration the mitigation of the accused.

This court is therefore convinced that in passing the sentence herein, the court duly complied with the directions given in the Muruatetu case before proceeding to exercise its discretion to pass the death sentence on the applicant. It is therefore improper and fallacious for the applicant to present before this court an application for sentence re-hearing, a matter that had been diligently carried out by the trial court. This court lacks the powers and jurisdiction to do so. I therefore find the application of the applicant filed herein on 3.6.2019 incompetent and lacking in any merit. The same is accordingly dismissed.

D. O. OGEMBO

JUDGE

29.6.2021.

Court:

Ruling read in (on-line) in the presence of the applicant (Langata Women), and Mr. Mutuma for the state.

D. O. OGEMBO

JUDGE

29.6.2021.