



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

MISC. CRIMINAL APPLICATION NO. 13 OF 2020

MOSES MUTEMBEI MUREITHI.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

(Intended Appeal from conviction(s) sentence(s) of the Chief Magistrate's Court

at Chuka in Criminal Case No. HCCR 8 of 2016.)

R U L I N G

INTRODUCTION

1. The petitioner herein was charged with the offence of murder contrary to **section 203** as read together with section **204 of the Penal Code vide Criminal Case No. 8/2016** and thereafter sentenced to life imprisonment.
2. The petitioner having been dissatisfied with the sentence, has filed this undated petition received at the registry on the 19th.03.2020.
3. The petitioner is seeking for the following orders:
 - i. A declaration that the death sentence imposed on him by **Chuka High Court vide Criminal Case No. 8/2016** is inconsistent with **Article 25(b)** of the Constitution of Kenya and Article **329 (sic) of the Criminal Procedure Code**.
 - ii. A declaration that the imposition of mandatory death penalty constitutes to cruel and inhumane treatment thus inconsistent with **Article 25(b) and Article 50** of the constitution of Kenya.
 - iii. A declaration that **section 203 and 204 of the Penal Code** is inconsistent with **section 26(i) ,27(1),48 and 50(2) of the Constitution of Kenya**.
 - iv. A declaration that the constitutional rights of the petitioner were highly violated in sentencing him to suffer death.
 - v. An order rendering the petitioner's case to the trial court for mitigation and determination of resentencing to an appropriate sentence that is in line with **Article 50 (2) (q)** of the constitution.
 - vi. A declaration in the alternative for review of the petitioner's case in the interest of justice.
 - vii. An order that the death sentence is cruel, inhumane and degrading thus unconstitutional.
 - viii. That no cost to this petition as the petitioner is a pauper and has no money.
4. He relied on the case of ***Francis Muruatetu and Another v Republic; Petition No. 15 and 16 of 2015***.
5. He prays that the Honourable Court be pleased to resentence him considering the mitigation, facts and sentence pursuant to the Supreme Court decision in the **case of Muruatetu**.

Background:

The Petitioner was charged before this court with the office of murder contrary to **Section 203** as read with **Section 204 of the Penal Code**. It was alleged that on 7/10/2016 at Kabalinge village Kamwoka Mutino Location within Tharaka Nithi County, the Petitioner murdered Mary Nthama.

6. The accused denied the charge. A full trial was conducted and the prosecution called seven- 7 in efforts to prove the charge against the accused.
7. The court ruled that the petitioner had a case to answer and he was put on his defence. The petitioner gave unsworn defence and urged the court to find that the death of the deceased was due to bad luck.
8. The court pronounced Judgment on 25/10/2018 and held that the prosecution had discharged its burden of proving its case against the accused beyond reasonable doubt. The court proceeded to find the accused person guilty and convicted him accordingly.
9. On 25/10/2018 the court proceeded to sentence the accused and stated as follows:-

“ This court has considered the mitigating circumstances. The accused person is a first offender but he caused demise of an innocent woman in a brutal way. He now says he was drunk but that is an aforethought because he did not say so in his defence. Having considered all factors in this case and though the penalty provided under the law (Section 204) of the Penal Code is death sentence, this court is minded about the decision of the Supreme Court in Muruatetu’s case stating that the court’s hands are not tied to meting out death sentence in cases of murder. Guided by that decision, the accused herein is sentence to life imprisonment.”

10. It would seem that the petitioner moved to the Court of Appeal and filed **Criminal Appeal No. 119/2018** at the Court of Appeal Nyeri. He has however informed this court that he has withdrawn the Appeal so that he can prosecute this application.

PETITIONER’S SUBMISSIONS

11. The Petitioner seeks for resentencing citing the **Supreme Court Decision in Petition No. 15 of 2015**. The now **famous Muruatetu’s case**.
12. He cites the main reason for his application being that he is a first offender and that having committed the offence, does not mean that he can never reform. He further reasons that he has undergone through various biblical rehabilitation programs. He submits that when he was arrested, he was 45 years of age and currently 50 years thus his continued incarceration definitely goes against the motto of ‘*kurekebisha na haki*’ and thus spoil the rest of his life. He thus calls upon the court to consider the period of his incarceration, age, the biblical reform programs he has undertaken while in the prison and his preparedness for reintegration back to the society and thus an appropriate sentence in substitute to the one previously awarded by the court.

RESPONDENT’S SUBMISSIONS

13. The respondents argued that the undated petition should not be allowed since it is devoid of merit. That the trial court did direct its mind to award a sentence that was commensurate to the offence committed by the petitioner. That the **Muruatetu case** never found the death penalty as unconstitutional and further that the petitioner was never in the first place sentenced to suffer death. That the court did factor the petitioner’s mitigations and further, the petitioner is only trying to use this court to avoid his period of reckoning after he committed the heinous crime.

ANALYSIS AND DETERMINATION

14. Essentially under the doctrine of *functus officio* a court has no jurisdiction to determine an issue which was previously before it and the court has given a final determination. The court having executed its mandate in the matter lacks jurisdiction as it conclusively determined the issue. The ‘*Functus officio*’ doctrine is defined as follows: ***“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality..... The (principle) is that once such a decision has been given it is (subject to any right of appeal to a superior body or functionary) final and conclusive.”***

The doctrine is akin to *resjudicata* in civil matters.

15. In ***Ever Fresh Market Virginia v Shoprite Checkers {2011} 2ACC 30*** the court stated that:

“The doctrine of res judicata in Criminal Law can only be relaxed if justice would result should the order be allowed to stand”.

16. My view is that the finality of decisions in a criminal process heard and determined on the merits is fundamental in any legal system as it ensures fairness, certainty, and predictability in the dispute resolution.

It must be stated that the duty or authority of this court in this matter has been spent. *Functus officio* is bound up with the doctrine of *res judicata* which prevents the re-opening of the matter before the same court, tribunal or other statutory actor that has rendered a final decision. This is based on the general rule that a final decision of a court cannot be re-opened save where there is a statutory provision which authorizes variations of the previous decisions.

17. In this petition, I find that it is not properly before this court. The petitioner has either deliberately or through ignorance filed this petition. I consider that he has deliberately attempted to mislead the court because he is fully aware of the sentence he is serving. The sentence was pronounced in his presence. The petitioner's contention that he was sentenced to suffer death is not correct. It is also not correct that the death sentence was commuted to life imprisonment on a presidential decree. The petitioner is dearly economical with the truth. The charge of murder is punishable by death. Although the Supreme Court of Kenya has declared that the mandatory death penalty is unconstitutional, the petitioner was not sentenced to death by this court. The petitioner was sentenced to life imprisonment after the court considered his mitigation and the Supreme Court decision in the case of Francis Karioko Muruatetu & Another -v- Republic and others. As can be seen from the notes on sentence which I have quoted above, the court properly addressed its mind to the mitigation, the circumstances in which the petitioner committed the murder and Muruatetu's decision. The Supreme Court did not declare the death penalty unconstitutional. This court is bound by the decision of the Supreme Court in line with Article 163(7) of the Constitution which provides:-

“ All courts other than the Supreme Court are bound by the decisions of the Supreme Court.”

The constitutionality of the death penalty was determined by the Supreme Court in **Muruatetu's case**. It is therefore futile for the petitioner to urge this court to declare the death penalty unconstitutional.

Conclusion:

I find that this petition is not properly before this court as it challenges the death penalty a matter which has been determined by the Supreme Court and which is not the sentence imposed on the petitioner. This court considered the mitigation by the petitioner and proceed to impose a sentence of life imprisonment. This court lacks jurisdiction to entertain the application at this stage. This is not the proper forum for the petitioner to challenge the sentence.

18. The petitioner was not candid and has approached court with untruths. All in all, I find that the petition is not properly before court and is without merits. I dismiss it.

Dated, signed and delivered at Chuka this 24th day of June 2021.

L.W. GITARI

JUDGE

24/6/2021

The ruling is read out in open court.

L.W. GITARI

JUDGE

24/6/2021