



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

PETITION NO 132 OF 2019

LUCY MUENI MUTAVA.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGEMENT ON RESENTENCING

1. **Lucy Mueni Mutava** the Petitioner herein was charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code in Mombasa HCCR No. 20 of 2012 the facts being that on the 23rd day of April 2012 at Kasaani Village within Taita-Taveta County she murdered Hassan Swaleh Almasi.

2. The Petitioner was on 19/6/2013 found guilty of the offence and was convicted and accordingly sentenced to 20 years imprisonment. She consequently filed an appeal vide Mombasa Criminal Appeal No 52 of 2013 and the same was dismissed on 28/5/2019.

3. The Petitioner having exhausted her appellate chances is now before this court for resentencing based on the decision of the Supreme Court in **Petition No's 15 And 16 Of 2015 Francis Karioko Muruatetu & Others v Republic**.

4. This matter came up before court on 16/12/2020 when M/s Wanjohi for the Respondent elected to file written submissions over the petition. A similar position was taken by the Petitioner on 12/4/2021 where she stated that she had filed her submissions and relied upon the same. She further gave brief oral submissions where she stated that the deceased hailed from Tanzania and his family could not be traced. Further that she has 3 children who have been on their own from the time she was jailed on 19/6/2013.

5. In her submissions filed in court on 26/10/2020 the Petitioner stated that she was keen on having the court review her sentence as she felt the same was too steep. That in the course of her incarceration she has undergone several rehabilitation skills and gained knowledge in crocheting and agricultural activities. That both her family and that of the deceased had forgiven her and were ready to receive her back to society. She stated that she had been granted remission pursuant to Section 46 of the Prison Act and asked the court to consider granting her a non-custodial sentence as was in **Mombasa HC Petition No 128 Of 2018 James Kazungu Luganje v Republic**.

6. In their written submissions dated 26/1/2021 the Respondent submitted that the Petitioner was not entitled to resentencing. That the offence committed was very grave and against public interest and the sentence ought not be interfered with.

7. The Respondent pointed out that the deceased and the Petitioner happened to be in an intimate relationship for over a year prior to his death. That the Petitioner inflicted severe cut wounds on the deceased's body using a panga and hence occasioning his death. The prosecution stated that the Petitioner was not beneficiary to the **Muruatetu Case** as she had been sentenced to 20 years imprisonment which was a definite sentence unlike a death sentence which was indefinite.

8. The Respondent drew the courts attention to Article 50(2) (p) of the Constitution which introduces the benefit of the least severe of the prescribed punishment to an accused person if the same has been changed between the time of committing the offence and sentencing. Lastly that the court was functus officio as an appeal against the sentence had been lodged and dismissed. Reliance was placed in the case of **Daniel Mutinda Munyilu v Republic Machakos Misc. Criminal Application No 134 of 2019**.

9. Having clearly considered the petition, it is not in dispute that a life was lost. The Petitioner herein was responsible for the said loss a fact she denied and insisted on having been provoked by the deceased. The said element of provocation was however not proved leading to her being sentenced to 20 years imprisonment. The Petitioner has in her resentencing application set out her mitigation that she has been in custody since 2013 to date; that her health had greatly deteriorated as she was suffering from high blood pressure, loss of eyesight, ulcers and Hiv/Aids; that she had been jailed at the age of 57 years and she was now 65 years old hence having served 8 years in prison.

10. In **Republic v Samwel Munyoki Mulungu [2020] eKLR Odunga J** on resentencing observed:

“A resentencing hearing or any other sentencing hearing for that matter is neither a hearing *de novo* nor an appeal. Such proceedings are undertaken on the understanding that conviction is not in issue. It therefore follows that in those proceedings the accused is not entitled to take up the issue of the propriety of his conviction. He must proceed on the understanding that the conviction was lawful and restrict himself to the sentence and address the court only on the principles guiding the imposition of sentence and on the appropriate sentence in the circumstances. Similarly, the court can only refer to the evidence adduced in so far as it is relevant to the issue of sentencing but not with a view to making a determination as to whether the conviction was proper. While the court is entitled to refer to the evidence in order to determine whether there existed aggravating circumstances or otherwise for the purposing of meting the sentence, it is not proper for the court to set out to analyse the evidence as if it is meant to arrive at a decision on the guilt of the accused”.

11. In the instant case the life sentence was not imposed upon the Petitioner. She was sentenced to 20 years imprisonment as per the High Court judgement and the same was not interfered with by the Court of Appeal. The Petitioner has based her resentencing application on the Muruatetu Case. However, it is clear that the Petitioner does not qualify for resentencing under the said case and cannot benefit from the same. In light of the sentiments stated above I find that this petition lacks merit and the same is dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 21ST DAY OF JUNE, 2021.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Petitioner in person

Ms. Wanjohi for DPP

Ms. Peris Court Assistant