



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL PETITION NO 71 OF 2020

FAUSTINE ETYANG KABURU.....1ST PETITIONER

GEOFFREY EKISA KABURU.....2ND PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Petitioners, who are brothers, were tried and convicted of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code on 14th September 2006. They were sentenced to death. They pointed out that they filed an appeal at the Court of Appeal but fifteen (15) years later, they were yet to proceed as they were informed that the appeal file records went missing.

2. On 26th August 2020, the Petitioners filed an application for review of the sentence. In their affidavit that they swore in support of their application, they stated that they had undergone rehabilitation and reformation programmes in Upholstery grade 1,2, and 3, Carpentry grade 1,2 and 3, Metal work grade 3 and a Certificate and Diploma in theology from Association of Faith Ministries (AFCM) Bible College which would enable them not indulge in crime.

3. They contended that they were first offenders and were remorseful of the events that led to the death of the deceased who they said was their step-father. The 1st Petitioner added that he was the only breadwinner of their family and their mother is of old age. The 2nd Petitioner urged this court to release them from jail to promote harmony in family hood (sic).

4. They both relied on the case of **Francis Karioko Muruatetu & Another vs Republic Petition No 15 of 2015**, where the Supreme Court ruled that the mandatory nature of death sentence is unconstitutional as it violates the dignity of an individual and therefore inconsistent with Article 26 of the Constitution of Kenya 2010.

5. They invoked Section 333(2) of the Criminal Procedure Code, and urged the court to consider the time they have spent in custody since their arrest on 4th March 2004. In this regard, they referred the court on the case of **Ahamad Abolfathi Mohammed & Another vs Republic [2018] eKLR** where the Court of Appeal reiterated that where a convicted person had spent time in custody, that period had to be taken into account while computing his sentence.

6. The State did not oppose their Petition for review of sentence. It pointed out that in the case of **Francis Karioko Muruatetu & Another vs Republic** (supra), the Supreme Court set out the following as mitigating factors for re-sentencing, which it urged this court to consider:-

- 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.

7. It further pointed out that the Petitioners had served fourteen (14) years imprisonment and that they had prepared themselves for integration into society by doing some courses.

8. It was persuaded that they had reformed and urged this court to re-sentence them to thirty (30) years imprisonment, taking into account the period spent in custody as provided in Section 333 (2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

9. On 6th July 2021, the Supreme Court gave the following guidelines in the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) :-

i. The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under Sections 203 and 204 of the Penal Code;

ii. The Judiciary Sentencing Policy Guidelines to be revised in tandem with the new jurisprudence enunciated in Muruatetu;

iii. All offenders who have been subject to the mandatory death penalty and desire to be heard on sentence will be entitled to re-sentencing hearing.

iv. Where an appeal is pending before the Court of Appeal, the High Court will entertain an application for re-sentencing upon being satisfied that the appeal has been withdrawn.

v. In re-sentencing hearing, the court must record the prosecution's and the appellant's submissions under Section 329 of the Criminal Procedure Code, as well as those of the victims before deciding on the suitable sentence.

vi. An application for re-sentencing arising from a trial before the High Court can only be entertained by the High Court, which has jurisdiction to do so and not the subordinate court.

vii. In re-hearing sentence for the charge of murder, both aggravating and mitigating factors such as the following, will guide the court;

a. Age of the offender;

b. Being a first offender;

c. Whether the offender pleaded guilty;

d. Character and record of the offender;

e. Commission of the offence in response to gender-based violence;

f. The manner in which the offence was committed on the victim;

g. The physical and psychological effect of the offence on the victim's family;

h. Remorsefulness of the offender;

i. The possibility of reform and social re-adaptation of the offender;

j. Any other factor that the Court considers relevant.

viii. Where the appellant has lodged an appeal against sentence alone, the appellate court will proceed to receive submissions on re-sentencing.

ix. These guidelines will be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals. They will also apply to sentences imposed under Section 204 of the Penal Code before the decision in Muruatetu.

10. 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.

11. Notably, the deceased suffered greatly for several hours before he succumbed to the injuries that were meted on him by the Petitioners. The murder can only be said to have been gruesome. It was so pre-meditated and malicious as they attacked him armed with a stick after alleging that he played a hand in the death of their own father and fled to Mombasa.

12. A perusal of the affidavit attached to their application for review of sentence showed persons who were remorseful. Having said so, while there was 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.

13. The Petitioners had already spent about seventeen (17) years behind bars. They obviously had had sufficient time to reflect on their actions. Indeed, vide his letter dated 4th June 2020 and filed in court on 11th January 2021, the officer in charge Kibos Maximum Security Prison had vouched for 1st Petitioner's good conduct. The 1st Petitioner's certificates were also presented to the court for perusal.

14. Notably, they filed two (2) sets of Written Submissions. One was filed on 11th January 2021 while the other was filed on 31st March 2021. In this latter Written Submissions, the 2nd Petitioner indicated that he had trained in carpentry grade 3, 2 and 1. He did not attach any certificates and there was no letter from the Kibos Maximum Security Prison vouching for his conduct. It was difficult to know if he had reformed.

15. However, this court was not ordering the immediate release of the Petitioner as they had sought. In the event the 2nd Petitioner did not have any certificates or had not reformed, he would still have sufficient time to reflect on his actions. He was younger than the 1st Petitioner who would have been in a better position to guide him at the material time of the incident. Taking all the factors into consideration, this court came to the firm view that a sentence of thirty (30) years imprisonment for both the 1st and 2nd Petitioners was fair in the circumstances of the case herein.

DISPOSITION

16. For the foregoing reasons, the upshot of this court's decision was that the Petitioners' Petition for review of the sentence that was filed on 26th August 2020 was merited and the same be and is hereby allowed. Accordingly, the court upholds the conviction of the Petitioners for the offence of murder but reviews the mandatory death sentences that were each imposed upon them and replace the same with thirty (30) years imprisonment for each of them.

17. It is hereby ordered and directed that the period the Petitioners spent in custody, if at all, shall be taken into account when computing their sentences in accordance with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

18. It is so ordered.

DATED and DELIVERED at KISUMU this 29th day of July 2021

J. KAMAU

JUDGE