REPUBLIC OF KENYA

IN THE HIH COURT OF KENYA

AT KISUMU

PETITION NO 54 OF 2020

ANDREW AMATALA.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Petitioner herein was tried and convicted on two (2) counts of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code and one (1) count of gang rape contrary to Section 10 of the Sexual Offences Act No 3 of 2006. On 24th March 2015, he was sentenced to death for Counts 1 and 2 and life imprisonment for Count 3.

2. Being dissatisfied with the said decision, the Petitioner lodged an Appeal in this Court **Kisumu Criminal Appeal No 55 of 2015.** In a judgment that was delivered on 1st March 2016, the Court affirmed the conviction and sentence and dismissed his Appeal in its entirety.

3. On 6th August 2020, the Petitioner filed this Petition for review of the sentence. The said application was supported by his Affidavit in which he stated that he had been in custody for over seven (7) years since the time he was arrested. He added that the mandatory sentence was unconstitutional, inhuman and degrading.

4. He relied on the case of **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR** where the court held that mandatory sentences deprive courts their legitimate jurisdiction to exercise discretion to individualise an appropriate sentence to relevant aspects of character and record of each accused person.

5. He submitted that Count 1, 2 and 3 emanated from a single transaction and hence the sentences ought to have run concurrently. To buttress this point, he relied on the cases of **Peter Mbugua Kibui vs Republic [2016] eKLR** and that of **Cosmas Akeya Don Alias Mogaka vs Republic Mombasa HC PET NO 240 OF 2018** (eKLR citation not provided) where Ogola J ordered that the sentences of various counts run concurrently.

6. He further placed reliance on Guideline No 7.13 of the Sentencing Policy Guidelines where it provides that where there are multiple transactions involving multiple victims, then the sentences ought to run consecutively.

7. It was his submission that while he was in prison, he had undertaken various moral skills due to the moral teaching at the institution and added that he was a choir member of the Prison Church. He stated that he was a first offender and very remorseful for the incident which he deeply regretted. It was his contention that having gained the skills, he was ready to be integrated into the society.

8. He averred that he did not have any complaint regarding his conviction but pleaded with this court to consider the period he spent in remand prior to his conviction and sentence as provided for under Section 333(2) of the Criminal Procedure Code in reviewing his sentence. He also prayed that the sentence be made to run concurrently.

9. The State was not opposed to the Petitioner's application for review of the sentence. It pointed out that indeed the provisions of Section 333(2) of the Criminal Procedure Code were not considered when he was sentenced.

10. In the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra), the Supreme Court rendered itself as follows:-

> **(111) "…For the avoidance of doubt, the sentencing re-hearing we have allowed, applies only for the two petitioners herein. In the meantime, existing or intending Petitioners with similar cases ought not approach the Supreme Court directly but await appropriate guidelines for disposal of the same.** (emphasis court). **The Attorney General is directed to urgently set up a framework to deal with sentence re-hearing of cases relating to the mandatory nature of the death sentence - which is**

similar to that of the petitioners in this case."

11. The Taskforce on the Review of the Mandatory Death Sentence under Section 204 of the Penal Code Act was appointed vide Gazette Notice No 2160 dated 15th March 2018 but guidelines were yet to be formulated despite the Taskforce having been duly presented to the Attorney General in October 2019.

12. Having said so, in the case of **William Okungu Kittiny v Republic [2018] eKLR**, the Court of Appeal expressed itself as follows;

> **"The decision of the Supreme Court only discouraged persons from filing petitions to the Supreme Court but the decision does not prohibit courts below it from ordering sentence re-hearing in a matter pending before those courts. By Article 163 (7) of the Constitution, the decision of the Supreme Court has immediate and binding effect on all other courts. The decision of the Supreme Court opened the door for review of death sentences even in finalized cases."**

13. Whereas the Constitution of Kenya, 2010 does not specifically provide that the decisions of the Court of Appeal are binding on the High Court, Environment and Land Court, Employment and Labour Relations Court, Magistrates' courts, Kadhis' courts and all tribunals like that in Article 163(7) of the Constitution of Kenya, the common law doctrine that decisions of higher courts are binding on courts below it apply.

14. This decision and others by the Court of Appeal clothed the High Court with jurisdiction to re-hear and re-sentence of all those that were convicted with capital offences that carried a mandatory death sentence.

15. Having said so, on 6th July 2021, the Supreme Court clarified the import case of **Francis Karioko Muruatetu & Another vs Republic** (Supra). It gave the following guidelines:-

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.

16. The above notwithstanding, this court noted the pronouncement of the Supreme Court when it stated as follows:-

> **"[14] It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing *mandatory* or *minimum* sentences are inconsistent with the Constitution. It bears restating that it was a decision involving the two Petitioners who approached the Court for specific reliefs. The ultimate determination was confined to the issues presented by the Petitioners, and as framed by the Court.**
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> **[15] To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under Section 40 (3), robbery with violence under Section 296 (2), and attempted robbery with violence under Section 297 (2) of the Penal Code, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases."**

17. In view of the fact that the Petitioner had been charged and convicted of the offence of robbery with violence and gang rape and not murder, the issue of reviewing the sentence that was meted upon him as was set out in the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra)did not arise herein. His prayer that the court reviews his sentence under Article 50(2) of the Constitution of Kenya was immaterial.

18. This court noted that in addition to the death sentence, the Petitioner was sentenced to life imprisonment. Both sentences were to run consecutively. In its judgment of 1st March 2016, the appellate court had, however, indicated that that the two (2) sentences were to run concurrently.

19. It was not clear to this court why the Trial Court did not keep the life sentence in abeyance having convicted the Petitioner to death as it was practically impossible for the death sentence and life imprisonment to run consecutively if the former sentence was executed. In fact, this court took the view that a death and life sentence cannot possibly run concurrently and/or consecutively at any given time for the reason that once the death sentence was executed, the life sentence would stop running. If the convicted person was still alive and serving his sentence, his death sentence would ideally have been kept in abeyance. Both sentences cannot be served at the same time.

20. Bearing in mind that commutation of the Petitioner's death sentence to imprisonment was merely speculative at this stage as the death sentence had not yet been declared unconstitutional in Kenya, this court found it prudent to limit its pronouncement regarding Section 333 (2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) only to the life imprisonment that was meted on him.

21. In this regard, it found and held that there was merit in his prayer that life sentence should commence from the date that he was arrested, a fact that was conceded by the State.

DISPOSITION

22. For the foregoing reasons, the upshot of this court's decision was that the Petitioner's Petition that was brought pursuant to the provisions of Section 333 (2) of the Criminal Procedure Code that was lodged on 6th August 2020 was merited and the same be and is hereby allowed.

23. Although the court hereby upholds the conviction and sentence of the Petitioner for the offence of robbery with violence and gang rape, it hereby orders that the period the Petitioner spent in custody, if at all, shall be taken into account when computing the life sentence in accordance with Section 333(2) of the Criminal Procedure Code.

24. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 26TH DAY OF JULY 2021

J. KAMAU

JUDGE