



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

PETITION NO. 7 OF 2019

ELIUD NG'ANG'A MWANGI.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Brief Facts

1. This application was filed on 17th July 2019 under **Article 165 as read with Article 25(A) (C) & (D) of the Constitution and Section 203 and 204 of the Penal Code**. It seeks for orders for review of sentence in view of the decision of the **Supreme Court in Petition No. 15 & 16 of 2015 (Consolidated) Francis Karioko Muruatetu vs Republic**.
2. The petitioner was charged in Nyeri High Court Criminal Case No. 39 of 2009 with the offence of murder contrary to Section 203 as read with 204 of the Penal Code in which he was convicted to death. He states that the death sentence was later commuted to life imprisonment. He subsequently appealed to the Court of Appeal vide Court of Appeal No. 7 of 2015 whereby the appeal was dismissed.
3. The petitioner has now sought rehearing on sentence and also seeks for orders that the period spent in custody during the pendency of the trial be considered by invoking **Section 333(2) of the Criminal Procedure Code**.
4. The petitioner filed submissions to support his arguments whereas the respondent made oral submissions.

Petitioner's Submissions

5. The petitioner states that he was arrested on 11th July 2009, charged, convicted and sentenced to death which was later commuted to life imprisonment. He appealed to the Court of Appeal but appeal was dismissed.
6. Relying on the decision in the **Francis Muruatetu** petition, the applicant seeks to have this Honourable court give him an alternative sentence. He urges the court to be guided by the principles in the Francis Muruatetu decision, the Sentencing Guidelines of 2016 and the case of **Michael Kalewa vs Republic [2018] eKLR**.
7. The petitioners submits that he is remorseful and asks the court to consider the time served to be sufficient punishment as was held in **Criminal Appeal No. 12 of 2013 Ali Mulamba vs Republic**. He further submits that he is entitled to the least severe sentence because he is a first time offender. He relied on the case of **Republic vs Otieno (1983)** to support his prayers before the court.
8. The petitioner further urges the court to consider the time spent in remand custody since his arrest on 11th July 2009 and invokes **section 333(2) of the Criminal Procedure Code** and the case of **Ahmad A. Mohammed Cr. App No. 135 of 2016**, which held that the sentence should commence from the date of arrest.

The Respondent's Submissions

9. The respondent submitted that the circumstances of the offence and the Victim's Impact Statement Report dated 3/3/2021 do not support the review of the petitioner's sentence. She added that the victim's family was robbed of a parent and that they are still bitter to date. The report also shows that neither the petitioner nor his family have ever approached the victim family for reconciliation and neither has the petitioner apologized. As such, the respondent prays that the application be dismissed.

Issues for determination

10. On perusal of the application, the affidavit and the submissions, the main issue for determination herein is whether the petitioner is entitled to the orders sought herein.

The Law

11. As for Section 333(2) of the Criminal Procedure Code, the trial court is mandated to consider the period spent in custody by the accused while imposing sentence. The applicant says the said period was not considered and seeks orders herein in compliance with the provisions of the law. This prayer was not opposed by the prosecution.

12. The second prayer is brought under the Supreme Court Petition of Francis Karioko Muruatetu No. 15 of 2015 in which the apex court declared unconstitutional the mandatory nature of death sentence. The court has power to hear the petitioner or re-sentencing in order to give him an opportunity to give his mitigation on sentence. The petitioner was sentenced on 28th October, 2014 before the Muruatetu Petition was decided and thus his case falls under the category that may be entertained for review. The Supreme Court Petition by virtual of the recent directions given by the Supreme Court only applies to murder cases where one is sentence under Section 204 of the Penal Code.

13. In his submissions, the petitioner states that he is very remorseful for his irresponsible act of killing the deceased which was influenced by his drunken state at the material time. He states that he seeks forgiveness from his family and that of the victim, from society and God the creator. He seeks for leniency and states that he was a first offender. It is his submission that he has learnt a lesson the hard way while in prison. He cites several re-hearing on sentence petitions among them Nairobi H.C.CR. App. No. 150 of 2016 where Judge Ngenya Macharia held that a petitioner who had spent six (6) years in custody and had stayed in prison for three years had served sufficient sentence. The petitioner attached certificates to show that he has learnt some trades in prison which would help him to integrate in society if he was released. This was supported by a letter from the officer in charge of Nyeri Maximum Prison.

14. The petition was opposed by the state on grounds that he had not approached the victim's family for reconciliation and forgiveness and that the family is still bitter to date as shown by the victim impact report.

15. I have perused the victim impact report. The deceased was a single mother of three children and worked as a casual labourer to earn her living. Her children were left at the mercy of the community following her death and her aged mother of 70 years old. The children were later taken to a children's home in Kisumu. The family is still very bitter to date having lost the deceased. However, the family of the petitioner would want him back home and are ready to help the petitioner reconcile with the victims family.

16. I have considered the petitioners mitigation, the Victims Impact Report and the Judiciary Sentencing Policy that sets out the factors to be considered in sentencing. The petitioner was a first offender and is remorseful. The in-charge prisons recommends him saying he is disciplined and that he has studied courses on Modern Farming and Business Skills. The petitioner has only served seven years imprisonment.

17. Having considered all the above factor, I hereby allow this petition thus:-

That the death sentence imposed on 28th October, 2012 is hereby set aside and substituted with twenty five (25) years imprisonment to commence from date of arrest being 11th July, 2009.

18. It is hereby ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 26TH DAY OF AUGUST, 2021.

F. MUCHEMI

JUDGE

Judgment delivered through video link this 26th day of August, 2021.