



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

PETITION NO. E018 OF 2021

DANIEL NZIOKI MBUTHI.....1ST PETITIONER

SIMON MAINA NJIRU.....2ND PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. What is before this court is an application dated 10.05.2021 and wherein the applicants pray that this Honourable Court do set aside the death sentence imposed on them and urges the court to consider the case regarding sentencing for mitigation to be factored, and that this court do consider remission on the period served and further that the court do consider Section 333(2) of the Criminal Procedure Code.
2. The applicants' case as can be seen from the pleadings is that they were both convicted of murder contrary to Section 203 as read together with Section 204 of the Penal Code and sentenced to death and they were arraigned in court on 11.12.2012 and sentenced on 2.08.2017. That the appeal to the court of Appeal at Nyeri being Criminal Appeal No. 121 of 2017 was dismissed and thus the instant application. The applicants deposed that they have undertaken several rehabilitation courses while in custody which will be beneficial to them; that they are remorseful for their actions and are now positively transformed; that they have learned temper management; that they have been rehabilitated in the prison and are ready for re-integration to the society; and that they are married and with children.
3. The application was canvassed by way of written submissions.
4. It was submitted on behalf of the applicants that this court has jurisdiction in resentencing and in doing so this court is merely enforcing and granting relief for what is in effect a violation caused by imposition of the mandatory death sentence. Reliance was made on the case of **Michael Kathekwa Laichena & another –vs- Republic (2018) eKLR** and further article 165 of the Constitution. Further that, the trial court did not consider mitigation by the petitioners during sentencing as the law provided for mandatory sentence and thus they ought to be resentenced.
5. It was further submitted that the petitioners have rehabilitated while in prison, they are remorseful and regret their actions, and further that they have families waiting for them. They invited the court to commute the sentence to the period served in prison and relied on **Nairobi Miscellaneous Criminal Application 397 of 2018**. Further relying on a number of authorities, they prayed that the sentence be reduced to five (5) years or any other sentence and which ought to run from the date they were presented in court.
6. The respondent in its written submissions submitted that it was not opposed to the revision of the sentence to a definite term as envisaged under Article 50(2)(p) of the Constitution.
7. I have considered the application before me and the written submissions filed herein and it is my view that the main issue for determination is whether the same is merited.
8. The petitioners basically invoke the resentencing jurisdiction of this court as was laid down by the Supreme Court in **Francis Kariuki Muruatetu & Another v Republic Petition No. 15 and 16 of 2015** and wherein the Learned Judges held that Section 204 of the Penal code was unconstitutional in so far as it provided for the mandatory death sentence for the reasons that it limited the trial court's exercise of discretion while sentencing. The court while remitting the matter to the high court for re- hearing on sentence held that: -

“The facts in this case are similar to what has been decided in other jurisdictions. Remitting the matter back to the High Court for the appropriate sentence seems to be the practice adopted where the mandatory death penalty has been declared unconstitutional. We therefore hold that the appropriate remedy for the petitioners in this case is to remit this matter to the High Court for sentencing.....”

9. The court proceeded to give the guidelines to be considered by the court while considering an application for re-sentencing and held inter alia: -

“ [71]. As a consequence of this decision, paragraph 6.4 - 6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge: -

- 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) remorsefulness of the offender;*
- g) the possibility of reform and social re-adaptation of the offender;*
- h) any other factor that the Court considers relevant.*

[72] We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process.....”

10. On the application of the mitigation of the accused before sentencing, the court held as follows: -

“It is during mitigation, after conviction and before sentencing, that the offenders’ version of events may be heavy with pathos necessitating the court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death penalty”

11. The petitioners were sentenced on 2.08.2017 and which was before the Muruatetu’s decision and when the courts would not exercise discretion while sentencing in murder cases. In fact, the trial court, Hon. F. Muchemi J while sentencing noted that;

“The court has considered the family responsibilities of the accused persons. However, the law provides for only one sentence...”

12. However, pursuant to the dictum in Muruatetu case (supra) the courts now can exercise discretion when considering and passing sentence. The said discretion however should only be exercised in the deserving cases. (See Republic v Ruth Wanjiku Kamande [2018] eKLR). In exercising discretion in sentencing, the court must further have in mind the objectives of sentencing as laid down in the Sentencing Policy Guidelines, 2016 published by the Kenya Judiciary and which includes: -

- i. Retribution: To punish the offender for his/her criminal conduct in a just manner.*
- ii. Deterrence: To deter the offender from committing a similar offence subsequently as well as discourage other people from committing similar offences.*
- iii. Rehabilitation: To enable the offender reform from his criminal disposition and become a law-abiding person.*
- iv. Restorative justice: To address the needs arising from criminal conduct such as loss and damages.*
- v. Community protection: To protect the community by incapacitating the offender.*
- vi. Denunciation: To communicate the community’s condemnation of the criminal conduct.*

In the directions issued by the Supreme Court on 6.07.2021 in Petition No. 15 & 16 (Consolidated)- Francis Karioko Muruatetu & Another –vs- Republic, the Court directed that 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.*

The Supreme Court proceeded to hold that; -

“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. ..”

13. Applying the above legal principles to the facts in question herein, it is clear from the trial court’s record that the petitioners mitigated in the trial court and that the court indeed noted the said mitigation. Nonetheless the trial court sentenced the petitioners to suffer death as provided by the law. The petitioners’ mitigation was to the effect that they were remorseful and further that they were married and with children hence prayed for leniency. In their application and submissions, they reiterated that they are remorseful and that they have rehabilitated while in prison.

14. However, the evidence on record is to the effect that the petitioners herein assaulted the deceased for reasons that he was a suspected thief. They assaulted him and dragged him from his home up to Machanga market where they left him for the dead. As such, the petitioners herein killed the deceased without any legal justification. They literally took the law into their own hands and there was no justification for the said killing. The extent of the injuries suffered by the deceased was fatal. It is my view therefore that even in exercising the discretion in sentencing and considering the mitigation before the trial court and the mitigation by the petitioners in their submissions before this court, I am of the considered view that the petitioners herein deserve a deterrent sentence which should be a lesson to would-be offenders. The petitioners never acted out of any despair, anguish or provocation.

15. The petitioners invited this court to invoke the provisions of Section 333(2) of the Criminal Procedure Code. The said section requires that in sentencing, the court should take into account the period spent in custody by the accused person. The record indicates that the petitioners were initially charged for the offence of manslaughter in Siakago SPM’s court but the charges were later withdrawn. They were then charged before this court and took plea on 28.01.2013 and the court retained the bond terms which had earlier been imposed. As such, there is no evidence as to the petitioners having spent time in custody pending the hearing of the case before the trial court.

16. As such, taking into consideration the principles set out in **Muruatetu case** as to the exercise of discretion in sentencing in murder cases and the guidelines in sentencing, and considering the objectives of sentencing as laid down in the Judiciary Sentencing Policy Guidelines, 2016 and further taking into consideration the circumstances under which the offence was committed, the seriousness of the said offence as well as the mitigation by the petitioners herein, it is my considered view that the petitioners still deserve a deterrent sentence.

17. In the end, the death sentence is hereby set aside and the same is substituted with 20 years imprisonment. The said sentence ought to run from the date of sentence by the trial court being 2.08.2017.

18. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 4TH DAY OF AUGUST, 2021.

L. NJUGUNA

JUDGE

.....for the Petitioner

.....for the Respondent