



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

MISC. CRIMINAL APPLICATION NO. E001 OF 2020

(CORAM: F.M. GIKONYO J.)

(From the sentence in Narok CMCR No. 462 of 2015)

WILSON KUYONI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Re-Sentencing based on Muruatetu

[1] The Applicant moved this court vide an undated application seeking for orders for a re-sentencing hearing pursuant to Article 22 (1), 19 (3), 25, 26, 27 (1) 28, 50(2) (q), 159 (1) and 165 (3) (b) of the Constitution, section 333 (2) of the criminal procedure code, Muruatetu case and Court of Appeal decision in **Benard Mulwa Musyo Criminal Appeal No. 25 Of 2016.**

[2] The applicant was convicted for the offence of being in possession of wildlife trophy contrary to Section 95 of the Wild Life Conservation and Management Act no. 47 of 2013 and was sentenced to life imprisonment.

Applicant's submission

[3] The applicant submitted that he appealed but his appeal was dismissed.

[4] The Applicant sought leniency of this court. He argued that the supreme court of **Kenya in Petition No. 15 and 16 Of 2015 Of Francis Karioko Muruatetu and Wilson Thirumbu Mwangi** declared the provisions of mandatory nature of sentencing unconstitutional. He relied on the cases of state of **M.P. Vs BabluNatt[2009]2s.C.C 272,S V Jansen 1999(2) SACR 368 At 373, S Vs Toms 1990(2) Sa 802 (A) At 806(L) – 807(B), S Vs Mofokeng 1999(1) SACR 502 (W) At 506 (D)**

[5] The applicant argued that the sentence meted on him is harsh and his mitigation was not really appreciated.

[6] The Applicant claims that he is now skilled to work in the Community. That he has taken full advantage of the rehabilitative programs offered in the correctional facility and has listed and certificate courses as evidence of his reformation.

[7] The Applicant urged the court to consider the period he has served in Prison in accordance with Section 333(2), sentencing policy guidelines 2016, and Article 50(2) (p) of the Constitution when considering the time spent in custody prior to conviction. He relied on the case of **Ahamad Abolfathi Mohammed & Another vs Republic [2018] eKLR.**

[8] The applicant prays for success of his application. He urges the court to pass a more lenient sentence than the life sentence and find that the period he has already served to be sufficient based on the rehabilitative programmes undertaken, cited case laws and his mitigating factors.

Prosecution's submission

[9] Ms. Torosi for the Respondent in her submission opposed the application and argued that the applicant should not bring various applications in court but should instead pursue his appeal no. 117 of 2016 on the issue of sentence. She urged this court not to allow the applicant in the circumstance to benefit from the doctrine propounded in *Muruatetu* case and further urged that the application for resentencing be dismissed for being unmeritorious. They relied **John Kagunda Kariuki Versus Republic [2019] eKLR And Dismas Wafula Kilwake Versus Republic [2018] eKLR.**

ANALYSIS AND DETERMINATION

[10] This application is premised upon the dictum in the case of *Francis Karioko Muruatetu & Another –vs- Republic (supra)*.

[11] Following the Supreme Court's landmark judgment in the *Muruatetu* case, courts saw an avalanche of applications by convicts seeking for lesser or reduced sentences in all cases where the penalty clause prescribed a fixed and mandatory sentence; the argument being, that such sentences denied the court discretion in sentencing, and therefore, inconsistent with the Constitution.

Turning of tables

[12] But tables turned on 6/7/2021; the Supreme Court hemmed application of *Muruatetu* decisional law to sentences in murder cases only. The Supreme Court reiterated that its decision in the *Muruatetu* case did not invalidate mandatory sentences or minimum sentences in the Penal Code, the Sexual Offences Act or any other statute, and accordingly cautioned as follows: -

“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”.

[13] Of particular relevance is that this application or proceeding does not relate to sentence passed under section 204 of the Penal Code. Accordingly, the court finds itself having to determine the competence or otherwise of the application.

[14] In so far as this application is founded on *Muruatetu* decision, it is incompetent. Consequently, the application is dismissed. However, this is not a foreclosure of the applicant's right to seek appropriate remedy or reduced sentence through the appellate process or on the basis of the Constitution. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 29TH DAY OF SEPTEMBER, 2021.

F. GIKONYO M.

JUDGE

In the presence of:

1. The applicant
2. Mr. Karanja for Respondent
3. Mr. Kasaso – CA

F. GIKONYO M.

JUDGE