



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL PETITION NO 45 OF 2020

KENNETH OPIYO GILO.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Petitioner herein was tried and convicted of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code on 30th September 2016. He was sentenced to death which was subsequently commuted to life sentence.
2. On 14th July 2020, he filed an application for review of the sentence. In his affidavit that he swore in support of his application, he stated that he was sentenced to mandatory death sentence which was later commuted to life by the President in the year 2016. He added that he had been in custody for the last eleven (11) years since his arrest. He averred that the mandatory death sentence meted on him was unconstitutional, inhumane and degrading.
3. In his Written Submissions, he reiterated his aforesaid averments and asserted that in the case of **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR**, the Supreme Court held that mandatory sentences deprive courts of their legitimate jurisdiction to exercise discretion to individualise an appropriate sentence to relevant aspects of character and record of each accused person. He argued that the discretion of the Trial Court to mete out a sentence that was commensurate to the circumstances of his case was curtailed by the minimum sentence.
4. He pleaded with court to consider the fact that he was arrested at the age of twenty seven (27) years and that he had spent eleven (11) years in custody. He submitted that he was a first offender and was remorseful of the events that led to the death of the deceased. He urged the court to consider granting him an opportunity of reshaping his future which would otherwise be ruined by the long incarceration.
5. He contended that he had undertaken various rehabilitation and reformation programmes in painting and tested by the Government Trade Testing Authority (NITA) where he qualified with Grades III and II and Diploma in Biblical courses from Emmaus Bible School which he believed would enable him integrate well back to society and not indulge in crime.
6. The State did not oppose his 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. These were age of the offender, whether he was a first offender, whether he had pleaded guilty to the offence, character and record of the offender, commission of the offence in response to gender-based violence, remorsefulness of the offender, the possibility of reform and social re-adaptation of the offender and any other factors the court would consider relevant.
7. It further pointed out that the Petitioner had served seven (7) years imprisonment which was not enough time for rehabilitation and reform. It pointed out that previously, he had not led an honest life having been in conflict with the law as a drug peddler. It therefore urged this court to re-sentence him 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).
8. On 6th July 2021, the Supreme Court gave guidelines in the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) to the effect that the decision of Muruatetu and these guidelines apply only in respect to sentences of murder under Sections 203 and 204 of the Penal Code. It also clarified that all offenders who had been subject to the mandatory death penalty and desired to be heard on sentence would be entitled to re-sentencing hearing.
9. The Supreme Court was categorical that an application for re-sentencing arising from a trial before the High Court could only be entertained by the High Court, which has jurisdiction to do so and not the subordinate court. It was also emphatic that where an appeal was pending before the Court of Appeal, the High Court would entertain an application for re-sentencing upon being satisfied that the appeal had

been withdrawn.

10. It further directed that in a 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. It added that where the appellant has lodged an appeal against sentence alone, the appellate court would proceed to receive submissions on re-sentencing.

11. It clarified that the guidelines would be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals and that the same would also apply to sentences imposed under Section 204 of the Penal Code before the decision in Muruatetu.

12. It reiterated that in re-hearing the sentence for the charge of murder, the court had to take into account the mitigating factors that had earlier been set out in the same case of **Francis Karioko Muruatetu & Another vs Republic** (Supra). It further directed that the Judiciary Sentencing Policy Guidelines to be revised in tandem with the new jurisprudence enunciated in the said case.

13. 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 life sentence. Notably, the court found and held that the commutation of the death sentence to life imprisonment by the President in 2016 was an executive order and was not as a result of a judicial function. The Petitioner herein was thus entitled to the benefit of re-sentencing by the court in line with the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra).

14. Notably, the deceased suffered greatly before she succumbed to the injuries that were meted on him by the Petitioner. The murder can only be said to have been gruesome. It was so pre-meditated and malicious as the Petitioner kicked the deceased who was pregnant at the material time, on the stomach, and she died after three (3) days.

15. A perusal of the affidavit attached to their application for review of sentence did not show a person who was remorseful. The Petitioner seemed to focus on the constitutionality of his death sentence. 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 had reformed and were remorseful ought to be given a second chance and have a new lease of life.

16. The Petitioner was arrested at the age of twenty seven (27) years and was presently aged thirty eight (38) years. He had so far been in prison for eleven (11) years. This was inclusive of four (4) years he spent in custody before being sentenced to death. He obviously had had sufficient time to reflect on his actions. Indeed, vide his letter dated 8th October 2020, the Chaplain in charge St Paul's Catholic Church-Kisumu Prison Command had vouched for his good conduct. Copies of the certificates he furnished court showed a person who was keen to acquire skills to enable him be re-integrated in the society and to earn a living.

17. Having said so, this court took cognisance of the fact that one of objectives of punishment is retribution. Indeed, justice must only be done for the deceased's family, it must be seen to be done. Accordingly, taking all the factors into consideration, this court came to the firm view that a sentence of thirty (30) years imprisonment for the Petitioner was fair in the circumstances of the case herein.

DISPOSITION

18. For the foregoing reasons, the upshot of this court's decision is that the Petitioner's Petition for review of the sentence that was filed on 14th July 2020 was merited and the same be and is hereby allowed. Accordingly, the court hereby upholds the conviction of the Petitioner herein for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 (Laws of Kenya) but reviews the mandatory death sentence that was imposed upon him and which was subsequently commuted to life imprisonment and hereby replaces the same with thirty (30) years imprisonment.

19. It is hereby ordered and directed that the period the Petitioner spent in custody, if at all, shall be taken into account when computing his sentence in accordance with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya). In addition, the computation shall also take into account the time the Petitioner has been in prison after sentencing.

20. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF SEPTEMBER 2021.

J. KAMAU

JUDGE