



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CRIMINAL PETITION NO E019 OF 2021**

**VINCENT ODOUR OKOTH.....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 29<sup>th</sup> June 2016. He was sentenced to death. He pointed out that he did not lodge any appeal.
2. On 18<sup>th</sup> February 2021, the Petitioner filed an application for review of the sentence. In his affidavit that he swore in support of his said application, he stated that his rights under Article 25c, 27, 1, 2 (sic), 28 and 50 (2)(p) of the Constitution of Kenya, 2010 had been violated. He relied on the case of **Francis Karioko Muruatetu & Another vs Republic [2017] e KLR** 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.
3. In his Written submissions, he reiterated the said averments pleaded with court to review his sentence on the ground that at the time of the omission of the offence, he was a first offender who was ignorant of the law at the time. He attributed the commission of the offence to poor upbringing and peer influence. He stated that he had a young family that he provided for. He submitted that he was a first offender and was remorseful of the events that led to the death of the deceased.
4. He contended that he had undertaken rehabilitation and reformation programmes in Carpentry Grade III and Theological Courses which he believed would enable him integrate well back to society and not indulge in crime. He filed his Certificates for the court's perusal and information.
5. He invoked Section 333(2) of the Criminal Procedure Code, and urged the court to consider the time he had spent in custody since their arrest. To buttress his point, he relied on the Judiciary Sentencing Policy Guidelines and the case of **Bettwel Willson Kibor vs Republic [2009] e KLR** where it was held that the courts must take into account the time already served in custody by convicted persons if they were in custody during trial.
6. He further relied on the case of **Benson Ochieng & Another vs Republic [2018] e KLR** where the court imposed a sentence of fifteen (15) years imprisonment, having found the death sentence to have been manifestly excessive and the case of **Eldoret Criminal Appeal No 253 of 2003 Shadrack**

**Kipkoech Kogo vs Republic** (eKLR citation not given) among other unreported cases where it was held that an appellate court will interfere with the discretion of a trial court if such trial court had considered irrelevant factors or proceeded under the wrong principles.

7. The State did not oppose his Petition for review of sentence for the reason that in the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra), the mandatory nature of the death sentence for murder cases was declared unconstitutional. It urged this court to apply the rules set out in the said case in determining an appropriate sentence herein. It further pointed out that the Petitioner had served eleven (11) years imprisonment and that he had prepared himself for integration into society.

8. It was persuaded the Petitioner was in the process of reforming and 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).

9. On 6<sup>th</sup> 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.

10. 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.

11. 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.

12. 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.

13. 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.

14. 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 mandatory death sentence.

15. Notably, the deceased suffered greatly before he succumbed to the injuries that were meted on him by the Petitioner among others. The deceased was killed in cold blood and in the presence of his children of tender years who were traumatised. It was so pre-meditated and malicious as the Petitioner attacked the deceased armed with a panga. The murder can only be said to have been gruesome

16. A perusal of the affidavit attached to the application for review of sentence did not show a person who was remorseful. He mainly focused on review of sentence. Be that as it may, while there was need to send a strong message to the society that violence against other persons is strongly condemned, convicts who have reformed and are remorseful ought to be given a second chance and have a new lease of life.

17. The Petitioner had already spent about eleven (11) years behind bars. He obviously had had sufficient

time to reflect on his actions. A letter dated 3<sup>rd</sup> May 2021, filed in court indicated that the officer in charge Kisumu Maximum Prison indeed vouched for his good conduct.

18. 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, having taken into account, 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. 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**

19. For the foregoing reasons, the upshot of this court's decision was that the Petitioners' Petition for review of the sentence that was filed on 18<sup>th</sup> February 2021 was merited and the same be and is hereby allowed. Accordingly, the court upholds the conviction of the Petitioner for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code but reviews the mandatory death sentence that was imposed upon him and replace the same with thirty (30) years imprisonment.

20. 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.

21. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF SEPTEMBER 2021**

**J. KAMAU**

**JUDGE**