



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL MISC. APPL. NO. 83 OF 2019

SAIDI HASSAN.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Muruatetu directions (Directions by the Supreme Court) issued on the 6th July 2021 clarifying and explaining the Judgement of Francis Karioko Muruatetu & Others vs Republic Petition No. 15 & 16 (as consolidated) of 2015 was as a result of the many applications filed by persons serving sentences on account of various offences and who returned to court seeking for reduction of their sentences relying on the same.

2. The Supreme Court in the directions stated as follows:

[4] By our judgment rendered on 14th December 2017, this Court (though differently constituted), readily accepted that the last two questions (b) and (c) above, not having been canvased before the two courts below, were not available for the Court’s determination. On the first question, however, the Court made the following declarations and orders:

“a) The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of the Constitution.

b) .....

c) .....

d) .....

[7] In the meantime, it is public knowledge, and taking judicial notice, we do agree with the observations of both Mr. Hassan and Mr. Ochiel, that while the report of the Task Force appointed by the Attorney General was awaited, courts below us have embarked on their own interpretation of this decision, applying it to cases relating to Section 296(2) of the Penal Code, and others under the Sexual Offences Act, presumably assuming that the decision by this Court in this particular matter was equally applicable to other statutes prescribing mandatory or minimum sentences. We state that this implication or assumption of applicability was never contemplated at all, in the context of our decision.

[8] While it is regrettable that the report was not filed timeously and these directions not issued immediately, there can be no justification for courts below us, to take the course that has now resulted in the pitiable state of incertitude and incoherence in the sentencing framework in the country, giving rise to an avalanche of applications for re-sentencing.....

[10] It has been argued in justifying this state of affairs, that, by Paragraph 48 of the Judgment in this matter, or indeed the spirit of the Judgment as a whole, the Court has outlawed all mandatory and minimum sentence provisions; and that although Muruatetu specifically dealt with the mandatory death sentence in respect of murder, the decision in its expansive reasoning can be applied to other offenses that prescribe mandatory or minimum sentences. Far from it, in that paragraph, we stated categorically that;

“[48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death.

Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right”.

Reading this paragraph and the Judgment as a whole, at no point is reference made to any provision of any other statute. The reference throughout the Judgment is only made to **Section 204** of the Penal Code and it is the mandatory nature of death sentence under that section that was said to deprive the “**courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases**”.

The Court went further in the said directions to state:

“**[14]** 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.”

3. Having extensively quoted the directions issued by the Supreme Court the court now turns to the matter at hand. The Applicant Saidi Hassan was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. He was found guilty and sentenced to suffer death. He preferred a first appeal to this court which concurred with the findings of the trial court and dismissed his appeal.

From the affidavit in support of the current application it appears that there is 2<sup>nd</sup> appeal pending in the Court of Appeal. He now seeks for resentencing relying on the **Muruatetu** case.

4. In his submissions in support of the application the Applicant cites inter alia, the fact that the victim who suffered injuries has since recovered, as there were no permanent injuries, secondly the value of stolen property was modest and no one lost life in the process of robbery, further he was a first offender and a young man at the time. He has spent 16 years in jail.

5. All the above are good mitigating factors no doubt but as cited above the **Muruatetu** case cannot apply in the circumstances of this case.

6. Apart from explaining the **Muruatetu** decision and clarifying the same the Supreme Court went further to state:

“(15) To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under **Section 40 (3)**, robbery with violence under **Section 296 (2)**, and attempted robbery with violence under Section 297 (2) of the Penal Code, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. **Muruatetu** as it now stands cannot directly be applicable to those cases.”

7. The application before court is resentencing of a case of robbery with violence under section 296(2) of the Penal Code based on the **Muruatetu** case. It cannot succeed for reason stated by the Supreme as quoted above

8. The Applicant is likely to succeed as his reasons for re-consideration of the death penalty meted against him are very valid but he needs to move the court appropriately as advised by the Supreme Court so as to challenge the constitutional validity of the penalty meted out on him.

9. For now, the application fails.

**DATED, DELIVERED AND SIGNED AT GARISSA THIS 28<sup>TH</sup> DAY OF OCTOBER, 2021**

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**ALI-ARONI**

**JUDGE**