REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MISC CRIMINAL APPLICATION NO. 33 OF 2020

ABDIRAHMAN MOHAMMED HAJIR..APPLICANT

VERSUS

REPUBLIC...RESPONDENT

RULING

1. The applicant herein was charged with the offence of **Murder contrary to Section 203 as read with Section 204 of the penal Code,** the particulars of the offence were that on 9th July 2014 at Gullet Area in Garissa Township within Garissa County in the Republic of Kenya, jointly with Others not before court he murdered Mohammed Hassan Abdi.

2. After the trial court the applicant was guilty found of the offence and sentenced to death. The applicant preferred an appeal to the court of Appeal; **Criminal Appeal No. 1 of 2019 Abdirahman Mohammed Hajir versus Republic,** where his appeal on both conviction and sentence was dismissed.

3. The applicant has now moved this court to review the death penalty sentence.

In his Supporting affidavit the applicant makes reference to the judgement of the Court of Appeal where the death penalty was affirmed and, in this regard, relies on the Supreme Court decision in the case of **Francis Muruatetu and Others vs Republic Petition No. 15 & 16 of 2015(Consolidated)**, further he urges the court to invoke the provisions of Section 333(2) of the Criminal Procedure Code as he was in custody for 6 years before he was sentenced.

4. The state did not file its response to the application. Both parties made brief submissions to the application.

Applicants Submissions

5. He was sentenced on the 18th of October 2018 to suffer death, which sentence was affirmed by the Court of Appeal. He seeks review based on the Muruatetu case and the sentencing Policy of the Judiciary on sentencing. Further the applicant submitted that this court has unlimited discretion concerning resentencing applications. In mitigation he urged the court to consider that he has already served six (6) years of his sentence, he is remorseful and ready to be reunited back to the community, he is now 43 years of age.

He urges further for the court to take into account the time spent in custody as provided under **Section 333 (2) of the Criminal Procedure Code.**

The applicant cited the following authorities in support of his submissions **Benjamin Changawa & Another vs Republic, Court of Appeal Case No. 99 of 2019, Martin Bahati Makhoha v Republic [2018] eklr, Sebastian Okwero Mrefu v Republic Petition No. 151 of 2012**

Respondent's Submissions

On its part the Respondent submitted that this court lacks jurisdiction to preside over the resentencing application, since this matter had been dealt with by the Court of appeal and indeed the Supreme Court in the Muruatetu did not outlaw the death penalty, which is still applicable as a discretionary maximum penalty.

Analysis and Determination

6. The issues emerging from the application and submissions by the parties are two-fold.

i. ***Whether this court has jurisdiction to determine resentencing applications*** **and**

ii. ***Whether the current application is appropriately before this court if so whether it is merited.***

7. The High Court has the mandate under **Article 165 (3) of the Constitution** to hear and determine as well as to enforce matters of rights and fundamental freedoms enshrined in the constitution. In **Michael Kathewa Laichena & Another -v- Republic (2018) eKLR** Justice Majanja stated:

> **"By re-sentencing the petitioner, the High Court is merely enforcing and granting relief for what is in effect a violation caused by the imposition of the mandatory death sentence".**

In **John Gichovi Muturi v Republic [2021] eKLR** the Court held;

> **"However, there is a new jurisprudence which was developed by the Supreme Court in Muruatetu's case (supra), and wherein the Supreme Court found that the mandatory death sentence under Section 204 of the Penal Code is unconstitutional as it takes away the discretion of the court while sentencing. The Supreme Court gave this court (being the trial court in murder charges) a special jurisdiction to hear a party on resentencing where an accused person was sentenced under the mandatory Section 204 of the Penal Code. (See paragraphs 110 and 111 of the said decision) …."**

8. Resentencing Petitions were pre-empted by the Supreme Court's decision in **Francis Karioko Muruatetu & another v Republic [2017] eKLR** where the court held;

> **"[109] Here in Kenya, in the case of Mutiso, the Court of Appeal stated**
>
> ***"[para 38]:***
>
> > ***In all the circumstances of this case, the order that commends itself to us is to remit the case to the superior court with the direction that the court records the prosecution's as well as the appellant's submissions before deciding on the sentence that befits the appellant."***
>
> **[110] We agree with the reasoning of the Courts in the authorities cited and the submissions of the 1st petitioner, the DPP and the amici curiae. Comparative jurisprudence is persuasive and we see no need to deviate from the already established practice. 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.**
>
> **[111] It is prudent for the same Court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners. For the avoidance of doubt, the sentencing re-hearing we have allowed, applies only for the two petitioners herein. In the meantime, existing or intending Petitioners with similar cases ought not approach the Supreme Court directly but await appropriate guidelines for disposal of the same. The Attorney General is directed to urgently set up a framework to deal with sentence re-hearing of cases relating to the mandatory nature of the death sentence - which is similar to that of the petitioners in this case."**

9. Therefore, it is right to say that the High court is the right court to file an application for resentencing as clearly enunciated in the **Francis Muruatetu's case (supra**).

10. The next issue for consideration is whether the application by the Applicant herein is properly before this court and if it is merited.

11. The Applicant's Appeal was determined and the Judgement delivered on the 10th of July 2020, well after the **Muruatetu** decision which the Court of Appeal was well aware of and made reference to in its judgement as follows;

> **"The Supreme Court did not outlaw the death sentence but rather declared the mandatory nature of the death sentence unconstitutional. In the present case, we find that the manner in which the Appellant committed the offence was heinous, horrid and gruesome. The appellant mercilessly shot the deceased 9 times while he was innocently going about his business. No Human deserves this kind of treatment. Given these set of circumstances in which an innocent life was lost, we are reluctant and not inclined to exercise our discretion in favour of the appellant to review the imposed sentence downwards. The sentence of death was deserved for the appellant…."**

12. The Court of Appeal having taken into account the decision of the Supreme Court and having addressed itself on the mandatory nature of the death sentence and the fact that Courts can in deserving cases deviate from the mandatory sentence, made its pronouncement affirming the decision of this court. In the circumstances therefore the directive by the supreme court for resentencing is not applicable in this instance.

The application filed on 5th August 2020 lacks merit and the same is hereby dismissed.

DATED SIGNED AND DELIVERED IN GARISSA THIS 16TH DFAY OF DECEMBER, 2021

ALI-ARONI

JUDGE