REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

PETITION NO. 49 OF 2016

ALI SAID ABDALLAH..PETITIONER

VERSUS

REPUBLIC...RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Ms. Nyoro for the State

The petitioner in person

RULING

The petitioner is before this court seeking re-sentencing relief under the broad spectrum principles enunciated in the case of **Francis Muruatetu v R {2017} eKLR.** The Supreme Court in **Muruatetu case** declared the mandatory sentence unconstitutional as punishment for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. This land mark case introduced a new dawn in our jurisprudence where all convicts are entitled to a re-sentencing hearings initially sentenced to death pursuant to Section 204 and Section 296 (2) of the Penal Code.

It was most legitimate and so essential that the **Muruatetu** principle apply to all other offences on sentences imposed circumscribed under the texture of mandatory sentences.

Brief factual history of the petitioner's case

The petitioner was charged, tried, convicted and sentenced to suffer death for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code in Criminal Case No. 938 of 1997.

Being aggrieved with both conviction and sentence he preferred an appeal to the 1st appellate court and soon thereafter to the Court of Appeal. unfortunately, in both appellate courts the petitioner lost the appeal under the constitution. The doctrine of exhaustion in Article 50 (6) (a) applies to the petitioner.

This court is therefore seized of jurisdiction pursuant to these provisions of the constitution to reconsider the sentence in conjunction with the principles in **Muruatetu case.**

Determination

Having considered the petition and submissions filed in pursuit of the declaration sought by the petitioner I see the following issues arising for determination.

Whether the petitioner would be entitled of the relief on re-sentencing? Whether the fact that the entire record of the case remains unavailable or, lost, or misplaced/missing or destroyed to which renders, scrutiny and examination of the record untenable?

Whether the issue of missing record would oust this court's jurisdiction to hear and determine the petition?

Issue No. 1, 2 & 3

The adjudication and administration of justice in either branch of Law is wholly dependent on the court record. Broadly, it's a term denoting the case file, containing all the materials and evidence admitted into the case both at interlocutory stage or at a full trial by the court and that which the court renders a decision or ruling (as provided in Section 169 of the Criminal Procedure Code).

In any adjudication by a trier of facts or Law, the ultimate outcome of a judge is a Judgment or Ruling specifically comprising of the points of determination and the decision itself.

The case record has therefore a constitutional foundation under Article 50(5) (b) where it provides that an accused person has the right to a copy of the record of the proceedings within a reasonable period after they are concluded, in return for a reasonable fee as prescribed by Law.

Whether or not a Court of Law under Article 50 (1) of the Constitution affords an equal opportunity to the parties as far as possible to meet the ends of justice. The sanctity, authencity and reliability of the record remains to be the single instrument of the adjudicative process.

The statement by **Thirston (Firstening Trust and Transparency through information systems {2005} 36 ACARM Newsletter 2,** observed:

> **"Dysfunctional records management undermines legal and judicial reform. Decision are made without full information about cases, and the absence of systematic record keeping and controls leaves scope for corruption, court time is wasted, delays are created and the judiciary's standing is lowered."**

The right of an accused or a convict to have his or her case reviewed or heard on appeal begins and ends with an authentic court record.

It is a matter of prime constitutional importance that the making and availability of the record to the parties in a civil suit or in a criminal trial is the responsibility of the state. The provisions of Article 35 of the Constitution provides good authority for the right of access to information held by the state, in this case the judiciary, on the need for the right to access by information to every litigant unhindered to exercise the legitimate expectation to exercise his right to access courts under Article 48 specifically and distinctively touches on the availability of the records.

In the present petition despite demand and application to the Registrar of the court in both the primary and appellate courts the petitioner is yet to receive a copy of the record in compliance with Article 50 (5) (b) of the constitution. The provision of the right on access to information was emphasized in the case of **Nairobi Law Monthly v Kenya Electricity Generating Company & 2 Others {2013} eKLR** where it was held interlia:

> **"The state organs or public entities have constitutional obligation to provide information to citizens as of right under the provisions of Article 335 (1) (a) ….. they cannot escape the constitutional requirement that they provide access to such information as they hold to citizens."**

The fundamentals and proper administration of justice is principally embedded under Article 10 on National values and principles of governance which include; human dignity, good governance, integrity, transparency and accountability etc. The constitutional requires that judicial officers being state officers do promote national values and principles of governance in every decision making process.

Therefore a defective record or no record at all undermines right to a fair trial for an individual to secure fundamental right and freedoms guaranteed in the bill of rights.

In the South African case of president of **Republic of South Africa v M & G Media CCT 03/11** held this that:

> **"The constitutional guarantee of the right of access to information held by the state gives expect to accountability, responsiveness and openness as finding values of our constitutional democracy."**

As for the standard set to discharge the obligation on right to access information held by the court its regulated by Article 50 (5) (b) of the constitution. The time frames established by the constitution is that of reasonable time after the conclusion of a trial at a fee to be paid by the litigant. By what means is this right attainable with regard to the copy of the record of proceedings? Evidently by the doctrine of within reasonable under Article 50 (5) (b) of the constitution and in the interest of fairness the time frame should be soon after delivery of Judgment or Ruling; the copy of the record ought to be made available.

In my view from this constitutional provision and the impracticability to attain the constitution prescribed standard, a more intrusive commitment to a realistic time ought to be incorporated in the rules of Civil Procedure and Criminal Procedure Code. In the instant case, its evident that the petitioner has never been supplied with a copy of the proceedings, the primary source of all the decisions made against him as illustrated in his supporting affidavit.

Procedurally, when this matter was placed before this court for adjudication on 6.9.2018, the direction to the Deputy Registrar to avail the record taken in any of the courts has not born fruits. At the date of the hearing on 6.2.2020, the contemplated record and its availability remains a mirage.

The question is whether a re-sentencing order can be made notwithstanding the absence of the record. The defects in the records and its pival role in the administration of justice continues to equally burden other comparative jurisdictions relying on the principles laid out by the court in **Francis Kafuntayeni and others v The Attorney General Constitutional Case No. 12 of 2005.**

The court was faced with a case where the records of all the six of the plaintiffs had been lost or destroyed, while their re-sentencing was pending determination. The court had this to say:

> **"The court ordered sentence re-hearings to take place, notwithstanding that by necessity these would have to be carried out without the benefit of the court records, because to do so would be contrary to the interest of justice; would cause further breaches of the plaintiff constitutional rights to a fair trial including sentencing and to access to justice, and would mean that the court would fail to provide an essential and effective remedy to the breaches of constitutional rights already suffered by the plaintiff at that time. …… the High Court explicitly condemned any potential limitations on the right to access a court for discretionary sentencing as amounting to a violation of rights guaranteed by the constitution. "We would reject any notion that any restriction or limitation on the guarantee under Section 41 (2) of the Constitution of the right of access to a court of final settlement, of legal issues, denying a person to be heard in a mitigation of sentence by such court can be justified under Section 44 (2) of the constitution as being reasonable or necessary in a democratic society to be in accord with international human rights standards."**

I have carefully evaluated the petition before me and the affidavit evidence relation to the events that transpired at the lower court all the way to the Court of Appeal.

It is evident that the petitioner was tried and convicted for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. He was duly sentenced to suffer death. It appears not to be disputed therefore that the petitioner is a convict and an order on sentence to suffer death places him on death row to await executive order to have him hanged as regulated by the Law. That as a result of the principles in **Muruatetu case (supra)** there is a public interest re-litigation on review of sentence of convicted persons on death row either under Section 204 or Section 296 (2) of the Penal Code.

That I find it pertinent and necessary despite the delay to place reliance in Section 352 of the Criminal Procedure Code not to quash the conviction properly confirmed by Court of Appeal but admit and address the petition on re-sentencing.

This cardinal principle was also articulated and summarized by the **Malawian Courlt in Mtameso & Others v The Republic MSCA CR Appeal No 1 of 2012 UR** where the court held:

> **"It is clear from what has been deposed to the material affidavits of this applications that no stone had been left in the search for the records of trial and sentence for all the three applicants. The records have so missed for not less than 10 years in respect of each applicant. It is accordingly as clear as day light to me that save for the fact that the applicants have not asked the High Court to fudicially confess its failure to help them, chances are so remote that the trial records will be traced. The meaning of this is that if it be insisted that their appeals only proceed on production of their records of appeal, then it would be as good as saying they should not exercise their right to appeal. what would be painful about such a result is that the appeals these applicants claim they lodged resolve on a very narrow compass that might not overly depend on what their records of appeal could have contained. The appeals, I have been assured relate to the sentences, they got visa viz, the ages they were during their commission of the respective murders, they were convicted and sentenced for. All they want to argue before the Supreme Court is that although tried and sentenced as adults, they were minors at the time of the commission and arrest."**

Going by this principles the appropriate relief for the petitioner will in essence be review of sentence depending upon the dicta in **Muruatetu Case**.

In the American case of **People v Jones {1981} 125 Cal App 30298.** The court stated:

> **"Here we have a case in which the defendants without any fault of his own was deprived of the right to an effective presentation of his appeal due to entirety to a failure on the part of the official of the trial court to comply with the Law. It would be a violation of the fundamental rights of the defendant to hold that an effective possibility of appealing the convictions was properly taken away by our system of justice. To forget that this defendant was in prison for all those years, without permitting him to urge his legitimate appeal is insufferable."**

Applying this principle to our very considered opinion, the case is distinguishable in view of the fact that the petitioner herein had already exhausted his right of appeal on the merits to the final Court of Appeal.

The jurisdiction exercisable by this court is in accordance to Article 50 (6) (a) (b) of the Constitution. The new compelling evidence is more purposeful approach on sentencing given by the Supreme in **Muruatetu case (supra).**

In proceedings brought under this Article this court may grant the relief on review of sentence including declaration of right invariably depending on the nature of the right stated to be infringed.

Therefore, it is clear that the objective purpose of this petition is on the determination of appropriate sentence on the fundamental principle in **Muruatetu case (supra).** In the Supreme Court correct view and having appreciated the legal position as it stands, the issue of re-sentencing is in tandem with the dicta in the case of **Spence v Queen CR Appeal No. 20 of 1998 and Hughes v Queen,** the courts observed:

> **"The issue here is whether, it is inhuman to impose a sentence of death without considering mitigating circumstances if the commission of the offence and the offender. Whether the lawful punishment of death should only be inflicted after there is a judicial consideration of the mitigating factors relative to the offence itself and the offender."**

In the later case the court observed interalia, that if the death penalty is appropriate for the worst case of homicide, then it must surely be excessive punishment for the offender convicted of murder whose case is far removed from the worst case."

In matters concerning this petition, the petitioner was charged, tried, convicted and sentenced to suffer death for the offence of robbery with violence.

Among the issues that come to the fore include the gravity of the offence, the threat of violence against the victim, the nature and type of weapon used by the petitioner to inflict harm. Despite the absence of adequate record on the effects of incarceration and other orders made by superior courts a review petition filed for re-sentencing should proceed as filed.

The constitutional underpinning that provide potential provisions for correction of sentences error are to be found in Article 50 (2) (p) of the constitution to benefit of the least severe of the prescribed punishments for an offence. If the prescribed punishment for the offence has been changed between the time, that the offence was committed and the time of re-sentencing.

Under the doctrine of substantive due process the petitioner must meet a high standard. The touchstone for resentencing the petitioner convicted of the robbery with violence and sentenced to death to benefit for a less offence is a draw down from **Muruatetu** decision and Article 50 (6) of the Constitution. However, by the time, the case had been remanded for trial in 2018 for re-sentencing in accordance with **Muruatetu case,** the entire original and appellate court record remains unavailable lost or missing.

In the instant petition, the petitioner singled out the long custodial sentence and the deprivation of liberty and curtailment of basic rights, including social isolation, less of personal responsibility increased dependency in facilities at the prisons. Further, the petitioner urged the court to factor on his age which he stated as forty six (46) years old.

Set in Article 50 (6) of the Constitution which provides as follows:

"A person who is convicted of a criminal offence may petition for a new trial if :

(a).The persons appeal, if any, has been discussed by the highest court to which the person is entitled to appeal, and

(b). New and compelling evidence has become available.

In the petition before this court, the petitioner submitted that he has served a total of twenty two (22) years since conviction for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. The court (s) which heard and determined his appeal on both conviction and sentence with finality the Court of Appeal confirmed the death penalty. That a more recent probation report dated 9th September 2019 shows that the community and family reintegration would be sustainable.

According to the petitioner, he remained in remand custody for a period of one year prior to conviction and sentence. The rational for describing the period is provided for under Section 333 (2) of the Criminal Procedure Code.

Therefore this statutory provision constitutes a factor for the trial court to make provision for the period a criminal was in remand custody awaiting trial and conclusion of his or her case.

The petitioners past and character is responsive as factored in the probation officers report to present positive future prospect of rehabilitation and complete transformation.

There is no risk shown that he would re-offend if released from prison custody. According to the officer in charge Malindi Prison, the petitioner is fairly equipped with carpentry and upholstery skills to handle after care towards social economic empowerment as a step towards community based rehabilitation. That is if he secures employment its regarded as a mitigating factor.

In the face of the already served sentence of twenty two (22) years, I hold the view that the punishment is just and proportionate to the offence and the victims together with the public. Wherever they are one would be satisfied that justice has been done and there is no further need for vengeance.

It follows with these in mind that the petition on severity of sentence succeeds to the already period served by the petitioner. It is ordered that the petitioner shall be set at liberty forthwith unless otherwise lawfully held.

DATED, DELIVERED AND SIGNED AT MALINDI THIS 26TH DAY OF FEBRUARY, 2020.

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R. NYAKUNDI

JUDGE