



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL PETITION NO. 1 OF 2019

JOSEPH WAITITU KAGO.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Like in numerous petitions that have been filed in the wake of the Supreme Court's decision in Petition No. 16 of 2015, **Francis Kariokor Muruatetu & Another versus Republic**, the petitioner in the present petition seeks to be resented in a trial in which he was convicted of the offence of murder contrary to section 203 as read with section 204 of the Penal Code, cap. 63.

Section 204 of the Penal Code prescribes a mandatory death sentence upon conviction for the offence of murder; however, the Muruatetu decision has since declared that section to be unconstitutional because of the mandatory nature of the penalty prescribed; the Supreme Court was of the opinion that as much as the trial court may very well pass a sentence of death upon conviction for the offence of murder, nonetheless, it ought to have some measure of discretion on the appropriate sentence to mete out depending on the mitigating circumstances of each particular case; in other words, a trial court's hands shouldn't be tied to a particular sentence.

Inevitably, an avalanche of petitions for resentencing by convicts who had initially been condemned to die have since been filed. This is one such a petition.

The original conviction of the petitioner and the sentence to which he was subjected were handed down by this court in Criminal Case No. 4 of 1999; he was sentenced to death. He appealed against this decision to the Court of Appeal, sitting at Nyeri in Criminal Appeal No. 39 of 2003. His appeal was dismissed.

In 2009, he got what I suppose is a reprieve when the President of the Republic of Kenya commuted his sentence to life imprisonment. It is against this background that the present petition has been made.

The immediate question that has arisen in petitions such as the present one is whether condemned prisoners whose sentences have been commuted to life sentences are eligible for a fresh consideration of their sentences in the context of the Muruatetu decision. This is because, as far as I understand this decision, it is only in those cases where the prisoners have been sentenced to death in the long-held belief that the penalty was mandatory that are appropriate for a fresh consideration of their sentences by the trial courts. There is little in that decision on the question whether the same courts can hear petitions on resentencing where the initial sentences have been commuted to life imprisonment.

Perhaps this is an issue that will be addressed in the fulness of time by the task force proposed by the Supreme Court to come up with guidelines on what, in many ways, is a retrial on sentencing in appropriate cases. So far, the envisaged guidelines are not yet out and so the trial courts have been left to their own devices to approach these petitions in the way they deem fit. It is reasonable to assume that when the guidelines are finally gazetted, there will be some measure of certainty and, probably, uniformity in the manner these cases are handled.

The absence of guidelines notwithstanding, the Supreme Court did not expressly bar the trial courts from entertaining resentencing cases where the sentences of death have been commuted to life imprisonment; it is thus logical to assume that it is open for the trial courts to hear this sort of cases on the basis of the original sentences. If this course is correct, then the present petition is properly before court.

The circumstances under which the petitioner was convicted are clear from the judgment of this honourable court and that of the Court of Appeal. In summary, the deceased was outside her house when, from nowhere, the petitioner appeared and confronted her. He was armed with a knife. Fearing for her life, the deceased took to her heels but the petitioner caught up with her and led her into a certain room at knife-point. Even after he had subdued the deceased, the petitioner eventually stabbed her several times until she succumbed.

It is not apparent from either of the judgments whether the petitioner was remorseful for his act or otherwise mitigated in any way. There is little in his petition that suggest that he may have mitigated. All he said in his petition is as follows:

1. That I the petitioner argue for a reduction of sentence under section 169(1)(a) and 25(a)(c)(d) in view of a recent decision by supreme court vide petition numbers 15 and 16 of 2015 Francis Karioko Muruatetu & Another.

2. That it is within rules of law for my prayer to be heard and considered by this honourable court.

And in the affidavit in support of the petition he reiterated the same grounds that the petition was made based on the decision in the Muruatetu case.

It is apparent that apart from stating the obvious with respect to the Muruatetu decision, the petitioner has not given any reason why his sentence, having been commuted from death to life sentence should be commuted any further to a less severe sentence.

As much as the petitioner has invoked the Muruatetu decision, this decision must not be mistaken to mean that every condemned prisoner is automatically entitled to a commutation of his or her sentence; the court has to be satisfied that, taking all the relevant factors into account, it is mete and just that the death sentence be commuted, in one way or the other. Unless sufficient material has been placed before court, there is nothing upon which it can exercise its discretion in favour of a petitioner seeking a review of his sentence.

It is also worth noting that death sentence has not been altogether outlawed; what the Supreme Court was concerned with was the mandatory nature of the sentence and not the sentence itself per se. It follows that if, in the view of a trial court, the petitioner ought to have been sentenced to death, it would be justified in declining a petition for commutation of the sentence.

In the present petition, no reason has been proffered why the petitioner's sentence should be commuted any further. There is therefore no basis upon which this honourable court can exercise its discretion and commute the petitioner's sentence. He should be satisfied that he was relieved of a death sentence by a presidential pardon. His petition is accordingly dismissed. It is so ordered.

Signed, dated and delivered in open court this 13th day of March, 2020

Ngaah Jairus

JUDGE