



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

(CORAM: R. MWONGO, J)

CONSTITUTIONAL PETITION NO. 6 OF 2019

JASON MAINA NGAU.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The petitioner is a prisoner at Naivasha main prison. He was convicted with the offence of robbery with violence contrary to section 296(2) of the Penal Code and sentenced to death on 21st December, 2001 by the lower court in CMCR No 2261/2001.

2. From the records and documents supplied by the petitioner, and from his supporting affidavit attached to his petition and filed on 16th May, 2018, he asserts that his death sentence was commuted by the President. He also states that he exhausted his first appeal vide HCCRA No 1 of 2002, and his second appeal vide Court of Appeal Appeal No 424 of 2007. He has filed this petition following the decision of the Supreme Court in *Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015, (Muruatetu's case)*, and seeks resentencing.

3. The court directed the parties to file submissions on re-sentencing and the lower court file was placed before the court. The court further ordered that a probation officer's report be availed prior to the hearing. The petitioner filed his submissions, the substance of which was to recall the facts of the case and the sentence. He pointed out that he was a first offender; that he was 23 years old and under peer pressure and alcoholism at the time of the offence; that he had reformed during the eighteen years he had been in prison and had acquired Grade 3, 2, and 1 Test Certificates for joinery and carpentry and had also done Upholstery at Grade 3.

4. In addition to asking the court to review his sentence, he availed a letter of recommendation from the Officer in Charge, Naivasha Maximum Prison which the Officer in Charge confirms the training undergone by the petitioner; and affirms that:

***“[the petitioner’s] conduct is good in prison. He relates well with members of staff and fellow prisoners, a condition which has seen him rise in the prison progressive stage system to special stage (trustee).*”**

In view of the above, I strongly feel that he has skills to enable him earn a living after release”

5. He further argues that in *Muruatetu*, the mandatory nature of the death sentence was found unconstitutional. He seeks that his sentence be quashed and substituted with an appropriate sentence, as he would like to have a part in building the nation.

6. The state did not oppose the petition, noting that they had seen the probation report which recommended that the offender should be given a chance to serve a probation sentence. More so, however, the state noted that the accused's mitigation factors were never considered by the trial court.

7. I think it apt to cite some of the distinctive pronouncements made by the Supreme Court in the **Muruatetu case**:

***“[56] We are therefore, in agreement with the petitioners and amici curiae that Section 204 violates Article 50 (2) (q) of the Constitution as convicts under it are denied the right to have their sentence reviewed by a higher Court – their appeal is in essence limited to conviction only. There is no opportunity for a reviewing higher court to consider whether the death sentence was an appropriate punishment in the circumstances of the particular offense or offender. This also leads us to find that the right to justice is also fettered.....*”**

[58] To our minds, any law or procedure which when executed culminates in termination of life, ought to be just, fair and reasonable. As a result, due process is made possible by a procedure which allows the Court to assess the appropriateness of the

death penalty in relation to the circumstances of the offender and the offence. We are of the view that the mandatory nature of this penalty runs counter to constitutional guarantees enshrining respect for the rule of law.

[59] We now lay to rest the quagmire that has plagued the courts with regard to the mandatory nature of Section 204 of the Penal Code. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the Penal Code, unfair thereby conflicting with Articles 25 (c), 28, 48 and 50 (1) and (2)(q) of the Constitution.”

.....Article 27 of the Constitution provides for equality and freedom from discrimination since every person is equal before the law and has the right to equal protection and equal benefit of the law. Convicts sentenced pursuant to Section 204 are not accorded equal treatment to convicts who are sentenced under other Sections of the Penal Code that do not mandate a death sentence. Refusing or denying a convict facing the death sentence, to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation is clearly unjustifiable discrimination and unfair. This is repugnant to the principle of equality before the law. Accordingly, Section 204 of the Penal Code violates Article 27 of the Constitution as well.

[66] It is not in dispute that Article 26 (3) of the Constitution permits the deprivation of life within the confines of the law. We are unconvinced that the wording of that Article permits the mandatory death sentence. The pronouncement of a death sentence upon conviction is therefore permissible only if there has been a fair trial, which is a non-derogable right. A fair hearing as enshrined in Article 50 (1) of the Constitution must be read to mean a hearing of both sides. A murder convict whose mitigation circumstances cannot be taken into account due to the mandatory nature of the death sentence cannot be said to have been accorded a fair hearing.”

8. These sentiments have been used by applicants who have been sentenced to death for robbery with violence, as the springboard for review of their sentences. As such, in **William Okungu Kittiny v R [2018] eKLR** the Court of Appeal applied the reasoning in the **Muruatetu** case to robbery with violence cases, and by extension to other cases where a mandatory death sentence can be meted.

9. In particular, the Court of Appeal in **William Okungu**, very pertinently, stated as follows:

[8] *Robbery with violence as provided by Section 296 (2) and attempted robbery with violence as provided under Section 297 (2) respectively provide that the offender:-*

“...shall be sentenced to death.”

The appellant was sentenced to death for robbery with violence under Section 296 (2). The punishment provided for murder under Section 203 as read with Section 204 and for robbery with violence and attempted robbery with violence under Section 296 (2) and 297 (2) is death. By Article 27 (1) of the Constitution, every person has inter alia, the right to equal protection and equal benefit of the law. Although the Muruatetu’s case specifically dealt with the death sentence for murder, the decision broadly considered the constitutionality of the death sentence in general.

In the Mutiso case which was affirmed by the Supreme Court, the Court of Appeal said obiter that the arguments set out in that case in respect of Section 203 as read with Section 204 of the Penal Code might apply to other capital offences. Moreover, the Supreme Court in paragraph 111 referred to similar mandatory death sentences.

[9] *From the foregoing, we hold that the findings and holding of the Supreme Court particularly in paragraph 69 applies mutatis mutandis to Section 296 (2) and 297 (2) of the Penal Code. Thus, the sentence of death under Section 296 (2) and 297 (2) of the Penal Code is a discretionary maximum punishment. To the extent that Section 296 (2) and 297 (2) of the Penal Code provides for mandatory death sentence the Sections are inconsistent with Constitution. The judgment of Chemitei, J., appealed from is four years earlier than the decision of the Supreme Court. That decision is in conformity with the decision of the Supreme Court. Thus, the finding of Chemitei, J., that death penalty per-se under Section 204 of the Penal Code is not inconsistent with the Constitution has been affirmed by the Supreme Court. By parity of reasoning the death penalty under Sections 296 (2) and 297 (2) is not inconsistent with the Constitution as the Supreme Court did not outlaw the death penalty. It follows that the main ground of appeal – the unconstitutionality of Section 204, 296 (2) and 297 (2) of the Penal Code on the death penalty fails.*

[10] *By paragraph 111 of the judgment, the Supreme Court allowed sentence re-hearing only for the two petitioners in the matter before it and said:*

“In the meantime, existing or intending petitioners with similar cases ought not approach the Supreme Court directly but await appropriate guidance for the disposal of the same. The Attorney General is directed to urgently set up a frame work 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.”

[11] *Although the appellants’ appeal was dismissed by the Court of Appeal on 20th June, 2008, which was then the last appellate court, the constitutional petition filed in the High Court revived the case and by the time the Supreme Court rendered its decision, this appeal was still pending.*

The decision of the Supreme Court only discouraged persons from filing petitions to the Supreme Court but the decision does not prohibit courts below it from ordering sentence re-hearing in a matter pending before those courts. By Article

163 (7) of the Constitution, the decision of the Supreme Court has immediate and binding effect on all other courts. The decision of the Supreme Court opened the door for review of death sentences even in finalized cases.”

10. Further, in **DismasWafulaKilwake v R [2018] eKLR** the Court of Appeal extended the reasoning in the **Muruatetu** case to mandatory minimum sentences imposed by the Sexual Offences Act holding that there was no rational reason for not so extending under appropriate circumstances. However, unlike in the **Muruatetu** case, the decision in **DismasWafulaKilwake v R [2018] eKLR** was specifically stated to operate non-retroactively. As such the binding principles in **DismasWafulaKilwake** case operate only in respect of future cases.

11. In light of the principles in **William Okungu** and **DismasKilwake** foregoing, I find that there is nothing to prevent the application of the principles in **Muruatetu** retroactively to this case.

12. I have perused the lower court’s file and also the probation report. I note the following from the lower court proceedings immediately the following after judgment was delivered on 21st December, 2001:

“Pros: He may be treated as a first offender.

Mitigation: I did not commit the offence. I am the oldest I the family.

Sentence: the accused is to suffer death as per law authorized...”

Disposition

13. It is clear that no mitigation factors were presented to the trial court for consideration, and that the sentence was meted forthwith. Accordingly, applying the principles in **Muruatetu** and **William Okungu**, the petitioner did not receive a fair hearing on sentencing. As such, I am satisfied that this case is appropriate for re-sentencing.

14. That notwithstanding, I consider that had I done the re-sentencing I would have, in the circumstances re-sentenced the petitioner to up to 20 years’ imprisonment. I have taken into account the fact that the accused has in fact been serving sentence in prison for 19 years, since 2001. I have noted his accomplishments in prison and the recommendations he has received, on account of his rehabilitation and reform. In addition, I have taken into account the probation report, which recommends that he serve his sentence on probation.

15. The criminal justice object of orders of incarceration are said to be: to remove and secure dangerous persons away from the presence of others who need protection and have or may equally suffer harm; to offer a warning to others who may be like-minded as to the consequences of breaching the law; to provide punishment for the offender for breaking socially agreed tenets; and most importantly, to reform and rehabilitate the individual who has offended the law. I think that in this case the incarceration of the petitioner has achieved its most productive and wholesome purpose of rehabilitation.

16. All in all, I consider this to be a proper case in which to order that the prisoner be set free forthwith unless otherwise lawfully held, and I so order.

Administrative directions

17. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Zoom video/tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

18. A printout of the parties’ written consent to the delivery of this judgment shall be retained as part of the record of the Court.

19. Orders accordingly.

Dated and Delivered at Nairobi this 30th Day of April, 2020

Signed

RICHARD MWONGO

JUDGE

Delivered via Zoom videoconference in the presence of:

1. Jason Maina Ngau the Petitioner present in person.

2. Ms Langat, Prosecutor for the Respondent

3. Court Clerk - Quinter Ogutu