



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

PETITION NO. 23 OF 2019

STEPHEN MWANGI MAINA.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

A. Introduction

1. The Petitioner herein moved the court vide a petition dated 14/02/2020. Despite having prayed for myriad of orders and/or declarations, it is clear from the perusal of the petition that the petitioner mainly sought for a declaration that detention at the President's pleasure is inconsistent with the Constitution of Kenya and for his sentence to be substituted with a definite sentence pursuant to the decision of the Supreme Court in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** considering his mitigation.

2. The petitioner was convicted of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code in Embu High Court's Criminal Case No. 6 of 2010. He was convicted of the said offence and having been found to be insane, sentenced to be held at the president's pleasure in accordance with Section 166 of the Criminal Procedure Code. The petitioner averred that he was not successful in appealing to the Court of Appeal and thus decide to file the instant petition. He relied on the High Court's decision in **Aloise Onyango Odhiambo & 6 Others -vs- Republic Petition No. 570 of 2015** and Supreme Court in **Francis Kariuki Muruatetu & Another -vs- Republic (Supra)**.

3. At the hearing of the petition, the parties herein took directions to canvass the petition orally. The petitioner submitted that he was convicted in 2014 and has been in prison for 6-7 years and that he had in custody since 2010 pending his trial. He thus prayed for a substitution of his indefinite sentence with a definite one.

4. In response, Ms. Mati for the respondent submitted that she was not opposed to the application to give a definite sentence but urged court to order a home inquiry report to so as to ascertain the petitioner's suitability in the re-integration with the society.

B. Issues for determination

5. I have considered the petition herein and the submissions by both the Petitioner and the Respondent and it is my opinion that the main issue which ought to be decided is whether this petition is merited.

C. Analysis of the law and determination

6. As to whether the petitioner's rights under the constitution were infringed, the petitioner under prayer (a) sought for a declaration that detention at the president's pleasure is inconsistent with articles 27(1)(2) and (4) and article 47 (1) (2) of the constitution. Under prayer (b) he sought orders that the sentence imposed on him violated article 28 of the constitution. Article 27 provides for equality and freedom from discrimination while article 47 provides for fair administrative action. Article 28 on the other hand recognizes the right to dignity. The petitioner in my opinion did not plead as to the manner and extent in which the sentence meted upon him violated the said articles.

7. However, the courts have pronounced themselves as to the unconstitutionality of the provisions of law which provides for detention at president's pleasure (section 166 and 167 thereof of the Criminal Procedure Code). For instance, Hon. Majanja J in **Republic v S O M [2018] eKLR** found that the provisions of **section 166** of the *Criminal Procedure Code* are unconstitutional to the extent that they take away the judicial function to determine the nature of the sentence or consequence of the special finding contrary to **Article 160** of the Constitution by vesting the discretionary power to the President to determine the nature and extent of the sentence. In the course of the judgement, the Learned Judge noted as thus (paragraphs 5 and 6): -

"...5. Although, the Francis Muruatetu Case dealt with the mandatory death sentence, the principles it espouses are

nonetheless applicable to this case. I would like to point out that the provisions of section 166 of the CPC dealing with conviction and sentence of an accused found guilty but insane are mandatory from the point of view of the accused and the court. They do not give the court any discretion irrespective of the nature of the mental illness or condition of the accused. The ultimate sentence imposed on an accused found guilty but insane is at the discretion of the President who determines under what conditions the accused serves either in a mental institution or a prison or is ultimately discharged.

6. The constitutional underpinning of the rights of persons with disability cannot be gainsaid. Central to these rights is the right to be treated with dignity guaranteed under Article 28 of the Constitution. Article 54(1)(a) of the Constitution buttresses the right of a person with disability, “to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning.” Kenya is also a signatory to the Convention on the Rights of Persons with Disabilities which is now part of Kenyan law by dint of Article 2(6) of the Constitution.....(emphasis mine)” (See also **Republic v E N W [2019] eKLR** (ruling on sentence), **Peter Kingori Gitahi v Director of Public Prosecutions [2019] eKLR** and **Paul Omondi Odipo & 4 others v Republic [2020] eKLR**).

8. It is my opinion that the above decisions reflect the right legal position. Sentence to detention during the President’s pleasure does not only amount to indeterminate sentence but implies that an accused remains psychologically tormented at the whim of the executive thus taking away the discretion of sentencing from the courts. Simply stated, it amounts to abdicating judicial authority to the executive. By the court having sentenced the petitioner herein to serve an indefinite period in jail, his rights (right against discrimination and right to dignity) was violated. Further, the court at the time of meting out the sentence, the discretion of the trial court was limited as the sentence in murder is death and thus was before the development of jurisprudence on the mandatory nature of death sentence.

9. I have carefully considered the petition, submissions by parties and relevant judicial decisions on resentencing for similar offences as well as the gravity of the offence. The mental state of the petitioner is key in this petition and also the time served in prison.

10. I have considered that the Petitioner’s attack on the deceased was unprovoked and that he died a painful death when the petitioner chopped him into pieces as shown by the post mortem report. The petitioner ought to be given a deterrent sentence for the serious offence he was convicted of. However, this ought to be considered *vis-a viz* the circumstances of the offence and the mitigation of the petitioner. It is no doubt that he was a first offender.

11. I have further considered the pre-sentence report which was filed pursuant to the orders of this court and which recommended that home environment was not conducive for the release of the petitioner. This means that even if the offender was to be released on a non-custodial sentence, the home environment will not favour him. However, the medical report demonstrates that the petitioner is still in need of treatment for his medical condition.

12. The court is guided by the decision in **Nelson Mwiti Gikunda & 2 Others v Republic [2018] eKLR** where the court re-sentenced the petitioners to twenty-five (25) years imprisonment commencing from the date of sentencing. The learned Judge had sought reliance in court of Appeal decisions in **John Ndede Ochola alias Obago v Republic -KSM C.A Criminal Appeal No. 120 of 2014 [2018] eKLR** and **Jonathan Lemiso Ole Keni v Republic – NRB C.A. Criminal Appeal No. 51 of 2016 [2018]** where the said courts upheld sentences of 25 and 30 years respectively.

13. I have further considered the medical report by Dr. Thuo stating that the petitioner was mentally unsound at the time of the offence. He is currently on treatment. It is my opinion that the petitioner ought to be committed to a mental institution for further treatment.

14. Having considered all the foregoing factors, and further taking into consideration the objectives of sentencing as provided for in the Judiciary Sentencing Policy guidelines, it is my opinion that the petitioner herein deserves a definite sentence.

15. On perusal of the record of the trial court, I note that the petitioner was arrested on the same day or one day after he committed the offence, that is on 19/03/2010. There is no evidence that the petitioner was ever released on bail. He was charged before the current Constitution was promulgated when capital offences i.e. murder and robbery with violence were not bailable.

16. At the time he was sentenced on 9/09/2014, this period could not be taken into account due to the indefinite nature of the sentence meted out to him. Section 333(2) of the Criminal Procedure Code provides that the period spent in custody during the pendency of the trial be taken into account. In this judgment, the court ought to consider the said period in the interests of justice.

17. I find this petition merited and I hereby allow it in the following terms: -

a) That the sentence imposed by the trial court on 9th September 2014 is hereby set aside.

b) That the petitioner is hereby sentenced to serve fifteen (15) years imprisonment to commence from the date of arrest the 19th March 2010.

c) That the petitioner is hereby committed to Mathari Mental Hospital for further treatment pending completion of the remaining sentence.

18. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 30TH DAY OF JULY 2020.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for the Respondent

Petitioner through Video Link