



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT VOI**

**HIGH COURT PETITION No 6 of 2020**

**ORIGINATING FROM HIGH COURT CRIMINAL CASE No 17/2001 IN MOMBASA HIGH COURT ; CRIMINAL APPLICATION No. 51 OF 2007 IN THE COURT OF APPEAL MOMBASA; CONSTITUTIONAL PETITION (RE-SENTENSING) No 34 OF 2018 IN THE MOMBASA HIGH COURT**

**UNDER ARTICLE 22(1) OF THE CONSTITUTION OF KENYA 2010**

**BETWEEN:**

**JIMMY RODGERS MWALUMA MSENGO.....PETITIONER**

**AND**

**THE REPUBLIC .....RESPONDENT**

**JUDGMENT**

1. The Court has before it an Application brought by Notice of Motion, undated but filed on 10<sup>th</sup> February 2020 at Voi High Court. The Applicant is seeking in effect a further review of his sentence. The Application states; “That I the applicant herein beg leave of this court seeking a non-custodial completion to my sentence.”. The Application is supported by the Applicant’s Affidavit and any other grounds that may be adduced during the hearing.

2. The Supporting Affidavit informs the Court that the Applicant is currently being held at Shimo La Tewa Max GK Prison. The Affidavit sets out the background concisely and therefore can be repeated herein usefully. The Deponent states:

*1. That I was arrested charged, convicted and sentenced to suffer death for the offence of murder contrary to **section 203 as read with 204 of the penal (sic) cap 63 laws of Kenya.***

*2. That I appealed that decision in the court of appeal but the same was dismissed.*

*3. That the said death sentence was later commuted to life sentence by His Excellency the President Hon. Mwai Kibaki.*

*4. That following the supreme court ruling in **FRANCIS KARIOKO MURUATETU & ANOTHER -VS- REP – PETITION NO’S 15 & 16 OF 2015**, I PETITIONED THE High court Mombasa vide **Cr, petition no 34/2018** for resentencing and my sentence was reduced to that of **forty 40 years**, in a judgment delivered on **19<sup>th</sup> December 2019**.*

*5. That with remission, I should serve **26 years and 8 months** and have now served about **19 years since 2001** when I was arrested for the same.*

*6. That it is remaining about 7 years and 8 months which I now plead with court to allow me to complete out of custody.*

*7. That this humble request is necessitated by the dire situation that my family is currently undergoing due to my long absence for 19 years that I have been in custody.*

*8. That I have undertaken both vocational courses and sports during the long stay in this penal institution which have helped in my bid to desist from any destructive interaction in here.*

*9. That I also have a very favourable progressive report from the administration of this institution confirming that I am fully*

reformed and can therefore be readily re-integrated back in society.

10. That I am willing and ready to comply with any conditions that this court may set, should it grant this humble request of suspending the remaining period of my incarceration.

11. That what I have deponed herein is true to the best of knowledge and understanding..... sworn etc.”

3. The Affidavit exhibits the Judgment of the High Court at Mombasa (Hon Mr Justice E.T. Ogola). Delivered on 19<sup>th</sup> December 2019. In his Judgment the Learned Judge considered the decision of Francis Kioko Muruatetu and Anor v The Republic [2017] SC eKLR. He also set out the particulars of the crime with which the Petitioner was charged and sentenced. The Learned Judge said; “*The Petitioner was tried and convicted of the offence of Murder in Mombasa High Court in Criminal Case No. 17 of 2001 and sentenced to death which sentence was later reduced to life imprisonment. He has been in prison for 19 years after exhausting their Appeal processes. The Petitioner armed with a panga hacked his wife to death and started shouting that he would murder his sister and his mother-in-law next.*”. In that application the Prosecution (through Mr Fedha) sought a sentence of a defined terms of years, namely 40 years. The Petitioner submitted before the Court that he is a father to three children. He killed his wife because of problems they had at home and that the 19 years imprisonment he has served is an adequate punishment. He sought a term of 25 years. The Learned Judge agreed with the submissions on behalf of the State.

4. It seems to this Court that a sentence of 25 years where 19 years were served results in immediate release after remission is taken into account. That is the sum of the Petitioner’s case. The Learned Judge also noted that the Petitioner’s Progress Report indicates that he had undergone basic guidance and counselling and that he is of general conduct and behaviour. Also that he acquired Grade 1 skills in sign writing and polishing. The Learned Judge handed down a sentence of 40 years. The Petitioner was also granted 14 days to file an appeal. No appeal was filed. Instead, about two months later, the Petitioner, renews the same application before this Court.

5. The Petition came before this Court in Voi on 3<sup>rd</sup> March 2020. The Court gave the following directions:

“**1. THAT** the National Probation Service is directed to appoint a suitable officer **based in Wundanyi** (emphasis added) to prepare a report on the petitioners and his rehabilitation in particular he or she must include:

1. A victim impact assessment

2. A report on whether the petitioner has rehabilitated in the sense of understanding his criminal behaviour and putting in place ways to prevent recidivism and re-offending including housing and work.

2. THAT the support the Probation Service can offer.

3. That list for mention on 1<sup>st</sup> April 2020 to confirm filing of the report and consider filing of the report and consider transfer to Mombasa.

4. THAT Production Order for that to issue.”

6. The Mention on 1<sup>st</sup> April 2020 did not take place due to the downscaling of court services following the advent of the Covid-19 Regulations and the NCAJ Guidance. It was not until 26<sup>th</sup> June 2020 that the Probation service filed a report. It is entitled “Re-Sentencing Report” Thereafter the Court directed the filing of submissions. The Respondent’s Submissions were filed on 9<sup>th</sup> July 2020. The Petitioner’s has not filed any further submissions however, attached to the Application is a document entitled “Legal Foundation of the Petition (The Constitution of Kenya) which sets out the legal basis relied upon by the Applicant together with a document entitled “Highlighted Consecutively” which sets out the history and legal arguments. This Court notes what is argued there.

7. The background to the offence is that at the time of the offence, the Applicant came from a family that had a large farm on which to live and had income from other sources. No other family member had a criminal record. The Applicant was also employed at the time. He was separated from his wife, the Deceased Judith Waleghwa. The couple were separated at the time of the offence. The Deceased had left the Applicant and taken her children to live with the maternal family. The (entirely male) persons that the Probation Officer chose to interview seem to have told him that the Applicant was a caring and devoted man who was disturbed by matrimonial squabbles. Sadly, one of the children became unwell and passed away before the Applicant became aware of the illness. The Probation Report suggests that this caused the Applicant to seek a reconciliation. What is uncontroverted is that he became enraged and committed the offence of murder. The Probation Officer also reports that the Applicant feels animosity against his mother-in-law because it was her interference that caused the domestic squabbles. Unfortunately, the views of the mother-in-law on the loss of her 29 year old daughter and threats to herself were not obtained nor recorded.

8. The Respondent is opposing the Application. The arguments against are set out in the Written Submissions. The Respondent’s opposition is centred on the Court’s jurisdiction. The Respondent relies on Article 165(3) of the Constitution of Kenya (CoK 2010). The Respondent concedes that this Court has wide jurisdiction, however, it is argued that this Court cannot supervise other superior courts including a court of similar jurisdiction or equal status. The Respondent argues that the Petitioner is asking the High Court at Voi to review the sentence of the High Court at Mombasa and that equates to supervision or an invitation to overturn the decision of the other Court. The Respondent relies on the authority of ***Kenya Hotel Properties Limited v Attorney General & 5 Others (2018) eKLR*** in support of that proposition.

9. The Respondent then changes tack and argues that the High Court could “alter the decision of a superior court” in the limited circumstances set out in Article 23(1) CoK, namely where it is sitting as a constitutional court deciding on the question of a breach of the Bill of Rights (See ***Jasbir Singh Rai & 3 Others v Talochan Singh Rai & 4 Others*** . The Respondent argues that the Petition does not come

within the parameters of that consideration. The Respondent argues that at no time during the Petitioner/Applicant's process through the High Court and the Court of Appeal and then the High Court again did he allege breach of an **Article 23** right. What he is arguing now is said (by the Respondent) to be mitigation and that has already been heard before the High Court and the Court of Appeal. As a consequence the Respondent argues that the Court lacks jurisdiction.

10. The Probation Report sets out in the biodata a different version of the period of incarceration. It is said that the Applicant has "spent 21 years in prison from 2001 to 2020. In fact the period between arrest in 2001 and re-sentence in 2019 appears to be just over 18 years. The Applicant spent several years on remand before he was sentenced to death. He was sentenced on 30<sup>th</sup> May 2007. That means the Applicant has served 13 years of his sentence when he filed this application. It seems the Applicant is also making an indirect application for time spent on remand to be taken into consideration of the sentence. The Probation Report was prepared, not by an officer from Wundhanyi (as directed) but by Mr Piri, a probation officer from Voi, a different sub-county. The Report is said to have compiled from information gathered through interviews, observations and reviews with the Petitioner at Manyani Prison (his date of transfer to that prison is not recorded) as well as with the paternal uncle, the brother and area chief. Also interviewed were the prison administrators. Contrary to the directions of the Court, the victims, in particular, the mother-in-law and sister who were also threatened at the time have not been interviewed. These are also the people who have care of the children of the Applicant and his deceased wife. Neither was the only surviving child interviewed. As a result, the Court has absolutely no insight into their wishes and feeling. In the circumstances, this Court cannot assume that they are comfortable with the Applicant returning to the community so soon after the event and the re-sentence.

11. It seems to this Court that the arguments raised before this Court by the Application filed in February 2020 are identical to those deliberated on in 19<sup>th</sup> December 2019. That raises a prima facie argument of res judicata at the least and forum shopping at the most. However, the Court is given a discretion to consider a sentence at any point in time (Section 6). However, discretion must be exercised judiciously. In this case the issue of re-sentencing pursuant to Muratetu was decided less than 2 months before the current application. It is not the function of a judge to review and/or sit on appeal over the decision of a judge of equal jurisdiction. The Court could have jurisdiction to review a sentence where it is just and equitable to do so, for example if there are new circumstances to consider. Neither the Applicant nor the Probation Report has put forward any grounds for a re-consideration so soon after the review in December 2019.

12. In the circumstances and for the reasons given above, the Application must fail. The Petition is dismissed with no order as to costs.

Order accordingly,

**FARAH S. M. AMIN**

**JUDGE**

**SIGNED DATED AND DELIVERED on-line IN MOMBASA ON THIS the 27th day of October 2020.**

In The Presence of :

Court Assistant: Daniel Njuguna

Appellant: In Person - online

Respondent: