



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

PETITION NO. 62 OF 2018

ELIZABETH MWIYAITHI SYENGO.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING ON RE-SENTENCING

1. The Petitioner herein **Elizabeth Mwiyaithi Syengo** has filed this petition requesting this court to consider resentencing her pursuant to the decision of the Supreme Court in **Francis Karioko Muruatetu & Another =Vs= Republic [2017] eKLR**.
2. The Petitioner had been charged, convicted and sentenced to death for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The Petitioner's trial was conducted before the **Machakos High court vide Criminal Case Number 21 of 2004**. The Petitioner, upon conviction and sentence lodged an appeal to the court of appeal at Nairobi vide **Criminal Appeal Number 108 of 2009**. The said Appeal was dismissed on the 17th day of January.
3. A summary of the record reveals that on the 27/02/2001 the deceased **Lenah Munyao** who was then seven months pregnant was at her home where she lived with her husband Benedict Munyao Kyengo (PW.3) when the Petitioner herein turned up and viciously wrestled her to the ground before strangling her with bare hands. The Petitioner is also reported to have tied a rope around the deceased's neck before dragging her into a nearby bush where she gouged out her eyes. It turned out that the Petitioner had been married to the deceased's husband before she separated in 1999 and left with her children. A neighbour by the name Eunice Wayua Musumbe (PW.2) witnessed the incident and later informed the deceased's husband as soon as he returned from school. The body of the deceased was later collected by the police and a post mortem was thereafter conducted by Dr. Joseph Maundu (PW.7) who observed that the deceased's neck was deformed and easily twisted in all directions. He also noticed that the eyes had been gouged out and the spinal cord severed as a result of strangulation. The doctor formed the opinion that the cause of death was cardio-pulmonary arrest secondary to strangulation.
4. The Petitioner stated that her first appeal to the court of appeal was dismissed in 2014 and that the death sentence was later commuted to life imprisonment. She further added that she had been arrested while at the age of 33 years old and she is now 50 years old. She sought for leniency and to be allowed to go home and rebuilt her family. She also stated that she has since reformed while in prison and has been awarded several certificates which she wished the court to peruse and consider her quest for leniency.
5. Learned Counsel for the Respondent opposed the petition. He submitted that the case was one of jealousy where the Petitioner murdered her ex-husband's new wife who was then seven months pregnant. It was also submitted for the Respondent that the manner of the killing of the deceased was a vile act of violence which was inhuman as the deceased died of a very painful death. It was finally submitted that the sentence meted out on the Petitioner was sufficient.
6. The Petitioner's sentence has since been commuted to life imprisonment pursuant to the mechanism of Power of Mercy under Article 133 of the Constitution. The Petitioner now wishes to take advantage of the Supreme Court decision in Francis Karioko Muruatetu (Supra). The said Supreme Court case considered that in re-sentencing in a case of murder, the following mitigating factors would be applicable as a guide namely:-

(a) age of the offender

(b) being a first offender

(c) whether the offender pleaded guilty

(d) character and record of the offender

(e) Commission of the offence in relation to gender-based violence.

(f) remorsefulness of the offender

(g) the possibility of reform and social-re adaptation of the offender

(h) any other factor that the court considers relevant.

The Supreme Court in the Muruatetu case (Supra) held that although the mandatory death penalty having been declared unconstitutional, the death penalty still exists as the maximum sentence for murder under Section 203 and 204 of the Penal Code. The learned Counsel for the Respondent has urged this court not to interfere with the sentence due to the fact that the deceased had met her death in a vile and cruel manner perpetrated by the Petitioner.

7. This court called for a report on the Petitioner by the County Probation Officer Machakos. The same was availed and it is dated 13/12/2018. The same is very comprehensive. It is reported that the community members from both her matrimonial and maternal home speak well of the Petitioner and hold no grudge against her. It is also reported that the Petitioner has reformed while in prison and there are good recommendation letters issued to her. However the Petitioner's husband is not ready to accept her back since he has already installed the first wife in the matrimonial home. The Petitioner appears not to bother with her husband and wants nothing to do with him nor the property they acquired during their rocky marriage. She wishes to settle down at the grandmother's home. It has emerged that the Petitioner and the deceased herein were first cousins as their fathers are brothers but they were not aware of it. This then might explain as to why the Petitioner ended the life of the deceased as she could not fathom the thought of sharing a husband with her cousin. It seems the Petitioner still has to manage her anger issues and generally work towards rebuilding her life.

8. The Petitioner, from the certificates issued to her while in prison, appears to have reformed somewhat. However, as the Holy Book says, nobody knows what is in someone's heart as that is an issue between him/her and their maker. The court of Appeal while delivering its judgment in the criminal appeal lodged by the Petitioner, noted that the kind of injuries sustained reveal a particular vicious and brutal attack fueled and impelled by the malice aforethought. Indeed the evidence that had been presented against the Petitioner is that she had viciously attacked the helpless deceased who was then heavy with child and wrenched her neck as well as tying a rope around the neck and dragging her some metres from the house and gouged out her eyes. The Petitioner had been separated from her husband of many years who eventually married the deceased and thus the Petitioner could not fathom the thought of another woman replacing her. The Petitioner's action was not warranted as she could as well have kicked her out of the matrimonial home and re-occupy it herself but not to kill her. As a result of her actions the lives of an innocent soul with an unborn child were cut short. Hence the Petitioner's vile and wicked act deserve nothing but severe punishment. Suffice to add that the Petitioner had not been provoked as she purposely visited the deceased with the sole aim of eliminating her.

9. It is noted that the Petitioner was arraigned in court on the 30/3/2004 and remained in custody until 29/04/2009 when she was sentenced to death. The period in remand custody will be taken into account. Several courts have given varying sentences during re-sentencing hearing depending on the particular circumstances of each case. For instance Majanja –J in **Nelson Mwiti Gikunda & 2 Others =Vs= Republic [2018] eKLR** re-sentenced the petitioners to 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 =Vs= Republic -KSM C.A Criminal Appeal No. 120 of 2014 [2018] eKLR** and **Jonathan Lemiso Ole Keni =Vs= Republic – NRB C.A. Criminal Appeal No. 51 of 2016 [2018]** where the said courts upheld sentences of 25 and 30 years respectively. I am guided by the said authorities.

10. Taking into account the mitigating and aggravating factors and also factoring the time served, I hereby re-sentence the Petitioner to 20 (Twenty) years imprisonment commencing from the date of sentencing namely 29th April, 2009.

It is so ordered.

Dated and delivered at Machakos this 31st day of .January 2019.

D.K. KEMEI

JUDGE