



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CRIMINAL DIVISION

HIGH COURT PETITION NO.3 OF 2018

**IN THE MATTER OF THE SUPREME COURT DECISION,
PETITION NO. 15 OF 2015 (FRANCIS KARIOKO MURUATETU)**

AND

**IN THE MATTER OF ARTICLE 21(1), (3), (4), 22(1), 23, 25 (a),
(c), (d), 27, 28, 29(a), (c), (d), (f), 47, 48, 50(2), (p), 159, 165,
258 AND 259 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (Protection of
Fundamental Rights and Freedoms) PRACTICE AND PROCEDURE
RULES 2013 (Rule 4 (1) IN THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF SECTION 216 AND 329 OF THE
CRIMINAL PROCEDURE CODE CAP 75, LAWS OF KENYA**

AND

IN THE MATTER OF COURT OF APPEAL CR. APP. NO 112 OF 2007 AT NAIROBI

AND

IN THE MATTER OF HIGH COURT CRIMINAL CASE NO. 54 OF 2004 AT MACHAKOS

AND

IN THE MATTER OF CRIMINAL CASE FILE NO. 1692 OF 2003 AT MACHAKOS LAW COURT

BETWEEN

STEPHEN KIMANTHI MUTUNGA.....PETITIONER

-VERSUS-

JUDGMENT

INTRODUCTION

1. The petitioner filed the petition simultaneously with an application under certificate of urgency. The application is basically seeking orders for sentence re-hearing and I am of the considered view that dealing with the petition will effectively dispose the application. The petition is undated but was filed on 26/06/2018.
2. The petitioner describes himself as an adult male of sound mind who brings the suit as an aggrieved Kenyan citizen seeking the enforcement, implementation and upholding of the Constitution of Kenya and the laws made there under.
3. The petitioner describes the respondent as the office of Director of Public Prosecutions established pursuant to Article 157 of the Constitution.

THE PETITION

4. On the facts of the case, the petitioner states that:-

- a) **He was arrested in the year 2003 and has since been in custody.**
- b) **He was charged with the offence of Robbery with violence contrary to section 296 (2) of the Penal Code vide Cr. Case No. 1692 of 2003 at Machakos.**
- c) **During sentencing, the petitioner was not accorded the opportunity to mitigate.**
- d) **He appealed to the High Court in Machakos in Criminal Appeal No. 54 of 2004 and Court of Appeal No. 112 of 2007 at Nairobi which were dismissed.**
- e) **He moves the Court with regard to the decision of the Supreme Court which found sections 296 (2), 203 as read with 204 of the Penal Code Cap 63 Laws of Kenya, unconstitutional.**
- f) **The Supreme Court has now declared the mandatory death penalty unconstitutional and has granted opportunity for re-sentencing of offenders subject to the mandatory sentence.**

5. On the law, the petitioner has quoted several decided cases but majorly relies on the Supreme Court of Kenya decision in **Petition No. 15 of 2015 as consolidated with petition No. 16 of 2015: Francis Karioko Muruatetu & Another v Republic [2017] eKLR**

(Herein after 'the Muruatetu case').

6. The petitioner seeks the following reliefs;

- a) An opportunity to mitigate in a re-sentencing hearing.
- b) This Court's determination on whether he is entitled to the guaranteed remedy in the Muruatetu case.
- c) Award of an alternative and definite sentence rather than the mandatory death penalty and subsequent life sentence.
- d) That this Court admits the three decided legal principles into records of Machakos Criminal Case No. 1692 of 2003.
- e) That in the alternative, this Court be pleased to order for representation of the petitioner in the Attorney General's decisions of constituting a re-sentencing framework as ordered by the Supreme Court.
- f) That the Court be pleased to consider the time already served other mitigating factors and acquit the petitioner.

7. Directions were given that the petition be canvassed by way of written submissions but none of the parties complied. When the parties appeared for mention on 12/11/2018, Mrs. Owenga for the State sought an adjournment pending directions.

8. On his part, the petitioner sought that the matter be sent back to the lower for re-sentencing. He said that he did not mitigate and the same was not required as the sentence was death. In response, Mrs. Owenga said she had no objection.

9. I have looked at the petition, the relevant case law and the brief sentiments of the parties and it is my view that two issues arise for determination are:-

- a) ***Whether this Court has jurisdiction to conduct a re-sentencing hearing.***

b) What relief, if any, is available to the petitioner?

JURISDICTION

10. First, I would like to clarify that contrary to the petitioner's assertions, Sections 296 (2) and 203 of the Penal code were never declared unconstitutional. What the Supreme Court of Kenya did in the Muruatetu case is to declare the mandatory aspect of the death sentence unconstitutional (*emphasis mine*). In other words, the death sentence is still legal but not mandatory and this essentially gives discretion to Judicial Officers to mete out alternative sentences to convicts of capital offences.

11. At this juncture, I believe it is imperative to reproduce the relevant parts of the judgment in the Muruatetu case.

(111) "...For the avoidance of doubt, the sentencing re-hearing we have allowed, applies only for the two petitioners herein. In the meantime, existing or intending Petitioners with similar cases ought not approach the Supreme Court directly but await appropriate guidelines for disposal of the same. (emphasis mine) The Attorney General is directed to urgently set up a framework 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.

(112) (c) The Attorney General, the Director of Public Prosecutions and other relevant agencies shall prepare a detailed professional review in the context of this Judgment and Order made with a view to setting up a framework to deal with sentence re-hearing cases similar to that of the petitioners herein. The Attorney General is hereby granted twelve (12) months from the date of this Judgment to give a progress report to this Court on the same.

12. I am aware that pursuant to the Supreme Court's directive, the Hon. Attorney General appointed a **Taskforce on the Review of the Mandatory Death Sentence under Section 204 of the Penal Code Act vide Gazette Notice No. 2160** dated 15th March 2018.

13. The Supreme Court's judgment seems to suggest that save for Muruatetu and his co-petitioner, all other existing and intending petitioners with similar cases would have to await the outcome of the taskforce, however, the Court of Appeal in **William Okungu Kittiny v R [2018] eKLR** expressed itself as follows;

"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."

14. The High Court has unlimited jurisdiction in both civil and criminal matters and also has the mandate of enforcing fundamental rights and freedoms as enshrined in the Constitution.

15. The mandatory aspect of the death sentence having been declared unconstitutional, the High Court is the right forum for an aggrieved party to seek redress. Further, I agree with the sentiments of Justice Majanja in **Michael Kathewa Laichena & another -vs- Republic [2018] eKLR** that;

"...by re-sentencing the petitioner, the High Court is merely enforcing and granting relief for what is in effect a violation caused by imposition of the mandatory death sentence..."

16. Accordingly, I am convinced that this Court has jurisdiction to deal with this petition.

What relief, if any, is available to the petitioner?

17. I will start by looking at the facts that led to the conviction of the petitioner. The particulars of the offence were that on the 1st day of June 2003 at 12.30am at Muvau Kambi Mawe village in Makueni District within the Eastern Province, jointly with others not before the Court while armed with dangerous weapons namely arrows, bows, pangas and simis, robbed David Munene Makali of Motor vehicle registration number KAP 545G Toyota Hilux and cash kshs 6,300/= all valued at kshs 456,300/= and at immediately before or immediately after the time of such robbery wounded DAVID MUTUNGI MAKALI.

18. The evidence on record is that the petitioner and his gang mates broke into the house of PW1 (David Mutunga Makali) and got away with his vehicle as well as money that was taken from his wife (PW2). During the confrontation, PW1 was hit on the head with a stone and shot on his leg with an arrow.

19. He fell down unconscious and woke up in the hospital where he learnt that the robbers had stolen his property. In the course of the robbery, the thugs threatened to kill PW1's wife and daughter. They however emerged unscathed and the motor vehicle was recovered. PW2 identified the petitioner as one of the people who took part in the robbery.

20. According to The **Sentencing Policy Guidelines, 2016** ("*the Guidelines*") published by the Kenya Judiciary, the sentence imposed must meet the following objectives in totality;

a) Retribution: To punish the offender for his/her criminal conduct in a just manner.

- b) Deterrence: To deter the offender from committing a similar offence subsequently as well as discourage other people from committing similar offences.**
- c) Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.**
- d) Restorative justice: To address the needs arising from criminal conduct such as loss and damages.**
- e) Community protection: To protect the community by incapacitating the offender.**
- f) Denunciation: To communicate the community's condemnation of the criminal conduct.**

21. In the spirit of uniformity and fairness, emerging jurisprudence suggests that when dealing with sentence re-hearing in robbery with violence cases, the starting point should be 14 years. This is informed by the fact that the felony of robbery, which is a lesser offence than robbery with violence, attracts a term of imprisonment for 14 years.

22. In determining a custodial sentence, the guidelines provide the points to be considered as; establishing the custodial sentence under the applicable statute, the mitigating circumstances, the aggravating circumstances and weighing both aggravating and mitigating circumstances.

23. The guidelines were published when the mandatory death sentence was still legal and as such, they did not provide for mitigating circumstances for offences which attracted the mandatory death sentence.

24. To avoid a lacuna, the Supreme Court in the Muruatetu case gave guidelines with regard to applicable mitigating factors during sentence re-hearing in a murder charge. Since the mandatory death sentence was also applicable to convicts of robbery with violence, the Supreme Court guidelines are also applicable to such cases. They are;

- 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 response 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.**

25. The Supreme Court however clarified that the guidelines did not in any way replace judicial discretion and are geared towards promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process.

26. Having looked at the circumstances of the case, the only mitigating factor on record is that the petitioner was a first offender. At this juncture, I must add that this petition was prosecuted rather casually. The petitioner did not even see the need of submitting as directed by the Court.

27. I have also noted that the petitioner was sentenced on 02/03/2004 having been arrested on 01/06/2003. He pleaded that he has been in custody since his arrest which means that he has been behind bars for approximately 18 years.

28. On the other hand, it is evident that the petitioner and his accomplices were armed with crude weapons and caused terror to their victims.

29. They also inflicted injuries to PW1 but the evidence does not show who among them caused the said injuries and I think the benefit of doubt should be given to the petitioner. It is also in evidence that the stolen motor vehicle was eventually recovered.

30. For consistency, it is imperative to look at sentences which have been imposed by other Courts following the decision in the Muruatetu case. In **Benson Ochieng & France Kibe –vs- Republic [2018] eKLR**, the petitioners who were armed with multiple guns during the commission of the offence offered substantial mitigation and demonstrated genuine remorse. They were re-sentenced to 20 years.

31. In **Eldoret Court of Appeal Criminal Appeal No. 22 of 2016 [2018] eKLR: Wycliffe Wangusi Mafura –vs- Republic** appellant was involved in robbing an Mpesa shop with the use of a firearm with which he threatened the attendant but was caught before he inflicted any violence on her. The Court of Appeal imposed a 20 year sentence.

32. In **Kisumu Court of Appeal Criminal Appeal No. 616 of 2010 [2018] eKLR, Paul Ouma Otieno alias Collera and Another –vs- Republic**, the Court of Appeal sentenced the appellants to 20 years imprisonment where the robbery was aggravated by the use of a firearm.

33. Having considered the foregoing, I am satisfied that the period already served is enough punishment for the petitioner.

CONCLUSION

In view of the a foregoing, the court makes the following orders;

i. The sentence is hereby reviewed to the period already served in custody from 1/6/2003.

ii. The petitioner be and is hereby set at liberty unless otherwise lawfully held.

SIGNED, DATED AND DELIVERED THIS 30TH DAY OF JANUARY, 2019, IN OPEN COURT.

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HON. C. KARIUKI

JUDGE