REPUBLIC OF KENYA

IN THE COURT OF KENYA

AT NYERI

HIGH COURT CRIMINAL PETITION NO.N0 12 OF 2017

GEORGE NGUGI MUNGAI.....PETITIONER

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

The petitioner herein was a clerk at the CID Headquarters' Nairobi before he was arraigned before the High Court at Nyeri on two counts of murder contrary to Sections 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on the 16th day of November 1996 at Karugumo village, Sabasaba, in the then Murang'a District within the then Central Province he murdered **Alice Njeri Mungai** and **James Kamanga Mungai**. The victims were his step mother and step brother respectively. The Petitioner's father, Henry Mungai, had two wives, the Petitioner's mother and Alice Njeri Mungai. Each of the wives had several children in their separate homesteads but the wives did not live in harmony. The families mutually accused each other of being responsible for each house's problems. In 1995 when the Petitioner's brother died in Nakuru, the Petitioner and his family alleged that his step mother and step brother had bewitched him. On the material date the 16th day of November 1996 the Petitioner took his colleagues gun while they were attending a birthday party in Nairobi. Boarded a Matatu to his rural home in Murang'a. Upon reaching home, he called out his step mother who at the time was sleeping. He shot her as she came to open the door for him. He then sought his step brother form the bar where he was working and shot him as well. He then boarded another Matatu and travelled back to Nairobi, where he found that his colleague had reported the missing gun. He told him what he had done, and the matter went through the criminal justice system.

During the trial, the Petitioner raised the defence of insanity. The assessors were of the opinion that the Petitioner was guilty but insane. The Judge was of the same view but held that the Petitioner could be clinically insane but his conduct indicated that he knew the nature and quality of the acts he was doing, he knew that what he was doing was wrong and that he set out on a mission to avenge the death of his deceased brother. The trial Judge therefore rejected the defence and sentenced the Petitioner to suffer death. The Court of appeal agreed with the Judge and dismissed ahis appeal on 27th October 2000.

1. The Petition

The instant Petition was initiated through a Notice of Motion filed on 27th of December 2017 by the Petitioner under Article 22(1) of the Constitution seeking for the following orders: -

> *a) That the Court should declare his fundamental rights were infringed under sections 72(2), 73(3) (b), 74(1), 77(1) and 77 (2) (a) and (b) (ii) of the former constitution and order for his release.*
>
> *b) That the Court declares the time spent in prison is enough for the crime the Petitioner committed.*

On 16th March 2018, the Petitioner filed 'Amended Grounds of Petition' seeking: -

> *a) The court to declare violation of his rights and fundamental freedoms.*
>
> *b) The court to grant him a chance to rehear his sentence and give him a chance to mitigate his case.*
>
> *c) The court to consider his case's mitigating factor namely severe depression and its effect on someone's actions.*
>
> *d) The court to rule that the time he has spent in prison is enough and order for his release.*

The Petitioner relied on his Supported Affidavit filed on even date in which he stated as follows: -

a) That he was arrested in 1996 and charged with murder vide Nyeri High Court Cr.No.6/98 contrary to Section 203 as read with 204 of the Penal Code.

b) That he appealed to the Court of appeal vide appeal No.122/2000 and the appeal was dismissed.

c) All along he was not accorded fair trial because he was not given a chance to mitigate his case as provided by section 216 and 329 of the CPC.

d) That the denial to mitigate by the trial Court occasioned a miscarriage of justice through unfair trial contrary to Article 50 (1) of the Constitution.

e) That the mandatory death sentence given by the trial judge and upheld by the court of appeal was unconstitutional since it went contrary to the principles of a fair trial in that the judge had no room to use his discretion.

f) That since the petition is based on violation of his rights and fundamental freedoms, the court has jurisdiction to hear and determine the matters raised and prayers sought as provided by Article 23(1) and 165 of the 2010 Constitution.

g) That he did not get a fair hearing since he was not given a chance to mitigate his case as provided by Section 216 and 329 of the Criminal Procedure Code.

h) That the fact that he was suffering from severe depression which is a mental illness was a strong mitigating factor to warrant the court to reduce his case to manslaughter and mete out a more lenient sentence.

i) That the fact of his case was heard and determined long time ago and all avenues of appeal exhausted, he petitions the High Court for rehearing of the sentence.

j) That the fact that he has been in prison for the last 22 years without a review of sentence or pardon by the institutions mandated to do that, he has been treated in cruel, inhuman and degrading manner contrary to article 25(a) of the 2010 Constitution.

k) That the failure by the power of mercy advisory committee to forward his petition to the President while doing the same for others is a clear indication of discrimination contrary to article 27(4) of the 2010 Constitution.

l) The fact that he did not know when he would leave prison despite serving 22 years behind bars, his continuous stay in the prison goes contrary to Article 19 of the Constitution that envisages all human beings to realize their full potential.

m) That since the purpose of our judicial process is to rehabilitate the offender, his continuous stay in prison goes contrary to the sentencing guideline policy of 2016 that calls for many factors to be taken into account before sentencing.

n) That the court to consider the long period of time he spent in prison and rule the same is enough punishment and rule for his release.

The amended grounds for the Petition are clearly motivated by Supreme Court of Kenya's decision in *Francis Karioko Muruatetu & Another v Republic [2017] eKLR* where the Court held that mandatory death penalty for murder is unconstitutional.

2. <u>The Response</u>

This Petition is opposed by the Director of Public Prosecutions who filed a Replying Affidavit sworn by Festus Njeru Njue, a prosecution counsel, stating *inter alia* as follows: -

a) This Honourable Court has jurisdiction pursuant to Article 165 (3) (b) and (d) of the Constitution to hear and determine this matter.

b) Section 72(3) of the repealed Constitution of Kenya was never violated as the Petitioner was arrested on Sunday 17th November 1996 and was produced in Court on Monday 2nd December, 1996. The 14th day lapsed on 30th November, 1996 which was on a Saturday and he could only be produced in Court on the Monday that followed which was done.

c) The Petitioner did not allege violation of Section 72(3) of the repealed Constitution at the time of committal proceedings and during his trial yet that would have been the most appropriate time to raise the issue.

d) The Petitioner did not allege to have been tortured or treated inhumanely or with cruelty or to have been degraded at the time he was in police cells.

e) The Petitioner neither demonstrated nor showed evidence that he was subjected to torture and cruel, inhuman and degrading punishment at the time he was at the police cells.

f) The Petitioner was given an opportunity to address Court after judgment but before sentencing but he chose to say nothing.

g) The Petitioner's defence of insanity was properly rejected based on principles governing the said defence.

h) Both the High Court and the Court of Appeal were satisfied that the Petitioner killed his step mother and step brother out of spite and to revenge death of his blood brother but not due to his mental illness.

i) The circumstances in which the Petitioner killed his step mother and step brother show aggravating but not mitigating factors thus it is completely improbable that the trial Court or even the Court of Appeal would have reduced the indictment to that of manslaughter as alleged by the Petitioner.

j) This Petition has been prompted by the Supreme Court decision in ***Francis Karioko Muruatetu & Another vs. Republic (2017)eKLR*** *which declared unconstitutional the mandatory nature of the death penalty provided for under Section 204 of the Penal Code.*

k) The Respondent is bound by the said Supreme Court decision that the mandatory nature of the death sentence is unconstitutional.

l) Neither the trial Court nor the Court of appeal are at fault because they proceeded on the notion that the only sentence for murder as provided for under Section 204 of the Penal Code is death and that was the prevailing jurisprudence then.

m) According to the said Supreme Court decision convicts are entitled to rehearing and sentencing but they have to await for appropriate guidelines on the sentencing rehearing to be made by stakeholders such as the Attorney General and the Director of Public Prosecutions.

n) On 15th March 2018 the Attorney General complied with the orders of the Supreme Court of Kenya by appointing a taskforce on review of the mandatory death sentence with terms of reference that include but not limited to recommending a guide to death sentencing.

o) The Supreme Court ordered that such guidelines should be in place within twelve months from the date of their said judgment which was delivered on 14th December 2017.

p) The guidelines contemplated in the said judgment are yet to be put in place and that the one year span ordered by the Supreme Court has not yet lapsed.

q) The Petitioner should await the guidelines on sentencing rehearing to be put in place.

r) The Petitioner is currently serving a life sentence which is not unconstitutional according to the said Supreme Court decision. In fact one of the terms of reference of the aforementioned taskforce appointed by the Attorney General is to formulate parameters of what ought to constitute life imprisonment.

s) The Petitioner should await for the determination by the Taskforce on what ought to constitute life imprisonment.

t) The petitioner has not demonstrated that he suffers from high blood pressure and diabetes and that he is not receiving or cannot receive proper medical attention while in prison.

u) The Petitioner's allegation that the sentence imposed upon him is curtailing his full potential is extremely selfish in that he is not considering that he murdered two people in cold blood thereby terminating their dreams and thus completely terminating their potential.

v) According to Sections 19-25 of the Power of Mercy Act the Power of Mercy Committee is not obliged to forward to the President each and every application for pardon.

w) Pursuant to Section 21(a) of the Power of Mercy Act, the Committee can forward to the President only admissible applications of pardon.

x) Failure by the Power of Mercy Committee to forward one's inadmissible application for pardon is not discrimination..

y) The Petitioner has not demonstrated that he ever petitioned for mercy under article 133 (1) of the Constitution and Section 19(1) of the Power of Mercy Act.

z) Rehabilitation is one of the objectives of sentencing but it is not the only objective as the Petitioner seems to contend. An offender can be sentenced to imprisonment for purposes of retribution or deterrence or denunciation or community protection.

aa) The Petitioner's incarceration is proper for purposes of retribution and deterrence and that the sentence is proportional to the gravity of the offences that the Petitioner committed and particularly in light of how he committed the same.

3. <u>Parties' submissions</u>

The Petitioner filed written submissions and both parties made oral submissions for and against the Petition summarized as follows: -

a) Petitioner's submissions

i) Mandatory death sentence being unconstitutional - he relied on the case of ***Francis Karioko Muruatetu and Wilson Thirimbu Mwangi vs. Republic Petition No. 15 and 16 of 2016*** where it was held that the mandatory nature of the death sentence was unconstitutional upholding the discretion of judicial officers in sentencing giving room for the consideration of mitigating factors in these cases.

ii) Death sentence and life imprisonment being arbitrary, harsh and excessive- he argued that pointed out that he was serving an indefinite prison sentence which had culminated to 22 years, contrary to Article 19 (2) and 25 (a) leading causing him physical and psychological torture resulting in high blood pressure and diabetes hence denying him the realization of his full potential as a human being.

iii) Mitigation and mitigating factors- he submitted that the fact that he was not given a chance to give his mitigation, the court did not have a clear picture of the mitigating circumstances in his case which was contrary to Article 25(c) of the constitution, section 216 and 329 of the CPC. In any event at that time it did not matter since the trial Judge's hands were tied by the law to give the death sentence regardless the circumstances of the case.

iv) The court be guided my sentencing policy guidelines of 2016 – He urged the court to be guided by the guidelines taking into consideration of the following:

a. Age of the offender

b. Being a first offender

c. Whether the offender pleaded guilty

d. The character and record of the offender

e. Commission of the offence in reference to gender based violence

f. Remorsefulness of the offender

g. Possibility of reform and social re adaptation

h. Any other factors relevant.

He submitted that he was a first time offender, aged only 26 years old at the time of conviction and sentence. That during his incarceration, he has never violated any prison rule, he was remorseful of the crime and had reconciled with the victim's family. He has also undergone various trainings that would assist him reenter society as a model citizen. That he was rehabilitated and wanted another chance to restart his life.

v) Plea bargaining and show of remorsefulness- he had applied for a plea bargaining agreement though it was objected by the State Counsel. He was forgiven by the victim's family as he showed his remorse.

vi) The task force: The petitioner submitted that it was not known when the task force appointed to prepare the guidelines on sentence rehearing would finish its work. That he and others were suffering while awaiting it to complete its task. That it would still have to present its report to parliament. He submitted that there was no certainty also on the period parliament would take to complete its part. He argued that the Task force could not take away the constitutional powers f the court to deal with the issue

b) **Prosecution's submissions**

In oral submissions supporting its case, the state through Mr. Njue prosecuting counsel reiterated their case as set out in the affidavit. In addition, the state conceded that the petitioner was entitled to the sentence rehearing, and that the court dealing with that will have the discretion to mete the sentence merited in the circumstances of the case. He urged the court to follow the decision in Muruatetu to the letter.

The prosecution counsel further pointed out that section 72(3) of the repealed constitution was never violated as the petitioner was arrested on Sunday 17th November 1996 and was produced in court on Monday 2nd December 1996. The 14th day had lapsed on 30th November 1996 which was on a Saturday and he could only be produced in court on the Monday that followed which was done. Further, the petitioner did not allege violation of section 72(3) of the repealed constitution at the time of committal proceedings yet that would have been the most appropriate time to raise the issue thus his complaint is unfounded.

The petitioner never raised the allegations of torture or inhuman treatment, or degrading treatment in the police cells while the case was in the high court or at the Court of Appeal neither did he in his pleadings show any evidence that he was actually subjected to torturous, cruel, inhuman and degrading punishment.

That the record showed that he his counsel, after delivery of judgment were , each given the chance to address the court prior to sentencing but chose to remain silent.

Further that the Petitioner's defence insanity at the time of the trial was considered and rejected both by the high court and the court of appeal, and could not be the subject of this petition. I agree.

This court was to await the guidelines on resentencing which are to be recommended by a taskforce set in place by the Attorney General

That the petitioner had not proved that the alleged illness: diabetes and high blood pressure, was as a result of incarceration, or that he could not receive the appropriate medical attention in prison. That the petitioner could not be heard to argue that the sentence imposed on him curtailed his full potential, as that was not only selfish but untenable as the petitioner was found guilty of the murder of two people in cold blood thereby terminating their own potential.

On the issue of the Power of Mercy Committee, the state argued that the committee was only obliged to forward to the President only admissible applications. The petitioner did not demonstrate that his application was competent and admissible. That one basis for incarceration is rehabilitation but it also includes deterrence, and retribution.

4. Issues for determination and disposition

a. The **UNCONSTITUTIONALITY OF MANDATORY DEATH SENTENCE AND LIFE IMPRISONMENT, AND THE RIGHT TO MITIGATION**: The issue is settled by the case of **Francis Karioko Muruatetu & Another vs Republic Petition No.15 of 2015**, the Supreme Court of Kenya rendered itself thus:

> *[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.*
>
> *[69] Consequently, we find that Section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment."*

2. Whether the Petitioner's right to freedom from torture, cruel, degrading or inhuman punishment was violated.

3. Whether the Petitioner's right to fair trial was violated.

4. The appropriate remedy if any or alternatively whether the term served by Petitioner is sufficient

b. WHETHER THE PETITIONER'S RIGHT TO FREEDOM FROM TORTURE, CRUEL, DEGRADING OR INHUMAN PUNISHMENT WAS VIOLATED

The answer to his complaint is simple. He has been in prison custody for a lawful reason. Conviction for the murders of two of his relatives in cold blood. How then can he argue that being in prison for this period of time has subjected him to torture, cruel, degrading or inhuman suffering?

The Power of Mercy Committee is regulated by law. If it acted ultra vires, the petitioner has a remedy but it would not be in these proceedings. The Committee is not a party to these proceedings and will not have the opportunity to respond.

c. WHETHER THE PETITIONER'S RIGHT TO FAIR TRIAL WAS VIOLATED

Even if the Petitioner had submitted his mitigating factors, the same would not have been made any difference because of the mandatory nature of the death sentence as couched in Section 204 of the Penal Code. The provision states: -

"Any person convicted of murder shall be sentenced to death."

In ***Muruatetu's case*** it was held: -

> *"(48) Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Article 25 of the Constitution; an absolute right"*
>
> Except for not having the mitigation on record, there is no evidence that the court acted in any manner that violated the petitioner's right to fair trial. In any event the court then did grant him and his counsel the chance to mitigate but each chose to say nothing.

d. **THE APPROPRIATE REMEDY IF ANY OR ALTERNATIVELY WHETHER THE TERM SERVED BY PETITIONER IS SUFFICIENT**

It is the Petitioner 's argument that the 22 years he has been in prison are sufficient punishment and should be declared sufficient. The view of the state is that this court should not even go there but wait for the report of the Task Force. In the Muruatetu *Case* the court guided thus

> *"[111] It is prudent for the same Court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners. 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. 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."*

However in **Wycliffe Wangusi Mafura vs Republic [2018] eKLR**, the Court of Appeal interpreted this directive of the Supreme Court to mean that the decision did not prohibit courts from sentence rehearings and passing the appropriate sentence;

> ***"We also said in William Okungu Kittony's case that the decision of the Supreme Court in Muruatetu's case has immediate and binding effect on all other courts and that the decision did not prohibit courts below it from ordering sentence rehearing in any matter pending before those courts. Accordingly since this appeal had not been finalized, this court has jurisdiction to direct a sentence re-hearing or pass any appropriate sentence that the trial magistrate's court could have lawfully passed."***

In **Benson Ochieng & France Kibe vs Republic [2018] eKLR** it was held:-

> ***"As I understand it, this Application is pivoted on Article 165(3) (a) of the Constitution. That clause gives the High Court unlimited original jurisdiction in criminal and civil matters. On the other hand, the Supreme Court advised similarly-positioned would-be Petitioners to await the formation of the Taskforce which will recommend the way forward for the thousands of prisoners presently serving the death sentence. However, the position of the Supreme Court was quite specific: it indicated that it will not consider individual Petitions presented to it by the prisoners after enunciating the constitutionality of the mandatory death sentence.***
>
> ***I have taken the position that the Supreme Court neither intended nor achieved the purpose of limiting the jurisdiction of this Court to consider applications for re-sentencing by individuals such as the Applicants who were sentenced to death under the then mandatory provisions of the Penal Code. A progressive and purposive reading of the constitutional provisions relied on by the Supreme Court to reach its outcome in the*** *Muruatetu Case* ***would lead us to this conclusion. The Court, may, of course, determine for prudential reasons, to await the work of the Taskforce or other docket management considerations."***

Further in **Michael Kathewa Laichena& Another vs Republic [2018] eKLR** it was held:-

> ***"Although the Supreme Court direction would seem to suggest that the all petitioners would have to await the outcome of the Taskforce, the Court of Appeal in the*** **Kittony** *Case* ***(Supra) thought otherwise…The tenor and effect of the Court of Appeal decision is that the High Court may review and re-sentence petitioners who come before by way of petition or appeal as the Supreme Court did not foreclose that avenue of re-sentencing. Further, the Supreme Court underlined the fact that sentencing is a judicial task hence a Taskforce of the kind appointed by the Attorney General cannot review and re-sentence petitioners. Since the High Court has unlimited jurisdiction in civil and criminal matters and is also the court imbued with jurisdiction to enforce fundamental rights and freedoms under Article 165(3) of the Constitution, it is the proper forum for re-sentencing."***

I am of the same view.

The Petitioner herein was not represented. He had brought at first an application for fresh hearing on the basis of violation of his fundamental rights and denial of a fair hearing. Upon the decision in ***Muruatetu***, he saw an opportunity to seek reprieve from his sentence. That was the basis of his amended petition something that was acknowledged by the respondent. From the tenor of the amendments and arguments, it was clear to me under the lights of Article 159 that the Petitioner was also seeking out the court through Article 165(3) of the Constitution.

And while it would be good practice to await the recommendations of the Task Force, the only thing is, that to do so while a matter is pending before court would, where the court is otherwise empowered by the Constitution, and bound by precedent and in my view amount to sacrificing the determination of the issues before me to the unknown, yet I am properly seized of, and guided, in the matter.

> **I have considered the Petitioner's mitigation, the pre-sentence report and all the annexures that the petitioner has placed before me. The report and annexures draw a picture of a person who is remorseful, who has done a lot towards rehabilitation and whom the prison authorities view as a model prisoner. Further that the family is ready to receive him back into the community. The petitioner was a first offender. All these are mitigating factors. But these must be weighed against the aggravating factors where the Petitioner made a very determined journey form Nairobi to Murang'a, having stolen his friend's gun, took a matatu, travelled to Murang'a, shot the 1st victim, his step mother, in the house, proceeded to the bar where the 2nd victim was, his step brother, shot him as well, took another matatu to Nairobi and returned the gun. The high Court and the court of appeal were satisfied he knew what he was doing was wrong.**

7.Conclusion

I want to agree with my brother Kemei J in **Elizabeth Mwiyaithi Syengo v Republic [2019] eKLR**, where he stated:

> *9.... The period in remand custody will be taken into account. Several courts have given varying sentences during resentencing 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.*

Having considered the mitigation by the petitioner and the circumstances of the offence, the only issue is what sentence could have been meted to him had it not been for the mandatory nature of the death sentence. I have also considered the aggravating circumstances in this case. The petitioner killed two of his relatives in cold blood.

The petitioner is sentenced to 30 years' imprisonment.

Considering that at the material time this offence was not bailable, and one could remain even in police custody for long, the sentence will run from the date of his arrest as indicated on the charge sheet as 17th November 1996.

It is so ordered.

Right of Appeal 14 Days.

Dated, delivered and signed at Nyeri this 25th March 2019.

Mumbua T. Matheka

Judge

In the presence of: -

Petitioner

Juliet: Court Assistant

Mr. Magoma for state

Probation Officer

Mumbua T. Matheka

Judge

25/3/19