



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**MISC CRIMINAL APPLICATION 205 OF 2018**

**SUSAN MUTONGORI MWITA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. On 09/11/2006, the Applicant herein, Susan Mutongori Mwita, was convicted of the offence of murder contrary to section 203 as read together with section 204 of the Penal Code. The victim of the murder was the Applicant's own daughter, JS. J was only one year old. The Applicant was sentenced to death as the law provided at the time.

2. The Applicant preferred an appeal to the Court of Appeal. It was dismissed and the conviction and sentence were upheld.

3. The Applicant was given a lifeline by the recent decision in *Francis Karioko Muruatetu & Another v Republic [2017] eKLR*. In the *Muruatetu Case*, the Supreme Court outlawed mandatory death penalty for murder as unconstitutional and struck down section 204 of the Penal Code to the extent that it prescribed mandatory death sentence upon conviction for murder.

4. In *Benson Ochieng & Another v Republic (Nakuru High Court Misc. Application No. 45 of 2018)*, I reached the conclusion that the High Court can invoke its original jurisdiction bequeathed to it in Article 165(3)(a) of the Constitution to re-sentence persons on death row who were sentenced pursuant to the mandatory death penalty provisions which have been declared unconstitutional. Addressing the advisory by the Supreme Court to those on death row pursuant to the mandatory death penalty provisions the Supreme Court had just declared unconstitutional that they should await a Taskforce ordered by the Supreme Court and not approach the Supreme Court with individual petitions, I had this to say:

*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.*

5. It is for this reason that I seized jurisdiction to re-consider the sentence imposed on the Applicant herein following the *Muruatetu Case*.

6. In order to consider the appropriate sentence in light of *Muruatetu*, it is imperative to have sight of the circumstances of the offence. Basically, the Applicant was convicted on the basis of circumstantial evidence. She was the last person seen with her baby. The next thing, the baby was found dumped under an overpass road in Naivasha. The Applicant was unable to adequately explain what had happened. In fact, she gave oddly conflicting and implausible stories which led to the suspicion that she had killed her daughter. The trial established her guilt and was confirmed by the Court of Appeal.

7. There is one curious part of the evidence though: when the child's body was found, there was evidence that the child had been sexually molested. It has been clear all along that a third person was involved. However, the Applicant never spoke of anyone else until the present hearings. During the hearing, she admitted that on the material day, she gave child mchele (a coma inducing drug) so that she could safely leave her at home as she went to work. She said that she had earlier disagreed with her boyfriend who had threatened her that he was going

to do something nasty to her. She suspects that her boyfriend, who had a key to her house, went home earlier than her, sexually assaulted the girl and then killed her. When S got home, she found her baby dead. She says she panicked. Knowing that she had committed an illegality in giving her *mchele* and locking her in the house, she decided to dump the body instead of reporting the matter to the Police.

8. Susan says she is very remorseful for what happened and that she is now fully rehabilitated. She brought two letters from Prison Authorities to this effect. The letters are as glowing as a reference letter can be. Susan has become a trusted and loved in-mate. There is no question that she has taken a turn for the better in her life. She had done vocational training in cross-stitching, embroidery, tailoring and detergent making. She has also done theological studies. I am persuaded that she is remorseful and that she is fully reformed.

9. The Applicant has been in Prison for a little more than thirteen (13) years for her conviction. Looking at all the circumstances of the case here, I am persuaded that that is sufficient time served. In the circumstances of this case, no more sentencing objectives would be achieved by further incarceration of the Applicant.

**10. In my view, therefore, considering the entirety of the facts, it is appropriate to substitute the death sentence pronounced on the Applicant in this case. In its place, I will impose a sentence equal to the time already served. The Applicant shall, therefore, be released from Prison forthwith unless otherwise lawfully held.**

11. Orders accordingly.

**Dated and delivered at Nakuru this 7<sup>th</sup> day of August, 2019**

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**JOEL NGUGI**

**JUDGE**