



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

MISC CRIMINAL RE-SENTENCING NO. 63 OF 2019

REVISION FROM ORIGINAL CONVICTION/SENTENCE IN CRIMINAL CASE NO. 24 OF 2014 OF THE MAGISTRATE'S COURT AT NAIVASHA

JOHN KAMAU GACHUHA.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

Date: 26th September, 2019

Before Hon. R. M. Mwongo, J

The matter above referred herewith for re-sentencing re-hearing. I have called for and perused the Lower Court File together with the Applicant's application/petition. **I am Not Satisfied that under the law** this is a suitable case for re-sentence re-hearing** for reason(s) that:

The Applicant preferred an appeal from the lower court judgment HCCRA 156 of 2015 which appeal was dismissed. This court has no jurisdiction to resentence.

R. MWONGO

JUDGE

****The Guidance Notes below on the law emanating from the Supreme Court Case of: Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR (SC Petition No. 15 &16 of 2015) and other emanating decisional law are hereby taken into account:**

1. The mandatory nature of the death penalty runs counter to constitutional guarantees enshrining respect for the rule of law.

“[58] To our minds, any law or procedure which when executed culminates in termination of life, ought to be just, fair and reasonable. As a result, due process is made possible by a procedure which allows the Court to assess the appropriateness of the death penalty in relation to the circumstances of the offender and the offence. We are of the view that the mandatory nature of this penalty runs counter to constitutional guarantees enshrining respect for the rule of law.”

2. Therefore, any court dealing with an offence in which the death penalty may be meted is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence

“[59] We now lay to rest the quagmire that has plagued the courts with regard to the mandatory nature of Section 204 of the Penal Code. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the Penal Code, unfair thereby conflicting with Articles 25 (c), 28, 48 and 50 (1) and (2)(q) of the Constitution.”

....

“Article 27 of the Constitution provides for equality and freedom from discrimination since every person is equal before the law and has the right to equal protection and equal benefit of the law. Convicts sentenced pursuant to Section 204 are not accorded equal treatment to convicts who are sentenced under other Sections of the Penal Code that do not mandate a death sentence. Refusing or denying a convict facing the death sentence, to be heard in mitigation when those facing lesser sentences are allowed

to be heard in mitigation is clearly unjustifiable discrimination and unfair. This is repugnant to the principle of equality before the law. Accordingly, Section 204 of the Penal Code violates Article 27 of the Constitution as well.”

“[53] If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Consequently, failure to individualise the circumstances of an offence or offender may result in the undesirable effect of 'over-punishing' the convict.”

3. Failure or refusal to hear a convict in mitigation on account of a mandatory death sentence is an unlawful and discriminatory practice

“[45] We think that a person facing the death sentence is most deserving to be heard in mitigation because of the finality of the sentence.”

“[46] We are of the view that mitigation is an important congruent element of fair trial.”

“Article 27 of the Constitution provides for equality and freedom from discrimination since every person is equal before the law and has the right to equal protection and equal benefit of the law. Convicts sentenced pursuant to Section 204 are not accorded equal treatment to convicts who are sentenced under other Sections of the Penal Code that do not mandate a death sentence. Refusing or denying a convict facing the death sentence, to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation is clearly unjustifiable discrimination and unfair. This is repugnant to the principle of equality before the law. Accordingly, Section 204 of the Penal Code violates Article 27 of the Constitution as well.”

4. Death Sentence is allowable under the Constitution but within the law

“[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 penalty.”

5. Which court should do the Resentence Re-hearing?

“[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 avoidance of doubt, the sentence re-hearing we have allowed applies only to the two petitioners herein ...”

6. Factors that may be considered in Mitigation

“[71] ..., the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

- (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.”*

“[72] We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process.”

7. Extension of **Muruatetu Principles** to Robbery with violence

In **William Okungu Kittiny v R [2018] eKLR** the Court of Appeal applied the reasoning in the **Muruatetu case** to robbery with violence cases, and by to other cases where a mandatory death sentence can be meted.

8. Extension of **Muruatetu Principles** to other mandatory minimum sentences

In **Dismas Wafula Kilwake v R [2018] eKLR** the Court of Appeal extended the reasoning in the **Muruatetu case** to mandatory minimum sentences imposed by the Sexual Offences Act holding that there was no rational reason for not so extending under appropriate circumstances.

9. Unlike in the **Muruatetu cases** the decision in **Dismas Wafula Kilwake v R [2018] eKLR** was specifically stated to operate non-retroactively. As such the binding principles in **Dismas Wafula Kilwake case** operate only in respect of future cases.

10. Accordingly, only persons sentenced to death pursuant to mandatory provisions of the law are entitled to new sentence hearings. All others are entitled to urge the new decisional law in their appeals.

In light of all the foregoing, the file is hereby transmitted to N/A Court at N/A for Resentencing/Review

OR

Having also considered all issues including the mitigation of the applicant herein I hereby determine as follows:

The Application for resentencing is hereby dismissed for lack of jurisdiction.

R. MWONGO

JUDGE

26/09/2019