



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

PETITION NO. 22 OF 2018

JOSEPH KAMAU MWANGI.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT

1. The Petitioner has come to this court for resentencing pursuant to the Supreme Court decision in *Francis Karioko Muratetu vs. Republic [2017] eKLR* in which the Court said that “...*the mandatory nature of death sentence is hereby declared unconstitutional ...*”
2. The Petitioner was charged with the murder contrary to section 203 as read with 204 of the Penal Code. He was convicted and sentenced to 40 years imprisonment. The Court took into consideration the mitigation on behalf of the accused that he was a first offender and had a family with young children who depend on him. The Court also noted that due to the actions of the accused a young life was needlessly lost. The High Court thus sentenced the Petitioner to serve 40 years imprisonment.
3. The Petitioner appealed to the Court of Appeal against the conviction and the sentence 40 years in COA CR 8 OF 2013. The Court warned the Petitioner that the sentence passed against him was illegal and if the appeal failed, the legal death sentence would be passed against him. The Petitioner and his counsel elected to pursue the appeal. In the end, their appeal failed, and the 40 years sentenced was enhanced to death sentence.
4. The DPP submitted that the Petitioner is engaged on a fishing expedition and that this Court lacks necessary jurisdiction to entertain him. He has exhausted his right to appeal. The DPP submitted that when the Petitioner was sentenced to 40 years imprisonment, the High Court was very much aware that the mandatory nature of death sentence was unconstitutional. The 40 years was therefore in the opinion of the trial court appropriate to the offence of murder as committed by the Petitioner, having been found guilty. The Petitioner opted to appeal against the conviction and sentence of 40 years. The appeal was dismissed and sentence enhanced to death. Can the petitioner still petition this Court on the issue of sentence? The DPP submitted that the Petitioner has no right to do so. By doing so, he will be appealing both the decisions of the trial Court and the Court of Appeal which were all delivered in the knowledge that the mandatory death sentence was unconstitutional.
5. Mr. Wamotsa for the Petitioner submitted that this Court has the jurisdiction to resentence the Petitioner in light of the aforesaid Francis Karioko Muratetu case.
6. This Court will not waste much time on the issue of jurisdiction because it is now beyond argument that the supreme court decision in Muratetu case has outlawed the mandatory death sentence and has opened the gates for resentencing of inmates who were initially condemned to death.
7. The issue for this Court then is whether this Court is bound by the 40 years the High Court had imposed on the petitioner. The issue is whether when the Court of Appeal rejected the high Court sentence of 40 years and substituted the same with death sentence, this High Court is still bound with the sentence of the trial Court.
8. Mr. Ayekha Shakhila learned counsel for the prosecution submitted that in the event that this court found that it had the jurisdiction in this matter, then the initial sentence of 40 years by the high court is automatically reinstated. Mr. Wamutso on his part submitted that this Court has a free hand to resentence the prisoner.
9. In my view, I am persuaded that the resentencing proceedings in the matter are fresh proceedings. This being so, the court is not bound by the earlier sentence of the High Court. The Court will however, consider the mitigation factors the Court heard in the earlier decision together with the current mitigating factors and render a fresh decision which meets the objectives of the resentencing proceedings.
10. The Petitioner was committed for murdering a young man using a gun. The deceased had alighted from a vehicle and walked towards his front door. Suddenly two men pounced on him from behind. The petitioner got hold of the deceased and fired several shots at him.

The deceased succumb to gun wounds. This was a senseless and un-explained death of a young man. This Court has the obligation to meet out a deterrent sentence.

11. Mr. Wamotsa in mitigation, submitted that the petitioner is remorseful; that he has now reformed and regrets having committed the offence; that the Petitioner has a family which he needs to take care of and that he has learnt professional courses while at the prison and that he needs to be given another chance.

12. I have carefully considered the said submissions. The aim of prison sentencing is to achieve the objectives of retribution, rehabilitation and reformation. For retribution to be seen to have taken place, the victim's family must be placed in a situation where they see that justice has been done. The Petitioner may have been rehabilitated, and may even have reformed during the time he has been in prison. However, I am not satisfied that the objective of retribution would be achieved without the Court giving out a clearly deterrence sentence.

13. Accordingly this Court hereby sets aside the death sentence imposed on the Petitioner and substitutes the same with a term sentence of forty (40) years from the date of arrest.

14. There is no right of appeal.

Dated, Signed and Delivered at Mombasa this 30th day of October, 2019.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Fedha for DPP

Mr. Wamotsa for the Petitioner

Mr. Kaunda Court Assistant