REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CONST. PETITION NO. 20 OF 2018

ATHUMANI SHUSHE BAHOLA.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Ms. Sombo for the State

The petitioner in person

RULING

The petitioner filed this petition seeking declarations under the provisions of Article 20(1), 22, 23, 25, 27, 28,29, 35, 48,50, 258, 259 in the matter of the mandatory nature of the death sentence under Section 204 of the Penal Code.

Background procedural history

The petitioner was charged with the offence of murder contrary to Section 203 of the Penal Code as punishable under Section 204 of the same code for the death of **Fatuma Ali** on 8.1.2010 at Bononi village – within Tana River District. He was tried, convicted and sentenced to suffer death by High Court at Malindi on 20.9.2011. Being dissatisfied with the outcome of the trial and the entire Judgment of the High Court he filed to the apex court with jurisdiction on criminal appeals.

On 13.2.2014 the Court of Appeal dismissed the appeal on both conviction and sentence. It is the dismissal of the appeal by the apex court, on such cases that has given rise to the present petition.

Analysis

The petition is preferred on the following grounds:

> ***1. That the imposition of a mandatory death sentence on me in the circumstances was arbitrary and unconstitutional hence the execution of the same denied me a chance to a right to a fair trial under Article 25 (c) and 50 (2) of the constitution.***
>
> ***2. That the petitioner has been in custody and lived well with fellow inmates and prison authorities.***
>
> ***3. That during my stay in custody I have attended a number of rehabilitation courses which have been assisting me while in custody and will still assist me in society when given a chance.***
>
> ***4. That I promise to be of good example to the society and among the community members.***

But quite apart from the above brief history and the affidavit in support of the petition, it is clear that the petitioners verdict of death had been commuted to life imprisonment, while on death row awaiting execution for several years but lady Mercy will smile in the pendency of execution to have him serve life imprisonment.

Further, before sentencing the petitioner, was given an opportunity to address the court in mitigation. The reasons on record reflect that the Learned Judge considered the mitigation and personal circumstances of the petitioner but still was satisfied that the proportionate and just sentence was that of death contrary to Section 204 of the Penal Code.

It appears the long wait on death row without execution order persuaded the executive to commute such sentences. In all circumstances, the petitioner is petitioning this court to vary the life imprisonment though not ideally under the **Muruatetu Principle** on unconstitutionality of mandatory death sentence contrary to Section 204 of the Penal Code.

The Supreme Court had occasion to consider the mandatory nature of the death sentence for the offence of murder contrary to Section 203 as punishable under Section 204 of the Penal Code. The rational as clearly stated the petitioners in **Muruatetu** was in tandem with decision by Supreme Court of India in **Rajandra Rao v Sharan AIR {1958} ALL 775, 787** defines as

> ***"a right which is an interest recognized and protected by Law. As it is recognized by Law, a man is entitled to have it. As it can be protected by Law, the possessor can enforce it by an appropriate and reasonable action in a court."***

The persuasion by the petitioner is premised in Articles 22, 23, 26,27, 28, 29, 47, 48, 49, 50 of the Constitution build up jurisprudence of the mandatoriness of the death penalty to be unconstitutional. Furthermore, the court duly emphasized that the ultimate power and discretion to sentence an offender belongs to the trial courts to be guided by various factors to impose a just, fair and proportionate sentence that fits the offence.

The constitution confers upon this court the authority to uphold and enforce the bill of rights which the petitioner so feels has been infringed requiring intervention by this court.

In the case of the petitioner he is aggrieved that by virtue of the life sentence his right to human dignity under Article 28 is under threat or in violation by the ordained decision to have him in custody for life. Further by dint of the decision to commute the sentence of death to life, he was denied the right on access to court and that limitation was in breach of Article 48 and the fundamental right to a fair and public hearing in Article 50 of the Constitution. Although the petitioner placed reliance on the various Articles of our constitution, essentially he was challenging the notion of a fair trial by the committee on the power of mercy which might have advised the president to commute the death sentence with that of life. He holds the view that the decision was in contrast with the decision or Judgment in **Muruatetu case.**

Following the outcome of the committee on the power of mercy, unlike other constitutional petitions on re-sentencing, in particular on the death penalty, he continued that his fundamental rights and freedoms have been infringed comparable to those cases directly applicable in line with **Muruatetu decision**.

It is safe to say that the petitioner is asking this court to admit the petition for re-sentencing, notwithstanding the order commuting the death sentence to life as provided.

It follows therefore that the fundamental feature of this petition is directly founded pursuant to the predominant principle in **Muruatetu case,** and whether the commutation of life imprisonment by the executive is reversible**.**

The contested sentence must be understood with regard to the background facts and the action taken by both the High Court and superior Court of Appeal to firmly stick to the death penalty which was later commuted to life imprisonment by the presidency.

Thus one can see the characteristics of **Muruatetu case** conveyed in this message as earlier illustrated by the **privy council in Reyes v The Queen {2002} UKPC 11AC 235** where their Lordship stated:

> ***(1). "The penalty of murder.***
>
> ***(2). Under the Common Law of England there was one sentence only which could be judicially pronounced upon a defendant convicted of murder and that was sentence death. This simple and indiscriminating rule was introduced into many states now independent but once colonies of the crown.***
>
> ***(3). It has however been recognized for many years that the crime of murder embraces a range of offences of unduly varying degrees of criminal culpability. It covers at one extreme, the sadistic murder of a child for purposes of sexual gratification, a terrorist adroitly causing multiple deaths or a contract killing at the mercy killing of a loved one suffering unbearable pain in a terminal illness or a killing which results from an excessive response to persecuted threat killings which satisfy the definition of murder are by no means equally heinous."***

The above passage endorses the principle in the Muruatetu case that the core of the death sentence as enshrined in Section 204 be imposed only to the rarest of cases. The Supreme Court also rooted for the death penalty to remain a discretionary sentence dependent on the facts of specific circumstances of the case by the exercise of discretion to meet the ends of justice.

The next important question is whether the substitution of the death penalty by the executive in exercise of its function as guided by the provision in the statute on prerogative of mercy ought to be interfered with by this court.

In my view the interest protected by Section 8 of the Act, entrenched, done under the ambit of the prerogative of mercy constitutional. The president has the power to pardon convicted person by exercise of the prerogative of mercy to commute any order on sentence of a convicted persons on death row, to life imprisonment or absolute pardon. The greater content of the policy decision is to subject the matter to a range of legitimate consideration to be taken into account before the president makes the decision.

In a case where the prerogative of mercy is satisfied that a person on reasonable grounds is not entitled the right, a review is therefore declined.

The rebuttable argument by the petitioner to the life sentence is premised on the grounds that he is a first offender and remorseful to the offence. The next important issue in this submissions of the petitioner is whether having benefited from the prerogative mercy, it would be prudent to consider re-sentencing by this court.

Is the approach is altogether unconstitutional? The Supreme Court has recently dealt with the issue of life imprisonment in the same **Francis Karioko Muruatetu & Another (supra).** on the other hand in assessing the petition, the question which lingers in my mind is the concept of proportionality. The court is not assessing a factual or practical question but a value Judgment as to where the balance lies between the petitioners rights and the interests of the public in criminal law.

The procedure to place the case before the president to exercise his constitutional mandate is informed of the guidelines laid out in the constitution and the Prerogative of Mercy Act 2011.

Thus the power of mercy for convicted persons is expressly provided for under Article 133 of the constitution.

> ***(1). On the petition of any person, the President may exercise a power of mercy in accordance with the advice of the Advisory Committee established under clause (2), by –***
>
> > ***(a). granting a free or conditional pardon to a person convicted of an offence;***
> >
> > ***(b). postponing the carrying out of a punishment, either for a specified or indefinite period;***
> >
> > ***(c). substituting a less severe form of punishment; or***
> >
> > ***(d). remitting all or part of a punishment.***
>
> ***(2). There shall be an Advisory Committee on the Power of Mercy, comprising –***
>
> > ***(a). the Attorney General;***
> >
> > ***(b). the Cabinet Secretary responsible for correctional services and***
> >
> > ***(c). at least five other members as prescribed by an Act of Parliament, none of whom may be a State Officer or in public service.***
>
> ***(3). Parliament shall enact legislation to provide for-***
>
> > ***(a). the tenure of the members of the Advisory Committee;***
> >
> > ***(b). the procedure of the Advisory Committee; and***
> >
> > ***(c). criteria that shall be applied by the Advisory Committee in formulating its advice.***
>
> ***(4). The Advisory Committee may take into account the views of the victims of the offence in respect of which it is considering making recommendations to the President.***

According to the equal protection of the Law under Article 27 and right to a fair hearing, in Article 50 of the Constitution, the candors of the prerogative of mercy incorporates the bounds of natural justice and due process before the decision is taken to grant the mercy or decline the petition. The sentence is either suspended, remitted or commuted in Law. The pardon granted by the executive is final and irrevocable.

Generally, speaking unless the exercise of prerogative of mercy can be described as arbitrary, irrational, illegal or unreasonable pursuant to the principles in the dicta **in Council of Civil Service Unions v Minister for the Civil Servant {1985} AC 374,** such a decision should not attract the wrath of the court by way of judicial review.

In **Biddle v Perovich 274 U. S. 48 {1927} the Supreme Court** held:

> ***"A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme. When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the Judgment fixed."***

Notwithstanding this statement where the purpose and effect of exercising the prerogative of mercy judicial review may be appropriately invoked to enforce the fundamental rights guaranteed by the constitution. The burden is on the petitioner to establish the justiciability of the unconstitutionality of prerogative of mercy by the president and that his, is a case fit for the court to have the decision reviewed.

The basis on which the independence of the decision is made by the advisory commission under Article 14 may be in contrast with the principle in **Muruatetu (supra).** The constitutionality was explained in the case of **C. O. Williams Co. Ltd v Black Man and another {1994} 45 WIR 94** where **Lord Bridge** stated:

"It is trite law that when the exercise of governable function is regulated by statute, the prerogative power under which the same function may have previously been exercised is superseded and, so long as that stature remains in force, the function can only be exercised in accordance with its provision."

As regards the alleged infringement of his constitutional rights, the action complained of must be unjust, arbitrary, fanciful or oppressive otherwise it would not meet the requirements of Article 22 and 23, 24 of the Constitution.

The healthy principle from the stated point of challenging the discretion of the prerogative of mercy as subject for judicial review is as stated by **H. W. R. Wade & C. F. Tursyth Administrative Law 9th Edition** where the Learned Author observed:

"There are grave objections to giving courts discretion to decide whether governmental action is lawful or unlawful: the citizen is entitled to resist unlawful action as a matter of right and to live under the rule of Law, not the rule of discretion. To remit the maintenance of constitutional right to the regaining judicial discretions is to shift the foundation of freedom from Rock to sand…"

In principle the petitioner had exhausted his right of appeal remedy by challenging his conviction and sentence for the offence of murder contrary to Section 203 of the Penal Code.

Here the petitioner is merely seeking to establish that the fundamental principle in **Muruatetu (supra)** should impliedly extend to the sentence of life imprisonment. The courts interpretation of the subject matter to this petition can only be better understood by commentary of the specific provisions of the Act.

The Act establishes a body called the Advisory Committee on the power of mercy. In determining eligibility of a petition under **Section 21 for the Power of Mercy Act No. 21 of 2011** various key considerations and factors:

(1). Upon receipt of a petition for the exercise of the power of mercy, the committee shall:-

(a). determine the admissibility of the petition;

(b). have all the necessary powers to determine the petition under this section, including:

(i). calling for evidence

(ii). Where appropriate conducting interviews.

(iii). Conducting investigations.

(iv). Receiving and reviewing the necessary reports from appropriate government agencies or officials; and

(c). make appropriate recommendations to the President in accordance with the Constitution.

(2). In determining the admissibility of the petition under subsection (1) (a), the Committee may consider-

(a). whether the convicted criminal prisoner has served at least one-third of the sentence pronounced by a court.

(b). where a person who is convicted and sentenced to imprisonment for life or to death and whose sentence has not been effected, has served for at least five years or

(c). any other matter that the committee may consider necessary

In determining whether or not the petitioner is compatible with the letter and spirit of Article 133 of the constitution, Section 22 envisages ascertainment of existence or non-existence of basic facts and evidence tending to approve or disapprove any recommendation to the president to exercise power pursuant to Article 133. The rationale for the decision is based in accordance to the following provisions:

(1). The committee shall, in making a recommendation under Article 133 of the Constitution and Section 21(1) (c) consider:-

(a). the age of the convicted criminal prisoner at the time of the commission of the offence.

(b). the circumstances surrounding the commission of the offence.

(c). whether the person, for whose benefit the petition is made, is a first offender.

(d). the nature and seriousness of the offence.

(e). the length of period so far served by the convicted criminal prisoner.

(f). the length of period served by the convicted criminal prisoner in remand.

(g). the personal circumstances of the offender at the time of making the petition, including mental and physical health and any disabilities.

(h). the interest of the State and community.

(i). the post-conviction conduct character and reputation of the convicted criminal prisoner.

(j). the official recommendations and reports from the State organ or department responsible for correctional services.

(k). where the petitioner has opted to pursue other available remedies, the outcome of such avenue and

(l). the representation of the victim where applicable.

(2). In addition to the requirements under subsection (1), the Committee may consider -

(a). where applicable a report of fellow inmates or

(b). reports from probation services.

The question therefore arises whether the measures carefully designed under the prerogative of mercy under the advisory committee demonstratively satisfied the constitutional imperatives with respect to the petitioner's case.

Is there an infringement to call for judicial review with regard to commuting the death sentence to life imprisonment. In **Yassin v Attorney General of Guyana {1993} 4 LRC** with regard to prerogative mercy the court held:

"In this case juridical ability concerning the exercise of the prerogative of mercy applies not to the decision itself but to the manner in which it is reached. It does not involve telling the Head of State whether or not to commute. And when the principle of natural justice are not observed in the course of the processes leading to its exercise, which processes are laid down by the constitution, securely the court has a duty to intervene; as the manner in which it is exercised may pollute the decision itself."

Clearly, the said proceedings taken up by the petitioner are on the grievance that despite the provisions with respect to the power of mercy pursuant to Article 133 of the Constitution to having considered commutation of the death sentence with life imprisonment a declaration should issue to annul or revoke the decision and the issue on sentence be determined under the framework of the Supreme Court decision in **Muruatetu (supra).**

One thing, however, is important to note in this connection, the main provisions of Article 50 (1) of the Constitution to have his case heard by an independent and impartial tribunal or body has not been impeached in anyway from the affidavit evidence in support of the petition.

There are other rights protecting the right to a fair trial under Article 50 but insulated in terms of Section 21 and 22 of the Power of Mercy Act. Some of the principle rights that are inherent in the concept of a fair hearing.

I must say that the petitioner in his petition has not demonstrated that in the president decision on advisory of the committee on prerogative of mercy has acted in excess of jurisdiction, or acted without jurisdiction or there is an error apparent on the face of the record or the decision was made ultravires or lack of due process.

At the root of this petition is the salient question whether it is appropriate to impugn the decision by the president. Can the court severe the portion of the decision to life sentence and embark on a fresh inquiry to satisfy itself whether it stands constitutionality?

Although the object of **Muruatetu (supra)** is founded on the principle of exercising discretion to achieve substantial justice in sentencing, essentially from the provisions of the prerogative of mercy Act the scheme leading to the decision incorporates elements of due process, inclusively transparency, accountability and public participation under Article 10 of the Constitution on national values and principles of governance are with certainty and clarity the necessary ingredients of a proper admission or rejection of the petition under which the power of mercy is exercised.

"A right to a fair trial is therefore, widely recognized in the Power of Mercy Act as implied by Magun Carta 1215. It is an important component of our right to a fair trial. Firmly embedded in our constitution 2010. If I were to admit the authority of the president under Article 133 of the Constitution to be a tribunal as such, because its established Law to decide particular issues between an individual charged and convicted of an offence and the state, the question would be whether equality before the Law and right to a fair trial as enshrined in the constitution were infringed.

Whatever form of proceedings adopted by the advisory committee, the basic elements stipulated in the Act states that the convict to participate and allowed an opportunity to present his case capable of resulting in pardon, review or commutation of his sentence. The more important point we must remind ourselves is the narrative character of our constitution. The argument by the petitioner to review the decision does not appeal to me.

In understanding statutes **Crabbe v CRAC Cavewish Publishing Ltd** emphasized the following fundamentals of Law in regard to the constitution:

> ***"(1). It contains the principles upon which the government is established.***
>
> ***(2). Regulates the power of the various authorities it establishes.***
>
> ***(3). Directs the persons or authorities who shall or may exercise certain powers.***
>
> ***(4). Determines the manner in which the powers it confers are to be confirmed or exercised; and specifics the limits to which powers are confirmed to protect individual rights and prevent abusive exercise of arbitrary power."***

Owing to the peoples desires to build a better vibrant transparent and accountable governance, the constitution distributed power to various institutions. It was thus one such basic structure that under Article 133 of the Constitution, the matter of executive clemency was entrenched in the constitution.

Its purpose is well illustrated by the Chief Justice Rehnquist in the case of **Hermra v Collens 506 US 390 1993** in his Judgment cited on Death penalty cases:

> ***"Our constitution adopts the British model and gives to the president the power to grant reprieves and pardons for offences against the United States."***

In **United States v Wilson Chief Justice Marshall:**

> ***"expanded on the procedure's pardon power. As this power had been exercised from time to time immemorial by the executive of that nation whose language is our language and to whose judicial instructions ours bears a close resemblance, we adopt their principles respecting the operation and effect of pardon and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.***
>
> ***A pardon is an act of grace, proceeding from the power entrusted with execution of the Laws, which exempts the individual on whom it is bestowed from persistence, the Law inflicts for a criminal convicted."***

In the instant case the petitioner was on death row having been properly tried and convicted by an independent tribunal duly constituted under Article 50 (1) of the Constitution. He exhausted his right of Appeal to the apex court under Article 50 (a) of the Constitution.

Closely akin to the question of wide discretionary powers vested under the Act on the prerogative of mercy is the question of substantive and procedural due process before the decision was taken. In **Ridge v Baldwin {1963} 1QB 539:**

> ***"The petitioners case was heard by the Advisory committee on the power of mercy. The legality of the whole proceedings has not been impugned. Judicial review exist on conviction of the merits of the process and the legality of the decision."***

In **Kemper Reinsurance v Minister of Finance {1998} 3 WLR 630** the court observed that:

> ***"Review of legality of a decision is the primary mechanism for enforcing the rule of Law under the inherent jurisdiction of the court, if an applicant can show illegality for illegal action should be stopped in its tracks as soon as it is shown."***

In many of the context this question arises in each task carried out under the Act, the intention of the legislature was not limiting the courts in vital policy and power in sentencing or reviewing of sentence. The purpose of the statute has the same idea in different words exercisable by the executive. The view that the sentence being challenged was constitutional falls short of the principles in the **Anisminic Ltd {1969} 2 AC 147.**

As noted under the Act once a decision has been communicated through a gazette notice, there exist a general power to review, granted or rejected, cases can be re-opened, where a convicted person discovers fresh evidence. At this juncture, an advise from the committee on powers of mercy, the decision made by the president to pardon, or commute the sentence may not be subject of review by the court. Further, in addition, the petitioner must show that something has gone wrong since the decision was made by the president to have the sentence commuted to life imprisonment.

To my understanding, the death penalty is still a legal sentence for the offence of murder contrary to Section 203 of the Penal Code. What was found unpalatable is the *'mandatory nature'* of it. Leaving no room for trial Judges to apply their mind and exercise of discretion on a case to case basis. I am of the view that the power of mercy to commute the death penalty with life imprisonment is in accordance with Article 133 of the Constitution.

There is already a substituted sentence in place pursuant to the conviction of the petitioner. The substituted sentence is a lawful recognized penalty in our penal statute. The provisions of the prerogative of mercy Act are not precluded from regular reviews by the advisory committee with regard to sentence. I am of the considered view that under Article 133 of the Constitution the president can grant a conditional pardon to a person under sentence of death, offer to commute the sentence into life imprisonment as it was in this case, and this court has not been provided with sufficient evidence to justify the discharge of the order. Within this scheme, a commutation effectively

reduces the severity of a sentence by substituting a lesser punishment of life.

In the instant petition, the legal position I take is quite clear and in accordance with the principles enunciated in the case of **United States v Wilson 32 U.S. (7 Pet) 150 (1833):**

> ***"The court observed that executive pardon power conferred by the constitution is unlimited, it extends to every offence known to the Law; and may be exercised at anytime after its commission, either before legal proceedings are taken or during their pendency or after conviction and Judgment. This power of the president is not subject to legislative control, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be faltered."***

The framers of the constitution aware of the potentiality for abuse of power have made it clear that courts can only be involved in cases where the applicant challenges the validity of the pardon or grant of commutation of sentence is in question.

Chief Justice Taft in the case of Exparte **Philip Grossman 71 U.S. 4 (WALL) 333 1867** explained the effect of the power of mercy as follows:

> ***"Executive clemency exists to afford relief from unique harshness or evident mistake in the operation or the enforcement of the Criminal Law. The administration of justice by the courts is not necessarily always wise or certainty considerate, of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as wells as monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal Judgments."***

The petitioner as earlier stated elsewhere is not challenging the fairness of the manner of review of his sentence from death penalty to life imprisonment. There is no question of illegality of the sentence. The petition therefore lacks merit for these reasons, with all of these it has not been shown that the president in exercising power on advise by the committee on the power of mercy acted in excess of jurisdiction or took into account irrelevant considerations or ignored material factors or the order was malafides or acted contrary to the Law for the decision to be vitiated in exchange of the principles that have been defined by the Supreme Court in **Muruatetu case (supra).** I would accordingly dismiss this petition with no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF DECEMBER 2019

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R. NYAKUNDI

JUDGE