



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

PETITION NO 61 OF 2016

IN THE MATTER OF ARTICLE 22, 23, 165, 50(1), 19(1) (2) & (3) 21(1)

24(1) 25(c) 26(1) 27(1) 28 AND 48 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF ARTICLES 22, 23, 165, 50(1),19(1)(2) (3)&(4), 21(1)

24(1) 25(c) 26(1) 27(1), 28, 47 AND 48 OF THE CONSTITUTION OF KENYA

THE MATTER OF THE SUPREME COURT DECISION:

PETITION NO 15 OF 2015 FRANCIS KARIOKO MURUATETU

BETWEEN

PETER NJOROGE KAMAU.....PETITIONER

AND

REPUBLIC.....RESPONDENT

JUDGMENT

1 **Peter Njoroge Kamau** the Petitioner herein has filed two undated petitions before this court. Both were filed on 16th May 2018 together with written submissions.

2 In the first petition which he has brought under article 50(6)(a)(b) of the Constitution he seeks to have a retrial ordered. The request he says is premised on the ground that his mitigation was never adequately considered and he was given a death sentence. Further that all the Judges who heard his appeals did to analyze the evidence to his satisfaction

3 In the second petition he is seeking for an opportunity to be re heard on sentencing in line with the Supreme Court case of Francis Karioko Muruatetu Petition no 15 of 2015.

4 Mr Maatwa for the Respondent opposed the Petition saying it had no basis in law. He further argued that the petitioner having exhausted all the channels of appeal should be contended and serve the sentence against him.

5 The Petitioner herein was charged and convicted on two counts of offence of Robbery with violence contrary to section 296(2) of the Penal Code. The trial Court (Ms U.P. Kidula CM) sentenced him to death on 15th March 2006, on counts 1 and 2.

6 He appealed to the High Court vide Nairobi High Court Criminal Appeal no 133 of 2006. The appeal was heard by J.B. Ojwang J. (as he then was) and D.A Dulu J who dismissed it on 21st February 2008. He moved to the Court of Appeal vide Nairobi Criminal Appeal no 5 of 2008. The same was heard and dismissed on 18th October 2013.

7 In his petition for a retrial he wants this court to re-evaluate the whole trial since according to him the trial magistrate did not base his conviction on existing evidence. The said petition is founded on Article 50(6) a & b of the Constitution which provides as follows:

6) A person who is convicted of a criminal offence may petition the High Court for a new trial if—

(a) the person's appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and

(b) new and compelling evidence has become available

8 His request is based on the availability of new and compelling evidence. What is new and compelling evidence? The supreme court dealt with this issue in the case of Lt COL TOM MARTINS KIBISU V REPUBLIC Supreme court Petition No 3 of 2014 (2014) eKLR and at para 42 stated as follows:

“We are in agreement with the Court of Appeal that under Article 50(6), “new evidence” means “evidence which was not available at the time of trial and which, despite exercise of due diligence, could not have been availed at the trial,” and “compelling evidence” implies “evidence that would have been admissible at the trial, of high probative value and capable of belief, and which, if adduced at the trial would probably have led to a different verdict.”

A court considering whether evidence is new and compelling for a given case, must ascertain that it is, prima facie, material to, or capable of affecting or varying the subject charges, the criminal trial process, the conviction entered on the sentence passed against an accused person.”

9 From the above explanation I find that re -evaluation of evidence as

sought by the petitioner cannot be said to be new and compelling evidence. Even alleged contradictions in the trial proceedings cannot be new and compelling evidence. These are matters that were dealt with during the appeals and cannot be revisited by this court. I therefore find that there is no new and compelling evidence for this court to evaluate. The first petition therefore fails.

10 Since the two petitions are before me I would prefer to handle

both of them in order to shorten the petitioner's trips to this court. In the second petition the petitioner seeks to have this court reconsider his sentence.

11 In the recent decision of the Supreme Court in Constitutional

Petitions Nos. 15 76 16 of 2015, FRANCIS KARIOKO MURUATETU & ANOR V REPUBLIC the said court addressed the issue of the death penalty by stating thus at para 112:

“(a) The mandatory nature of the death sentence as provided for under section 204 of the Penal code is hereby declared unconstitutional. For avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under article 26(3) of the Constitution.

(b) This matter is hereby remitted to the High Court for re hearing on sentence only, on a priority basis, and in conformity with this Judgement.”

12 The Supreme court in the above decision dealt with the death penalty which does not only apply to murder cases but also to robbery with violence contrary to section 296(2) Penal Code and attempted robbery with violence contrary to section 297(2) Penal Code cases.

In the case of Williano Okungu Kittiy v Republic [2018] eKLR the Court of Appeal Kisumu applying the Muruatetu case (supra) stated thus:

“The appellant was sentenced to death for robbery with violence under section 296(2). The punishment provided for murder under section 203 as read with section 204 and for robbery with violence and attempted robbery with violence under section 296(2) is death. By Article 27(1) of the Constitution, every person has *inter lia*, the right to equal protection and equal benefit of the law. Although the *Murwatetu's* case specifically dealt with the death sentence for murder, the decision broadly considered the Constitutionality of the death sentence in general. In the Mutiso case which was affirmed by the Supreme Court, the Court of Appeal said *obiter* that the arguments set out in that case in respect of section 203 as read with section 204 of the Penal Code might apply to other capital offences. Moreover, the Supreme court in para 111 referred to similar mandatory death sentence.

(9) From the foregoing, we hold that the finding of the Supreme Court particularly in para 69 applies *Muttis Mutandis* to section 296(2) and section 297(2) of the Penal Code. Thus the sentence of death under sections 296(2) and 297(2) of the Penal Code is a discretionary maximum punishment.”

13 From the foregoing it is clear that the Muruatetu decision may be applicable to the Petitioner at some point. The Attorney General was mandated to form a committee to formulate Rules and guidelines and procedure to operationalize the decision on re-sentencing. The Rules and Guidelines are yet to be published. We are all waiting for them. The petitioner will have to be a little bit more patient. His petition will be held in abeyance until the appropriate time.

Dated signed and delivered this 31st day of July 2018 in open court at Kiambu.

HEDWIG I. ONG'UDI

JUDGE