



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT MOMBASA

JUDICIAL REVIEW & CONSTITUTIONAL DIVISION

MISC. CIVIL APPLICATION NO. 34 OF 2018

**IN THE MATTER OF THE DIRECTIONS GIVEN BY THE SUPREME COURT JUDGMENT DATED 14TH DECEMBER, 2017
IN CRIMINAL PETITIONS NO. 15 & 16 OF 2015 (AS CONSOLIDATED)**

AND

IN THE MATTER OF CHAPTER FOUR OF KENYA, 2010 ON THE BILL OF RIGHTS

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS.....APPLICANT

VERSUS

DOMINIC MUSILA ETIMBO & 96 OTHERS.....RESPONDENTS

AND

HON. ATTORNEY GENERAL.....INTERESTED PARTY

RULING

1. The Respondents are persons who were sentenced to serve the death sentence, although the sentence was later commuted to life imprisonment by the President. The Respondents in light of the Judgment delivered by the Supreme Court in Petition No. 15 of 2015 as consolidated with Petition No. 16 of 2015 on 14th December, 2017 (herein after to be referred as the “Supreme Court Judgment”) have each filed petitions before the High Court seeking a re-consideration of the death and life imprisonment sentences imposed on them. The Applicant, the Director of Public Prosecutions (DPP) seeks the stay of the proceedings in all the petitions filed pending the outcome of the framework ordered by the Supreme Court in the aforementioned case.

2. The DPP contends that the Supreme Court Judgment declared the mandatory nature of the death sentence as provided under Section 204 of the Penal Code as unconstitutional but did not disturb the validity of the death sentence. Instead, the Applicant avers that Supreme Court ordered the Attorney General, the Director of Public Prosecutions and other relevant agencies to set up a framework to deal with sentence re-hearing cases similar to those of the petitioners in the aforementioned case and to give a progress report to the apex court within 12 months from the date of the Judgment. The Applicant faults the Respondents for bringing their petitions prematurely as the framework by the above agencies is yet to be set up. The Applicant avers that the timeline of 12 months given by the apex court is reasonable as the Respondents do not have to wait indefinitely.

3. The DPP points out that some of the Petitions filed emanate from Judgments outside the jurisdiction of the Mombasa High Court and foresees difficulty in accessing, moving and availing original certified records of the matters to the court at Mombasa for hearing. The Applicant is apprehensive that copies of court records supplied by the Respondents in the various Petitions may require authentication to avoid doctoring of proceedings. Therefore, the Applicant opines that the petitions filed would have been heard expeditiously if they were filed in the jurisdictions within which the Respondents were each tried, convicted and sentenced. It is for these reasons that the Applicant seeks the following orders:

1) That the application be certified urgent and the same be heard ex-parte in the first instance.

2) That this honourable court be please to issue an order of stay of proceedings in the following High Court Criminal Petitions and/or Review Applications pending the formation of a framework to deal with sentence re-hearing as ordered by the Supreme Court Judgment dated 14th December, 2017 in Criminal Petition No. 15 as consolidated with 16 of 2015 on both death sentence and life imprisonment: Pet No. 31/018, 46/018, 45/018, 47/018, 50/018, 51/018,49/018, 48/018, 76/018, 77/018, 78/018, 79/018, 81/018, 82/018, 83/018, 84/018, 85/018, 33/018, 37/018, 67/018, 3/018, 13/018, 32/018, 57/018, 66/018, 69/018, 71/018, 72/018, 74/018,

70/018, 65/018, 62/018, 61/018, 60/018, 58/018, 56/018, 55/018, 54/018, 54/018, 52/018, 59/018, 53/018, 73/018, 66/017, 20/018, 4/018, 40/018, 61/018, 60/018, 62/018, 18/018, 22/018, 19/018, 21/018, 39/018, 37/018, 38/018, 41/018, 42/018, 28/018, 7/018, 34/018, 30/018, 33/018, 29/018, 5/018, 30A/018, 52/018, 29/018, 26/018, 64/018, 71/018, 98/018, 45/018, 118/018, 119/018, 120/018, 121/018, 122/018, 123/018, 124/018, 125/018, 126/018, 127/018, 128/018, 129/018, 130/018, 131/018, 133/018, 134/018, 135/018, 136/018, 137/018, 158/018 and any other related matters.

3) This court be pleased to issue directions that the High Court Criminal Registry do receive any other forthcoming filings of criminal petitions and/or review applications related to the Supreme Court Judgment dated 14th December, 2017 on death and life imprisonment sentences and not to fix hearing dates for the said Petitions and/or Review Applications until the ultimate formulation of a framework to deal with the said Petitions and/or Review Applications until the ultimate formulation of a framework to deal with the said sentence re-hearing as ordered by the Supreme Court on its Judgment dated 14th December, 2017.

4) This Court be pleased to issue an order directing that all Petitions and Review Applications emanating from Judgments outside the jurisdiction of Mombasa High Court be filed and received by the relevant Criminal Court registries within which the matters were so earlier determined for easier tracing of certified court records and to avoid inconveniences in moving of court records from one far jurisdiction to another.

5) This court be pleased to grant any other order and/or administrative directions for the proceedings in all criminal petitions and/or review applications touching on the Supreme Court Judgment dated 15th December, 2017 vide Criminal Petitions Nos. 15 & 16 of 2015 (as consolidated) awaiting formulation of a framework for sentence re-hearing on matters touching on both death and life sentences.

The Response

4. The Respondents opposed the application by way of grounds of opposition dated 4th July, 2018 and a replying affidavit filed on 4th July, 2018.

5. The Respondents claim that this application is bad in law and incurably defective as it purports to stay the petitions filed while this court has the jurisdiction under the Constitution to hear and determine petitions. The Respondents contend that the application is a derailment of the due of process of the law. Further, the Respondents allege that the formation of the Taskforce as per the Judgment of the Supreme Court cannot be interpreted as a stay of petitions such as those of the Respondents.

6. The Respondents point out that other courts of similar jurisdiction as this court, have dealt with petitions such as theirs and Judgments have been rendered which have not been appealed or reviewed. Also, the Respondents claim that the Court of Appeal has dealt with appeals enforcing the principles set out in the Supreme Court Judgment, for example, **Mulamba Ali Mabanda vs. Republic, Criminal Appeal No. 12 of 2013; Sammy Konde Tuva vs. Republic, Criminal Appeal No. 25 of 2016** and **Garama Chengo vs. Republic, Criminal Appeal No. 34 of 2015**.

7. The Respondents aver that the Supreme Court did not order a stay of proceedings involving sentence re-hearing as the same would amount to staying of the Respondents' rights and that would be unfathomable.

8. The Respondents claim that the administrative functions of the Taskforce established by the Hon. Attorney General cannot supersede judicial authority.

9. As to the prayer to have the petitions and/or review applications filed with the courts in which the sentences were made, the Respondents claim that they have the right to approach any High Court as long as they have the requisite records and that sending the petitions to the courts that earlier determined their matters would cause unnecessary delay.

10. The Respondents are apprehensive that the Taskforce set by the Hon. Attorney General could take too long to complete its mandate while the Respondents are forced to continue serving their sentences.

11. It is the Respondents' case that the application offends the Respondents' rights as enshrined under Article 25, 47 and 48 of the Constitution.

Hearing and Submissions

12. The application came up for hearing on 5th July, 2018. **Mr. Isaboke** and **Mr. Jami** appeared for the Applicant. **Mr. Makuto** and **Mr. Mwanjeje** appeared for the Interested Party, while **Mr. Wamotsa** and **Mr. Nabwana** appeared for the Respondents.

13. Mr. Isaboke, learned Counsel for the applicant submitted that the application was hinged on section 23 of the Office of the Director of Public Prosecutions Act which gives the DPP the power to control criminal prosecutions and implement an effective prosecution mechanism to protect the rule of law. Counsel stated that the Supreme Court Judgment had declared the mandatory nature of the death sentence unconstitutional but the court did not render the death sentence invalid. Further, Counsel submitted that the Supreme Court ordered the Hon. Attorney General and the DPP to set up a framework to deal with death sentences and the same was to be done within 12 months. To this end, Counsel pointed out that a Taskforce was formed by the Hon. Attorney General vide Gazette Notice no. 2610 dated 23rd March, 2018 with one of its mandates being to formulate amendments or enact law to give effect to the Supreme Court Judgment within 12 months.

14. Mr. Isaboke opined that the Petitions by the Respondents which he argued were similar in nature needed to be stayed pending the report from the established Taskforce. In the alternative Counsel contended that if the court were to proceed with the Petitions it would be difficult

to obtain the records for matters which did not emanate within the jurisdiction of the Mombasa Court. Counsel pointed out that most of the records supplied in the petitions by the Respondents were photocopies that were not certified and would therefore require authentication. Mr. Isaboke believed that the best way to deal with the matters would be to have the petitions sent to the courts within which the matters therein emanated.

15. Mr. Jami who appeared with Mr. Isaboke drew the court's attention to various paragraphs of the Supreme Court Judgment. At paragraph 101 of the Judgment, Counsel contended that the Supreme Court found that it was essential to have appropriate sentencing frameworks based on legislative reform. This formed the basis of the court's recommendation that the Attorney General and parliament should develop legislation defining the parameters of a life sentence.

16. Mr. Jami submitted that some of the Respondents had their sentences commuted to life sentences and if their petitions were heard now it would be difficult for the courts to determine the number of years that constitute a life sentence. Counsel argued that this was the reason behind the Supreme Court's directive that other petitioners with similar cases await the enactment of appropriate guidelines on sentencing. Counsel urged the court to be guided by the reasoning of the Supreme Court and allow the application.

17. Mr. Makuto, learned Counsel for the Interested Party in support of the application submitted that the only beneficiaries of the Judgment by the Supreme Court were the two petitioners who appeared before the Court. Counsel stated that other persons with cases similar to those of the two petitioners were to await the framework to be prepared by the Taskforce. Counsel argued that there was need for uniformity in sentencing and therefore the report to be prepared by the Taskforce was of utmost importance.

18. Mr. Nabwana, learned Counsel for the Respondents submitted that the court cannot shut its doors to the Respondents on the ground that there is a Taskforce, whose timeline he argued was not known, reviewing sentencing guidelines. Counsel submitted that access to justice is guaranteed under the Constitution. Therefore this Court should enforce that right by allowing the Petitions by the Respondents to be heard and determined.

19. Mr. Nabwana submitted that administrative proceedings by a Taskforce cannot be subservient to the Bill of Rights and judicial authority. In support of this assertion, Counsel submitted that the Court of Appeal has as recent as March, 2018 handled sentence review petitions. To this end, Counsel cited the cases of **Sammy Konde Tuve vs. Republic, Criminal Appeal No. 25 of 2016** and **Garama Chengo vs. Republic, Criminal Appeal No. 34 of 2015**.

20. Mr. Nabwana submitted further that the Gazette Notice forming the Taskforce did not stay petitions such as those of the Respondents. As to the transfer of the Petitions to courts where the matters had originated, Counsel contended that the Respondents had all the relevant documents necessary for the hearing of their petitions in Mombasa High Court.

21. Mr. Wamotsa who appeared together with Mr. Nabwana for the Respondents submitted that the Supreme Court in its Judgment only estopped filing of petitions before that court, but not before the other courts. Further, Counsel argued that various courts across the country had heard cases similar to those of the Respondents and the DPP had participated without seeking stay of the proceedings.

The Determination

22. The issue that arises for determination by this court is whether this court should stay the proceedings in the petitions and/or review applications filed by the Respondents. If this court finds that those matters should proceed, then the court will proceed to determine whether the files should be transferred to the courts where trial and sentence took place.

23. The Applicant contends that the application herein results from the Judgment of the Supreme Court in the now famous case of **Francis Karioko Muruatetu & another vs. Republic [2017] eKLR**. According to the Applicant the case stayed also petitions similar to those of the two petitioners in the said case, pending the setting up of a framework to deal with sentence re-hearing cases. The Respondents suggest that the Applicant misinterpreted the orders of the apex court in the said case. The Respondents submitted that the Judgment of the Supreme Court did not stay sentence re-hearing cases.

24. I have read through the Judgment of the Supreme Court in the case of **Francis Karioko Muruatetu & another vs. Republic (supra)**. I do agree with both parties that the court found that the mandatory nature of the death sentence as provided for under Section 204 of the Penal Code was unconstitutional. At paragraph 48 of the Judgment the court observed as follows:

“Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right.”

The court further affirmed itself at paragraph 52:

“We are in agreement and affirm the Court of Appeal decision in Mutiso that whilst the Constitution recognizes the death penalty as being lawful, it does not provide that when a conviction for murder is recorded, only the death sentence shall be imposed. We also agree with the High Court's statement in Joseph Kaberia Kahinga that mitigation does have a place in the trial process with regard to convicted persons pursuant to Section 204 of the Penal Code. It is during mitigation, after conviction and before sentencing, that the offender's version of events may be heavy with pathos necessitating the Court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness.”

25. Subsequent to finding the mandatory nature of the death sentence unconstitutional, the court directed the sentence re-hearing of the two petitioners' cases in the following manner:

“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 the avoidance of doubt, the sentencing re-hearing we have allowed, applies only for the two petitioners herein. In the meantime, existing or intending Petitioners with similar cases ought not approach the Supreme Court directly but await appropriate guidelines for disposal of the same. The Attorney General is directed to urgently set up a framework to deal with sentence re-hearing of cases relating to the mandatory nature of the death sentence - which is similar to that of the petitioners in this case.” (emphasis added)

The court then made orders as follows:

“[112] Accordingly, with regards to the claims of the petitioners in this case, the court makes the following Orders:

a) The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For the 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 Judgment.

c) The Attorney General, the Director of Public Prosecutions and other relevant agencies shall prepare a detailed professional review in the context of this Judgment and Order made with a view to setting up a framework to deal with sentence re-hearing cases similar to that of the petitioners herein. The Attorney General is hereby granted twelve (1) months from the date of this Judgment to give a progress report to this Court on the same.

d) We direct that this Judgment be placed before the Speakers of the National Assembly and the Senate, the Attorney-General, and the Kenya Law Reform Commission, attended with a signal of the utmost urgency, for any necessary amendments, formulation and enactment of statute law, to give effect to this Judgment on the mandatory nature of the death sentence and the parameters of what ought constitute life imprisonment.” (emphasis added)

26. Order (c) above is currently being enforced as agreed by both parties. Vide Gazette Notice No. 2610 dated on 15th March, 2018, the Hon. Attorney General formed a Taskforce of fifteen (15) members to review the mandatory death sentence under Section 204 of the Penal Code. Among its mandate, the Taskforce is required to set up a legal framework to deal with sentence re-hearing cases similar to that of the Petitioners; review the legislative framework on the death penalty in Kenya; recommend a guide to death sentencing; formulate parameters of what ought to constitute life imprisonment and formulate amendments and enact law to give effect to the Judgment. The Taskforce is required to submit its final report to the Attorney General within twelve (12) months from the date of first appointment unless the period is extended.

27. The Respondents herein contend that it would not be fair for them to await the report of the Taskforce as the period of twelve (12) months may be extended to an indefinite period. Further, the Respondents opine that administrative authority granted to the Taskforce does not supersede judicial authority and the Respondents rights as enshrined under the Bill of Rights in the Constitution.

28. The Respondents were all sentenced to death and are currently serving their sentences. The Bill of Rights in the Constitution of Kenya applies to all persons including the Respondents. Article 20 provides that the Bill of Rights applies to all persons and all persons shall enjoy the rights and freedoms enshrined therein to the greatest extent consistent with the nature of the right or fundamental freedom. The Respondents are guaranteed the right to access to justice under Article 48 of the Constitution. It is in the exercise of this right that the Respondents filed the various petitions listed at paragraph (3) of this Judgment.

29. The Respondents are apprehensive that waiting for the report of the Taskforce may occasion them unnecessary delay. This court takes notice that the Respondents are incarcerated. They are already rightly deprived of certain rights due to their incarceration. In my view, this could be the reason why the Supreme Court directed that the sentence re-hearing cases of the two petitioners' therein be heard by the High Court on a priority basis.

30. The Respondents' right to fair trial under Article 50 of the Constitution is one of the rights that cannot be limited as provided by Article 25 of the Constitution. This court opines that the Supreme Court Judgment did not aim to violate the Respondents' right to fair hearing. If anything, the Supreme Court sought to enforce this right by emphasizing the place of mitigation by an accused person in a trial.

31. The Supreme Court Judgment ordered that a framework be set up by the Attorney General, the Applicant herein and other relevant agencies to deal with sentence re-hearing cases. The Attorney General has formed a Task force to deal with this issue within 12 months. The said 12 months are subject to extension at the discretion of the Attorney General. Does this mean that the Respondents' right to have their cases heard should be suspended or limited until the Taskforce completes its work? The Constitution of Kenya does not envision suspension of rights and/or limitation of freedoms unless where necessary and in accordance with the law. If anything, the Constitution favours the enforcement of fundamental rights and freedoms to the greatest extent possible.

32. The Taskforce formed by the Attorney General will play a great role in the development of guidelines and principles to guide judicial officers in dealing with sentence re-hearing cases. The Taskforce will also investigate the death sentence and the life sentence with the aim of creating parameters for these offences. Ultimately, the report by the Taskforce may inform the need to amend or enact laws on these issues. I do agree with the Applicant that the Taskforce's findings if implemented will create uniformity in sentence re-hearing cases such as those of

the Respondents. Be that as it may, this court must address its mind as to whether the Taskforce which emanated from the Supreme Court Judgment has essentially stayed sentence re-hearing cases pending finalization of its work.

33. At paragraph 111 of the Supreme Court Judgment the court held as follows:

“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 the avoidance of doubt, the sentencing re-hearing we have allowed, applies only for the two petitioners herein. In the meantime, existing or intending Petitioners with similar cases ought not approach the Supreme Court directly but await appropriate guidelines for disposal of the same. The Attorney General is directed to urgently set up a framework to deal with sentence re-hearing of cases relating to the mandatory nature of the death sentence - which is similar to that of the petitioners in this case.” (emphasis added)

34. The Court of Appeal in the case of **William Okungu Kittiny vs. Republic, CRIMINAL APPEAL NO. 56 OF 2013, [2018] eKLR** interpreted the above paragraph to mean that the apex Court only discouraged persons from filing petitions before the Supreme Court but did not prohibit courts below it from ordering sentence re-hearing in matters pending before those courts. The Court of Appeal went further to observe that the decision of the Supreme Court opened the door for review of death sentences even in finalized cases. I do agree with the court. In the said case, the Court of Appeal remitted the case before it to the Chief Magistrate’s Court at Kisumu for sentence re-hearing only. It is important to note that the matter before the Court of Appeal had emanated from a Constitutional Petition that had been filed in the High Court at Kisumu challenging the constitutionality of Sections 204, 296 (2) and 297 (2) of the Penal Code and seeking an order that the Petitioners cases be remitted to the High Court so that they can be afforded an opportunity to offer mitigating circumstances before sentencing.

35. The Respondents have contended that other courts are entertaining sentence re-hearing cases and have cited the cases of **Sammy Konde Tuve vs. Republic (supra)** and **Garama Chengo vs. Republic (supra)** which they claim are similar to their cases. I have read through these decisions by the Court of Appeal. I disagree with the Respondents to the extent that the said cases are similar to theirs reason being that the two cases were appeals from decisions of the High Court. The Appellants in the said cases had not finalized their appeal options as is the case for the Respondents herein. The Appellants in the two cases were exercising their right to appeal which I believe the Respondents herein have already exhausted. This Court can therefore not be guided by these two authorities.

36. However, this court stands guided by the decision of the Court of Appeal in **William Okungu Kittiny vs. Republic (supra)** as this case involved an Appellant whose circumstances are almost similar to those of the Respondents herein. The Court of Appeal afforded the Appellant an opportunity to be heard and in turn enforced his right to a fair trial by remitting his case to the High Court for sentence re-hearing.

37. Article 27 (1) of the Constitution provides as follows:

27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

This court finds no reason why the Respondents herein should be treated differently. The Supreme Court Judgment only prohibited persons from filing similar petitions as those of the Petitioners before that court. In my view, to allow the Respondents to continue with their petitions and have the petitions heard on their merits would be fair and just in this situation. This would guarantee the Respondents’ right to access to justice and fair hearing. Further, in my view, it can never have been the intention of the Supreme Court to stay the freedom of convicts serving death sentences in our prisons. A court of law cannot purport to stay or postpone the enjoyment of a fundamental right or freedom, once declared to be so. Since the Supreme Court by the aforesaid Judgment have pronounced the possibility of such right to the Petitioners, every Petitioner has the immediate right to access court to vindicate their positions. It cannot be in the exercise of right to justice that the Petitioners’ right to access the same justice would be stayed and pegged at the altar of a report to be filed by a Taskforce yet to begin work, and which Taskforce has been given a renewable one year period to make that report. In the case of **William Okungu Kittiny vs. Republic (supra)**, the Court of Appeal as discussed above observed as follows:

“The decision of the Supreme Court only discouraged persons from filing petitions to the Supreme Court but the decision does not prohibit courts below it from ordering sentence re-hearing in a matter pending before those courts. By Article 163(7) of the Constitution, the decision by the Supreme Court has immediate and binding effect on all other courts. The decision of the Supreme Court opened the door for review of death sentences even in finalized cases”.

38. If the right to eat is a fundamental right, then it’s like telling the Petitioners that they shall not eat until crops, yet to be planted, are harvested in 12 months’ time. This direction would itself kill the person who obeys it. It is the finding of this court that the enjoyment of a right to access justice cannot be stayed for a single day except through a lawful order, and that in the matter before the Court there is no such order to stay the enjoyment of such rights. I therefore dismiss prayers No. (2) and (3) of the application.

39. As regards prayer (4), the Applicant seeks an order from this court directing that all petitions and/or review applications emanating from Judgments outside the jurisdiction of Mombasa High Court be filed within the courts in which the matters emanated. The Applicant submitted that the court records supplied by the Respondents were copies which would need to be verified. For the purpose of verification, the Applicant contended that original court records of cases emanating outside the jurisdiction of this court would have to be sent to this court which would occasion some difficulty and delay. The Respondents on their part submitted that they have the right to approach any High Court as long as they have the requisite documents.

40. On this issue I am inclined to agree with the Applicant. The Respondents have clearly argued that their matters need to be heard without any unnecessary delay. The Respondents have in their possession copies of court records. This court or any other court cannot rely on such copies while there are proper original or certified court records and or documents on the matter. To request for the original files for all the matters emanating outside Mombasa Law Courts will be time consuming and expensive. It will therefore be prudent if the petitions or review

applications such as those of the Respondents are entertained within the jurisdictions where the matters emanated.

41. For the foregoing reasons, the prayer for stay of proceedings in the Petitions and/or Review Applications filed by the Respondents is dismissed. Orders are made as follows:

a) An order be and is hereby issued directing that the Petitions and/or Review Applications filed by the Respondents emanating from Judgments outside the jurisdiction of Mombasa High Court be transferred to the relevant court registries where the matters emanated for faster and efficient hearing and determination thereof.

b) Costs to the Respondents.

Dated, Signed and Delivered in Mombasa this 24th day of July, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Isaboke and Mr. Jami for DPP

Mr. Nabwana for Respondent

Mr. Mwandeje for Interested Party

Mr. Kaunda Court Assistant