



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CONSTITUTIONAL PETITION NO. 15 OF 2018

CHARLES IRUNGU NDUNGU APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

1. In his petition filed on 18th March, 2018, the Petitioner, Charles Irungu Ndungu challenges his conviction on the ground that the same did not comply with the provisions of both the retired Constitution and the current Constitution. He also prays for resentencing in accordance with the decision of the Supreme Court in **Francis Karioko Muruatetu & another v Republic, Petition No. 15 of 2015 as consolidated with Petition No. 16 of 2015**.
2. Briefly, the Petitioner was tried and convicted by a magistrate's court for robbery with violence contrary to Section 296(2) of the Penal Code. As the legal philosophy stood then, the sentence imposed, which was deemed mandatory, was death. His first appeal to this Court and his second appeal to the Court of Appeal were both rejected.
3. On the illegality and unconstitutionality of his trial, he submits that he was taken to court sixteen days after his arrest thus breaching the then Constitution. Further, that the investigating officer was never called to testify in his trial and there was therefore no explanation offered as to why he was charged and why he was held in custody for long.
4. It is the Petitioner's case that the identification parade was not held in compliance with the law as the complainant testified that he identified him by pointing whereas the law requires identification by touching.
5. Still submitting on the evidence that was adduced at his trial, the Petitioner stated that although it was said that he had been arrested with a G3 rifle, the ballistics examiner had found that the rifle could not be fired. He asserts that the evidence was thus insufficient to lead to a conviction.
6. Turning to the question of re-sentencing, the Petitioner submits that **Francis Karioko Muruatetu** (supra) provides for re-sentencing in all the cases where the mandatory death sentence was imposed. His case is that the circumstances of the offence would have availed him of a lighter sentence. The Petitioner then goes on to provide a powerful mitigation on how he has reformed in prison and has since learned the Bible and received a certificate in theology.
7. The Respondent opposed the petition. It is the case of the Republic that the Petitioner's trial commenced and concluded under the retired Constitution which had no clause on the provision of legal representation to a person undergoing trial.
8. On the Petitioner's allegation that he was held in custody beyond the period provided by the old Constitution, it is submitted for the Respondent that the Petitioner ought to have filed a separate suit for compensation.
9. As for the alleged weakness in the evidence that led to the Petitioner's conviction, the Respondent's reply is that the strength or weakness of the evidence that was adduced at the trial cannot be canvassed through this petition. The Respondent's case is that the Petitioner has not provided new evidence to entitle him to the reopening of his case.
10. On the question of resentencing, the Respondent's position is that the Petitioner's prayer for resentencing is premature since the Supreme Court had directed that cases like that of the Petitioner await policy directions from the Attorney General.
11. In reply, the Petitioner states that he has not asked for any compensation and his petition is all about his resentencing. He stated that all that the Supreme Court in the **Francis Karioko Muruatetu** asked them not to do is to file fresh petitions in the Supreme Court. He asserts

that he is entitled to resentencing as was decided by the Court of Appeal in **William Okungu Kittiny v Republic [2018] eKLR; Criminal Appeal No. 56 of 2013 (Kisumu)**.

12. The Petitioner has narrowed his petition to the issue of resentencing. Be that as it may, I hold that all the other issues raised by him fail the test of Article 50(6) of the Constitution as he has not placed any new and compelling evidence before the court. As correctly pointed out by Mr. Monda for the Respondent, if indeed the Petitioner was held in custody beyond the fourteen days allowed by the retired Constitution, then the correct remedy for him is to sue for compensation. Again, Mr. Monda is correct that the old Constitution did not specifically provide that the State should avail legal representation to a person undergoing a criminal trial.

13. On the question of resentencing, the issue is whether this petition is premature. The orders of the Supreme Court in **Francis Karioko Muruatetu** were 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 any 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 (12) 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.”

14. The Petitioner’s case is similar to that of the petitioners in the cited Supreme Court case. The Supreme Court directed the Attorney General, the Director of Public Prosecutions and other relevant agencies to set up a framework to deal with sentence re-hearing in cases similar to that of the petitioners in that case. They were given twelve months from the date of judgement (14th December, 2017) to give a progress report to the Supreme Court. The twelve months have not lapsed.

15. In the case of **William Okungu Kittiny** cited by the Petitioner, the Court of Appeal provided the rationale for resentencing the appellant therein by stating in paragraph 11 of its judgement thus:

“[11] Although the appellants’ appeal was dismissed by the Court of Appeal on 20th June, 2008, which was then the last appellate court, the constitutional petition filed in the High Court revived the case and by the time the Supreme Court rendered its decision, this appeal was still pending.

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 of 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.”

16. The Court of Appeal was making a decision after the Supreme Court had made its decision in **Francis Karioko Muruatetu**. That means that any appellant whose matter was pending at the time the Supreme Court made its decision, and any accused convicted after the decision of the Supreme Court, is entitled to benefit from the fruits of the **Francis Karioko Muruatetu** case. Any person who had exhausted the appellate process will have to abide the framework to be made by the Attorney General and the other relevant agencies.

17. In my view, there is no contradiction between the decision of the Supreme Court in **Francis Karioko Muruatetu** and that of the Court of Appeal in **William Okungu Kittiny**. The Court of Appeal simply clarified that accused persons and appellants whose matters were still pending before trial courts and appellate courts were to immediately benefit from the decision of the Supreme Court. Nowhere did the Court of Appeal state that persons who had exhausted the appellate ladder, like the Petitioner herein, could be resentenced immediately. My understanding of the Supreme Court decision is that the Petitioner and all those in a similar position should await a sentence re-hearing framework from the Attorney General and his team.

18. I stand guided by the order of the Supreme Court in **Francis Karioko Muruatetu** that the Petitioner should be patient as a framework on his resentencing is worked out. I thus agree with the Respondent that this petition is pre-mature. The petition is dismissed. The Petitioner is however entitled to file an application or petition on sentence re-hearing once the guidelines have been made by the Attorney General.

Dated, signed and delivered at Malindi this 27th day of Sept., 2018.

W. KORIR,

JUDGE OF THE HIGH COURT