



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARISSA**

**CRIMINAL APPEAL NO. 108 OF 2013**

**ARTE ABDI WITO.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. Before me is an undated Constitutional Application filed by the applicant following the Supreme Court decision in the case of **Muruatetu vs Republic – Petition No. 15 of 2015**.
2. In this matter, the applicant was tried and convicted with Shariff Aden Abdi for robbery with violence in Garissa Principal Magistrate Court, Criminal Case No. 560 of 1998, and sentenced to suffer death.
3. He and his co-accused Aden Shariff Abdi filed Criminal Appeal Nos. 1083 of 2000 and No. 1092 of 2000 at Nairobi, which were dismissed by the High Court on 25<sup>th</sup> June 2004.
4. They again appealed to the Court of Appeal, the High Court at that time, under Nairobi Criminal Appeal Nos 252 and 254 of 2007, both of which were again dismissed on 9<sup>th</sup> July, 2010, before coming into effect of the present Constitution in August, 2010.
5. Subsequent to the coming into effect of the present Constitution, several attempts have been made all the way to the Supreme Court for abolition of the death penalty, which made a decision in **Petition No. 15 of 2015 - Francis Karioko Muruatetu & Another vs Republic & 6 Others** on 14<sup>th</sup> December, 2017 [2017] eKLR, and determined that the death sentence is not mandatory.
6. The petitioner has now come to this court seeking a review of his sentence based on the decision of the Supreme Court above.
7. At the hearing of the petition, the petitioner stated that though he had appealed all the way to the Court of Appeal and his appeal was dismissed, recent developments through court decisions in the Malindi High Court, the Court of Appeal in Kisumu, and the Supreme Court, had convinced him that the death penalty imposed on him could be reviewed by this court. He thus urged this court to set aside the death sentence imposed on him, and impose an appropriate sentence.
8. Mr. Okemwa the learned Principal Prosecuting Counsel submitted that this court had made a ruling on this matter and refused to release the applicant from custody.
9. Counsel submitted that though the Supreme Court declared that the mandatory death penalty in the Penal Code was unconstitutional, it did not abolish the death penalty but left to the sentencing court to impose other sentences, including the death sentence. Counsel submitted also that though there were two recent decisions from the High Court, that is, **Douglas Muthaura Ntoribi vs Republic – Meru Criminal Appeal No. 4 of 2015**, and **Malindi Constitutional Petition No. 24 of 2015 Aden Abdi Simba vs DPP**, the Supreme Court had given guidelines in the **Muruatetu case** to the Attorney General and the National Assembly and asked them to come up with a framework for the implementation of its decision. Counsel pointed out that the Supreme Court gave a period of 12 months for preparation of the guidelines by the Attorney General who had already appointed a task force for the same. In counsel's view therefore, there was need for courts to await the putting into effect of those guidelines before dealing with such cases, where sentence of death was pronounced prior to the decision of the Supreme Court. Counsel submitted that as this court had already dismissed a similar request in **Constitutional Petition No. 10 of 2015 Mohamed Abdi alias Kauni vs Attorney General**, the applicant herein should await the implementation of the said guidelines.
10. In response, the applicant stated that the Supreme Court said that the High Court could hand down a prison sentence instead of the death sentence. He stated also that he was ready to be taken to the trial court for re-sentencing.

11. Indeed the applicant does not challenge his conviction. He comes to this court on sentence, based on his interpretation of the Supreme Court decision in consolidated **Petition No. 15 of 2015**, the **Muruatetu case** above.

12. In the **Muruatetu case**, the Supreme Court considered the legality of the mandatory statutory death sentence and made the following orders;-

**“(112) Accordingly, with regards to the claims of the petitioners in this case, the court makes the following orders;-**

**(a) The mandatory nature for 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 12 months from the date of this judgment to give a progressive 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 to constitute life imprisonment.”**

13. I have been referred to a number of decided courts cases after the Supreme Court decision. The first is **Malindi High Court Constitutional Petition No. 24 of 2015 – Aden Simber vs DPP** which was determined on 7<sup>th</sup> February 2018 and judgment delivered on 6<sup>th</sup> March 2018, wherein the High Court set aside the death sentence and replaced it with 15 years’ imprisonment from the date of conviction. The second case is also a High Court decision that is **Meru High Court Miscellaneous Criminal Application No. 4 of 2015 Douglas Muthaura Ntoribi vs Republic** which was decided on 19<sup>th</sup> January 2018 and judgement delivered on 25<sup>th</sup> January 2018. In that case, the court set aside the death sentence and also imposed a prison term of 15 years from the date of conviction.

14. The third case was a decision in the Court of Appeal, in **Kisumu Criminal Appeal No. 56 of 2013, William Okungu Kittiny vs Republic [2018] eKLR** wherein judgment was delivered by the Court of Appeal on 8<sup>th</sup> February 2018 and the Court concluded as follows;

**“The decision of the Supreme Court only discouraged persons from filing petitions in 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.**

**From the foregoing, the learned judge, having partly found in favour of the appellant erred in law in not remitting the case for sentence re-hearing and the appeal is allowed to that extent. Now that the Supreme Court has opened the door for sentence re-hearing, the matter is remitted to the Chief Magistrate’s Court, Kisumu, for sentence re-hearing and sentencing only. The Registrar of this court to return the record of the Chief Magistrate’s Court at Kisumu – Criminal Case No. 180 of 2004 as soon as reasonably applicable for sentence re-hearing and sentencing by the Chief Magistrate.”**

15. In my understanding, the decision by the Supreme Court was that the mandatory statutory death sentence was unconstitutional. However, the death sentence was constitutional and thus the trial court, depending on the particular facts and circumstances of each case, may either impose the death penalty or another penalty. That in all cases pending before courts and those where sentence had not been pronounced, the trial court could impose a sentence other than death. Previously decided cases could also be reviewed on sentence, after guidelines were prepared by a team led by the Attorney General. This in summary is what the Supreme Court decided.

16. The Court of Appeal in its decision of 8<sup>th</sup> February 2018 in **Criminal Appeal No. 56 of 2018 Kisumu – William Okungu Kittiny vs Republic** stated that the High Court should have referred the case to the Chief Magistrate’s Court at Kisumu for sentence re-hearing and sentencing only. The Court of Appeal itself then sent the file to the Magistrate’s Court for that purpose. The case of **Mohamed Abdi alias Kauni vs Republic** by this court is distinguishable, as he did not come to this court specifically in the basis of the **Muruatetu case**.

17. From the decision of the Supreme Court, even if this matter is sent to the Magistrate’s Court for sentence re-hearing, in my view, such sentence re-hearing cannot be done before the framework ordered by Supreme Court is put in place. Since I am bound by the decision of the Court of Appeal however, I will send this file to the Garissa Magistrate’s Court for sentence re-hearing. In my view however, before the lapse of the one year period, or before the operationalisation of the framework ordered by the Supreme Court, it would be futile and illegal for a court to conduct the sentence re-hearing process as such will contravene the directions given by the Supreme Court.

18. Though I find that this application may appear to be premature, I order that the file be and is hereby sent to the Magistrate’s Court at Garissa for re-hearing on sentence. That re-hearing on sentence will however have to await the publication and operationalization of the framework ordered by the Supreme Court. I make this order in the spirit of Article 159 (2) (b) and (d) of the Constitution to avoid the expense and inconvenience of the applicant having to file another application.

19. Orders accordingly.

Dated and delivered at Garissa this 21<sup>st</sup> day of September, 2018.

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**George Dulu**

**JUDGE**