Ng'etich v Republic (Criminal Petition 28 of 2018)
[2025] KEHC 1820 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1820 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL PETITION 28 OF 2018

JRA WANANDA, J

FEBRUARY 21, 2025

BETWEEN

KIPROP NG'ETICH ..... PETITIONER

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Petitioner was charged in Eldoret High Court Criminal Appeal No. 10 of 2008 with the offence of murder contrary to Section 203, as read with Section 204 of the *Penal Code*. The particulars of the offence were that on the 23/12/2007 at Cheplambus sub-location, Tenges Division in Baringo District of the now defunct Rift Valley Province, he murdered one Kipngetich Chirchir. The deceased/victim was the Petitioner's own father.

2. By the Judgment delivered by P. Mwilu J (as she then was) on 29/10/2009, the Petitioner was convicted of the offence, and was then sentenced to death, the Judge remarking that this was only one punishment stipulated for that type of offence. Dissatisfied with the decision, the Petitioner filed Eldoret Court of Appeal Criminal Appeal No. 77 of 2014 which was however dismissed on 15/06/2006, and the conviction and sentence upheld.

3. The Petitioner, having exhausted his avenues of Appeal, has now returned to this Court with the undated Notice of Motion filed herein on 20/08/2018, whereof he seeks re-sentencing.

4. The Petition was canvassed vide written Submissions. The Petitioner filed undated submissions whose date of filing is also unclear while the Respondent, through Prosecution Counsel, Leonard A. Okaka filed its Submissions on 11/10/2024.

5. In his Submissions, the Petitioner urged that he is remorseful and regrets participating in the crime, that he has undergone rehabilitation programmes, and that the commission of the offence was brought about by misuse of alcohol. He urged the Court to consider mitigating factors and give a lenient or

lesser sentence. He submitted that at the time of the commission of the crime, he was a young man of 49 years who had just married and blessed with 3 children and that he left a very young family, that he had no past criminal record and that there is no fear that he would pose a danger to the society if released. He cited the case of Francis Opondo V Republic [2017] eKLR.

6. He then cited the Supreme Court case of Francis Karioko Muruatetu & Another v Republic [2017] eKLR which declared the statutory mandatory sentence of death in murder cases to be unconstitutional. He also prayed that this Court takes into account the period that he spent in custody from the date of his arrest. He cited Section 333(2) of the *Criminal Procedure Code*.

7. On his part, Prosecution Counsel, Mr. Okaka submitted that despite the Petitioner's mitigation, the death sentence meted out by the High Court was upheld by the Court of Appeal and that where circumstances warrant it, Courts still retain the discretion to impose the death sentence. He then urged that in any case, both decisions were before the case of Muruatetu. Counsel submitted further that in sentence re-hearing, consideration of the circumstances prior to the offence, at the time of trial, and subsequent to conviction is often required, and that cardinally, the conduct of a Petitioner during the 3 stages could be a factor to be considered in determining an appropriate sentence. He urged that should the Court consider the above, then the death sentence should be substituted with a stiff custodial sentence bearing in mind aggravating factors, such as the fact that the Petitioner repeatedly cut his own father all over the body with a panga, the attack was vicious yet completely unprovoked, that it has deprived a family of a father figure and breadwinner, and that it will forever be etched in the memory of the mother and other siblings who witnessed it.

8. He urged further that as much as the Petitioner indicated remorse in his mitigation upon conviction, conduct which emerged during his defence should be hard to ignore. According to Counsel, the Petitioner could be of ill-temper and bellicose nature particularly when inebriated and he thus might be deserving of a sentence that meets the objectives of retribution and deterrence. Counsel then submitted that the record suggests that the Appellant was in remand during trial and if that time is credited, then he could have been in custody for about 16 years. He submitted that although possibility of reform and social re-adaptation of an offender is among factors that could guide a Court in re-hearing resentence for murder, whether one in such circumstances is sufficiently reformed or rehabilitated ought to at least first be subject of inquiry. He cited the case of *Republic v Mboya Ndindi Machakos HCCRC No. 2 of 2002*. In conclusion, he submitted that should such inquiry be less appropriate, then he proposed that the death sentence be substituted with a jail term of 20 years, less the time spent in remand.

Determination

9. The issue that arises for determination herein is "whether this Court should review the sentence of death imposed by the trial Court in 2016."

10. Section 204 of the *Penal Code* provides as follows:

> " 204. Punishment of murder
>
> Any person convicted of murder shall be sentenced to death.

11. In Kenya therefore, the one and only sentence provided under statute for the offence of murder is the death penalty.

12. However, in the Supreme Court case of Francis Kariuki Muruatetu & Another v Republic Petition No. 15 and 16 of 2015, which, as herein, dealt with the issue of a mandatory death sentence imposed upon conviction for a charge of murder, the Learned Judges of the Supreme Court unanimously held

that Section 204 above is unconstitutional in so far as it provides for a one and only mandatory death sentence. This is because the Judges held that mandatory sentences limit a trial Court's exercise of discretion in sentencing. The Court however clarified that the decision would not in any way disturb the constitutionality of the death sentence as contemplated under Article 26(3) of *the Constitution* of Kenya, 2010.

13. Although therefore the only and one sentence provided under statute in Kenya for the offence of murder is the death sentence, in light of Muruatetu, it is clear that Courts are no longer restricted by the shackles of statutory mandatory sentences in murder cases, and can and should exercise discretion when considering and passing sentence. Nonetheless, however, the discretion to impose a sentence different from the death sentence in murder cases should only be exercised in deserving cases.

14. The Supreme Court in Muruatetu therefore directed that all offenders who had been subject to the mandatory death penalty and desired to be heard on sentence were entitled to a re-sentencing hearing. The Court, while remitting the matter to the High Court for re-hearing on the issue of sentence held that:

> 110 The facts in this case are similar to what has been decided in other jurisdictions. Remitting the matter back to the High Court for the appropriate sentence seems to be the practice adopted where the mandatory death penalty has been declared unconstitutional. We therefore hold that the appropriate remedy for the petitioners in this case is to remit this matter to the High Court for sentencing ....."
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> "111 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 avoidance of doubt, the sentence re-hearing we have allowed applies only to the two petitioners herein ..."

15. Although therefore the Petitioner already appealed to the Court of Appeal and lost, and although this Petition has been brought 16 years after he was sentenced by this Court, in view of the directives given in Muruatetu as above, this being the trial Court, it still retains the jurisdiction to revisit the issue of sentence for purposes of considering the Petitioner's mitigation and if satisfied, to re-sentence him.

16. The Supreme Court, in the Muruatetu case, also guided that, in re-sentencing by the High Court, the following mitigating factors would be applicable; (a) age of the offender; (b) being a first offender; (c) whether the offender pleaded guilty; (d) character and record of the offender; (e) commission of the offence in response to gender-based violence; (f) remorsefulness of the offender; (g) the possibility of reform and social re-adaptation of the offender; and (h) any other factor that the Court considers relevant.

17. The sentence meted out on an offender must therefore be commensurate to the moral blameworthiness of the offender and before settling on a sentence, the Court must consider the facts and the circumstances of the case in its entirety. In restating the above principles, the Court of Appeal in the case of Thomas Mwambu Wenyi Vs Republic (2017) eKLR quoted the decision of the Supreme Court of India made in the case of Alister Anthony Pereira Vs State of Mahareshtra where it was held as follows:

> 70. Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no strait jacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: twin objective of the sentencing policy is deterrence and correction.

What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.

71. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence

As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence."

18. Similarly, in the case of Daniel Kipkosgei Letting Vs. Republic [2021] eKLR, the Court of Appeal stated as follows;

> " ..... we observe that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. ....."

19. Applying the above principles to the facts of this case, I consider that the crime of murder is and has always been a serious offence in the society, and for this reason, it is always severely punished. It is also relevant to note that the victim in this case was the Petitioner's own father, a figure in a human being's life who ought to receive the utmost reverence. The attack was also extremely vicious noting that the Petitioner slashed his father repeatedly, aiming at and targeting very sensitive areas of the body, such as the head. He clearly meant to kill. Failure to control his temperament rendered his own mother an instant widow and his siblings fatherless. The Petitioner must serve as an example to others that whatever the nature for any disagreement, taking the life of a human being is and shall never be rewarded with a simple pat on the back. A killer must be made to pay. Taking all these factors into account, it cannot therefore be denied that the Petitioner merited a stiff and deterrent sentence.

20. There are however also mitigating factors. For instance, the Petitioner's statement that he was a 1st offender was not challenged. I also note his expression of remorse and regret for his actions and his plea for leniency. He also states that he has learnt a number of skills while in prison which he can put into use outside. The offence was also committed during a moment of drunken stupor. I also note that at the time that the Petitioner was arrested in December 2007 as stated in the Charge Sheet, he was at the prime age of 46 years old. This means that he is currently about 64 years old. He is no doubt now a senior citizen.

21. Further, having been arrested in the year 2007, and there being no evidence that he was at any time during the trial, released on bail or bond, it means that, if his account is true, then he has been in custody for an aggregate period of about 18 years to date. That indeed, is a long time.

22. In the circumstances, having taken into account the factors mentioned hereinabove, I am of the view that the sentence of death ought to be substituted with a determinate prison sentence as I believe the Petitioner has undergone sufficient retribution for his actions and has now been rehabilitated. Although the offence he was convicted of merited his being put away for a long time, I believe that sufficient retribution has now been achieved, and continuing to incarcerate him for a further unreasonably long period of time is unlikely to serve any further purpose.

23. Regarding the period spent by the Petitioner in remand during the trial however, I decline to deal with that issue. Although Section 333(2) of the *Criminal Procedure Code* enjoins the trial Court to

take that period into account when sentencing, the Petitioner ought to have raised that issue as one of his grounds of Appeal when he moved to the Court of Appeal. The Court of Appeal, a higher Court, having already dealt with the issue of sentence and upheld it, I have no jurisdiction to re-open any issue relating thereto save only for the Muruatetu guideline which the Supreme Court specifically directed the High Court to apply and technically remitted back to the High Court all cases that fitted the bill, for re-sentencing. My jurisdiction in re-sentencing in this case therefore starts and ends with the Muruatetu test, nothing more.

Final Orders

24. In the end, I hereby set aside the sentence of death imposed upon the Petitioner, and substitute it with a sentence of 25 years imprisonment.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 21ST DAY OF FEBRUARY 2025

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Petitioner present virtually from Naivasha Main Prison

Mr. Okaka for the State

Court Assistant: Brian Kimathi