Wanasolo v Republic (Criminal Revision E754 of 2024)
[2025] KEHC 2820 (KLR) (Crim) (13 February 2025) (Ruling)

Neutral citation: [2025] KEHC 2820 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL REVISION E754 OF 2024

AB MWAMUYE, J

FEBRUARY 13, 2025

BETWEEN

YUSUF RASHID WANASOLO ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. Before this Court is the undated Application filed on 15/04/2024. It is brought on the basis of seminal Supreme Court case of *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (commonly referred to as *Muruatetu 1*). The Petitioner seeks that the sentence of death imposed upon him in this matter in Criminal Case No 30 of 1995 upon conviction for the offence of murder be reviewed.

2. Considering the age of the original High Court file, the same could not be traced. Ordinarily, it would have been prudent for this Court to have sight of the Trial Court file before determining this Application. However, In the interest of justice, the absence of the original Court File should not be elevated above the constitutional imperatives on access to justice and on determination of disputes on merit without giving undue regard to procedural technicalities.

3. Even without the original Trial Court file, it is possible to ascertain from the ancillary records the background and facts of the original case. The Applicant was charged in Nairobi High Court Criminal Case No 30 of 1995 with the offence of Murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The Applicant was thereafter convicted and sentenced to suffer death on 13th December, 1995 by Hon. Justice Bosire.

4. It is also evident from the records available that the Appellant, being aggrieved with the decision of the Trial Court, appealed against the conviction and sentence imposed vide Criminal Appeal Number 75 of 2005. The Appeal was however dismissed in its entirety on 12/10/2007.

5. In his submissions, the Applicant urged that the imposition of a mandatory death sentence was arbitrary and unconstitutional, that the same was a denial of his right to fair trial and right to correction and rehabilitation, that he has been in custody for over thirty (30) years and two (2) months (as at the date of writing his submissions on 19/11/2024), that he is remorseful and regrets the commission of the offence, that during his stay in prison, he has acquired training in various vocational fields, and he promised to be a model in the society if is given a chance to return thereto. He stated further that his death sentence was commuted by the then President of the Republic of Kenya, the Late Emilio Stanley Mwai Kibaki CGH, though the evidence of this was not conclusive. He also prayed that pursuant to Section 333(2) of the Criminal Procedure Act, the period he stayed in remand be factored into the determinant term that he prayed for.

6. The Respondent, bearing in mind the binding applicability of *Muruatetu 1* , did not oppose the review per se, and left the matter of what the resultant determinant sentence should be squarely in the hands of this Court.

7. Having considered the Application, Applicant's submissions and the Respondent's rival submissions, I find that the only issue for determination is "whether this Court should review the death sentence imposed by the High Court in the year 1995."

8. Section 203 and 204 of the *Penal Code* under which the Applicant was convicted is premised as follows:

> " 203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
>
> 204. Any person who is convicted of murder shall be sentenced to death."

9. It is therefore clear that the prescribed mandatory maximum sentence for the offence of "murder" as per the provisions of Section 204 of the *Penal Code* is the death sentence. I presume that the Trial Judge imposed the death sentence on the basis that the same was the only sentence available upon conviction for the offence of murder thus a mandatory sentence; having been a decision made pre the 2010 Apex Law as well as the *Muruatetu 1* decision of the Supreme Court.

10. In light of *Muruatetu 1*, it is now settled that despite the mandatory language employed by the statute, the Courts nevertheless still possess discretion in sentencing of offenders convicted for the offence of murder. The Supreme Court, in its celebrated decision, opined that:

> " (66) It is not in dispute that article 26(3) of the *Constitution* permits the deprivation of life within the confines of the law. We are unconvinced that the wording of that article permits the mandatory death sentence. The pronouncement of a death sentence upon conviction is therefore permissible only if there has been a fair trial, which is a non-derogable right. A fair hearing as enshrined in article 50(1) of the *Constitution* must be read to mean a hearing of both sides. A murder convict whose mitigation circumstances cannot be taken into account due to the mandatory nature of the death sentence cannot be said to have been accorded a fair hearing."

11. Regarding sentence, Majanja J, quoting Muruatetu, in the case of *Michael Kathewa Laichena & another v Republic* [2018] eKLR, stated as follows:

> " The Sentencing Policy Guidelines, 2016 ("the Guidelines") published by the Kenya Judiciary provide a four tier methodology for determination of a custodial sentence. The

starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. Since the Guidelines did not take into account the fact that the death penalty would be declared unconstitutional, the Court in the Muruatetu Case (Supra, para. 71), considered that in re-sentencing in a case of murder, 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;

(h) any other factor that the Court considers relevant."

12. It should however be recalled that the decision of the Supreme Court in Muruatetu only faulted the mandatory nature of the death sentence in Section 204 of the *Penal Code* and which it termed inconsistent with the *Constitution* . The Apex Court did not therefore outlaw the death sentence but held that the Court has the discretion to impose a sentence other than death in accordance with the circumstances of the case. The death penalty is therefore still prescribed in Kenyan law and can still, in appropriate cases, be imposed.

13. Applying these Muruatetu guidelines, the Court of Appeal has on several occasions, upon considering the factors set out above, substituted death sentences imposed on convicts for the offence of murder to determinate terms. For instance, in *Jonathan Lemiso Ole Kini v Republic* [2018 eKLR, the Court of Appeal substituted a sentence of death with one of 30 years, in *Simon Shisukane v Republic* [2019] eKLR, with 15 years and in *Olum v Republic* (Criminal Appeal 225 of 2018) [2024] KECA 386 (KLR) (12 April 2024) (Judgment), also with 30 years. The High Court has also followed suit in numerous cases.

14. Coming back to this case, the Applicant having been sentenced on 13/12/1995, is now serving his 30th year in prison since then. He states further, that he remained in remand custody throughout during the trial but did not state how long he stayed in remand during the trial; and without the benefit of the original Court File this Court could not determine that period independently.

15. On mitigating factors, I note the Applicant's expression of remorse and regret for his actions. He also states that he has learnt a number of skills which he can put into use outside prison. He has pleaded for leniency.

16. In the circumstances, and having taken into account of all the factors mentioned hereinabove, I am of the view that the sentence of death ought to be reduced as I believe the Applicant has undergone sufficient retribution for his actions and has now been rehabilitated; coupled with the fact that he is an individual of demonstrably advanced age.

17. From the foregoing, I hold that the aggregate period of about 29 years minimum that the Applicant has already served both in remand and in prison custody is sufficient punishment. I therefore order as follows:

    i. The death sentence for murder that is the subject of this Revision Application is quashed and is consequently reviewed and commuted to the period already served in custody; and

    ii. In the circumstances, the Petitioner is ordered to be set at liberty forthwith and released from prison, unless otherwise lawfully held.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 13TH DAY OF FEBRUARY, 2025.

BAHATI MWAMUYE

JUDGE

In the Presence of:

Counsel for the Applicant – Mr. Mwesigwa

Applicant – Mr. Yussuf Rashid, at Manyani Prison

Respondent/The State – Ms. Kariuki h/b Mr. Mwandawiro

Court Assistant – Mr. Guyo