



Kangai v Director of Public Prosecutions (Miscellaneous Criminal Application E069 of 2023) [2024] KEHC 1372 (KLR) (8 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1372 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
MISCELLANEOUS CRIMINAL APPLICATION E069 OF 2023**

**TA ODERA, J
FEBRUARY 8, 2024**

BETWEEN

SAMUEL AMADI KANGAI APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

RULING

1. By a Chamber Summons Application filed on 6.9.2023, the Applicant sought the following orders: -
 1. Spent.
 2. That this Court be pleased to hear and determine on the present application for resentencing as directed by the Supreme Court in its recent directives on the 6th of July, 2021 in Petition No 15 & 16 (Consolidated) of 2015.
 3. That this Court be pleased to factor in the period stayed in pretrial custody by the applicant at the hearing and determination of the present application.
2. The Application was based on the grounds that the Supreme Court issued directives on 6.7.2021 on murder offenders. That the Trial Courts have jurisdiction to hear applications on resentencing. Sections 216 and 329 of the *Criminal Procedure Code* allow the Court to consider mitigating circumstances before making determinations on applications such as the one before Court.
3. The Application was supported by an Affidavit sworn by the Applicant and filed on 6.9.2023. He deponed that he was arrested, charged, convicted for the offence of murder and sentenced to death on 19.12.2008. He appealed to the Court of Appeal in Kisumu where the Court of Appeal affirmed the High Court's decision on 22.3.2012. He deponed that following the Supreme Court's decision in *Muruatetu I* and *Muruatetu II*, he was applying for resentencing. He urged the Court to consider new mitigating factors pursuant to Article 50 (6)(b) of the *Constitution* and Sections 216 and 329 of the



- Criminal Procedure Code and grant him a new sentence. He urged the Court to consider that he had served enough time for the offence and in the alternative, the Court orders that he serve the remaining sentence under probation. He also deponed that he was a pauper and urged the Court to exempt him from paying the application fee.
4. The Applicant also filed a Petition on 6.9.2023. The Petition basically laid out the same issues set out in the Chamber Summons Application. The prayers in the Petition were:
 - a. This Honourable Court will aptly be convinced to find that it has the requisite jurisdiction to entertain the present application and review the applicant sentence downwards.
 - b. This Honourable Court will be pleased to find that the time already served in custody from the date of arrest i.e. 17th January, 2006 as sufficient punishment for the offence that was committed.
 - c. This Honourable Court will be pleased in the alternative of prayer (b) above and in consideration of the applicant's age, grant him a non-custodial sentence so that he can be of service to the community while doing his time.
 - d. This Honourable Court will be pleased to find that in the alternative of prayer (c) above to grant a sentence that it will deem fair, just and reasonable in the circumstances in promoting his rehabilitation and transformation while in custody.
 - e. The Honourable Court will be pleased to grant any other order(s) that it shall deem fit in the interest of justice.
 - f. The Court be pleased to make such order(s) as it shall deem just.
 5. The Respondent opposed the Application and Petition vide Grounds of Opposition dated 19.10.2023 and filed on the same date. The Respondent stated that the Court lacked jurisdiction to review the sentence of the Court of Appeal.
 6. The matter was heard on 30.10.2023.
 7. The Applicant submitted that he was seeking resentencing having been condemned to death which was later commuted to life imprisonment.
 8. The Respondent submitted that the Court lacked jurisdiction to entertain the Application as that would be akin to reviewing the orders of the Court of Appeal.

Determination

9. I have considered the Application, the Petition, the Grounds of Opposition and the Parties' Submission.
10. It is not in dispute that the Applicant was charged with the offence of murder contrary to Section 203 as read together with Section 204 of the Penal Code. It is further uncontested that the Applicant was convicted and sentenced to death in Kisii HC Cr. Case No 13 of 2006. The Applicant appealed and the Court of Appeal upheld the conviction and sentence.
11. The Applicant now prays for a resentence on account of the Supreme Court's decision in the Muruatetu Case.
12. In the case of Francis Karioko Muruatetu & another v Republic [2017] eKLR, the Supreme Court held that pursuant to Sections 216 and 329 of the Criminal Procedure Code, mitigation is a part of the



trial process. The Court further held in par. 48 that the mandatory nature of the death sentence “... deprives 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.”

13. The Supreme Court in Murutatu & Another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions) issued directions in relation to resentencing hearings.
14. Indeed, in the Sentencing Guidelines (2023) under Clause 4.8.1 provides that all offenders convicted of murder and were subject to the mandatory death penalty and desire to be heard on sentence are entitled to re-sentencing hearing for consideration of mitigation. Further that the sentencing court is the one with jurisdiction to deal with re-sentencing applications.
15. The Applicant submitted that his death sentence was commuted to life imprisonment. Accordingly, the decision set out in the Murutate Case relates to mandatory death sentences. The Applicant’s sentence having been commuted to life imprisonment, I find that he cannot find any relief from the Murutatue Decision.
16. That said, this Court cannot interfere with the decision of the Court of Appeal. Having unsuccessfully appealed, the Applicant’s fate is sealed and this Court has no jurisdiction to sit on appeal or review the decision of a superior court.
17. On the remand period, this applies to where an offender has been sentenced to a definite term. In this case, since applicant’s sentence was commuted to life sentence the issue of remand period does not arise.
18. The Applicant’s Application is therefore dismissed.

DATED, DELIVERED AND SIGNED AT KISII THIS 8^H DAY OF FEBRUARY 2024.

TERESA ODERA

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

Mr. Ochengo for the State

Mr. Amadi Kangai the Accused Person/Applicant

Oigo - Court Assistant

