



**Kisaka v Republic (Criminal Petition E033 of 2023)
[2024] KEHC 5320 (KLR) (17 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5320 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL PETITION E033 OF 2023**

DK KEMEL, J

MAY 17, 2024

BETWEEN

CLEMENT WAFULA KISAKA PETITIONER

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant brought the instant application wherein he seeks resentence hearing. It is his case that he was charged and convicted of the offence of murder contrary to section 203 are read with section 204 of the *Penal Code* in Bungoma High Court Criminal Case No. 36 of 2010 and sentenced to death. The Applicant invoked the Supreme Court's decision in *Francis Karioko Muruatetu -vs- Republic Petition* No. 15 of 2015.
2. In its ruling dated 31.1.2024, this Court established that the Petitioner herein was not granted an opportunity to offer his mitigation before sentence was meted out and with the Supreme Court's guidelines dated July 6, 2021, it is imperative to note that the Petitioner's approach of this court was warranted. This court proceeded to call upon a social enquiry report on the Petitioner to guide it in arriving at an appropriate sentence.
3. At the hearing, the court vide directions issued on March 6, 2024 directed parties to make brief oral submissions on the availed social enquiry report. The Petitioner submitted that he was sentenced when he was a minor as he was born in 1995. He submitted that he is currently 28 years old and that the Probation officer's report is not correct. He submitted that he was not served with any contrary evidence with regard to his age by the Probation officer and that he seeks this court's indulgence in interfering with his sentence as he was a minor at the time of his conviction and sentence. He submitted that he availed his birth certificate to the court and that he ought to be granted a different sentence. He opposed the proposal by the Respondent to have him incarcerated for 40 years as he relied on the South African Constitutional Court's decree that sentences of children ought to be shorter periods.



He referred to Article 37 of the Convention on Children which states that no child should be subjected to cruel treatment. He insisted that custodial sentences ought to be the last resort in his case as he was a minor at the time of his sentence. He submitted that he has been in prison for the past 13 years and that there is no need for reconciliation between him and the family of the victim as the Probation officer's report suggests. He relied on the case of Criminal Revision E.152 of 2021(2022) eKLR-*Mohammed Shariff vs Republic*. He submitted that he has been in custody since his arrest in 2010.

4. The Respondent vide Miss. Kibet, did oppose the application for reduction of the sentence but invited this court to consider all the circumstances of the case. Miss. Kibet further submitted that from the enquiry report, the family of the victim are still bitter and that should the Petitioner be released, the villagers will lynch him. Miss. Kibet urged this court to reject the Petition for re-sentencing and that the Petitioner be granted a custodial sentence.
5. I have considered the application herein and the response by the Respondent. I have perused the court record and as the Applicant correctly put, he was convicted by this court for the offence of murder and sentenced to death.
6. I have carefully considered the oral submissions, the mitigation and the social enquiry report. I have also looked at the circumstances of the case.
7. This court's jurisdiction in resentencing arises out of the Supreme Court's holding that the mandatory nature of the death sentence was unconstitutional, that the fact that the accused's mitigation was of no consequence in sentencing amounted to an unfair trial and that...

“It is prudent for the same court that heard this matter to consider and evaluate the mitigation submissions and evaluate the appropriate sentence befitting the crime committed by the petitioners.”

8. From one of the social inquiry reports, the victim was a husband and father. According to the widow, the victim bought land from the Petitioner's family and that the victim and his family were subjected to perennial harassment.
9. The Petitioner was born in 1995 and that he has been in custody ever since his arrest. According to the report, the Petitioner studied theology while in custody up to a diploma level, criminal law and dispute resolution.
10. I go back to the jurisdiction of this court as per Muruatetu case (*supra*) in order to consider the mitigation and consider the appropriate sentence following the guidelines set by the Supreme Court. Hence, I will proceed to deal with the re-sentencing.
11. From this court's record, it is evident that the Petitioner took plea while he was just 15 years of age making him a minor. He was later convicted and sentenced to death at the age of 22 years. The petitioner has pegged his case on the ground that he was a minor when he was arraigned in court over the murder charge and hence he should be treated as a minor even in sentencing. He has also urged this court to set him at liberty due to the violation of his rights a child.
12. However, matters are not as straightforward as imagined since section 190 of the Children Act, 2001 outlaw's imprisonment for children by stating that:

“190. Restriction on punishment

- (1) No child shall be ordered to imprisonment or to be placed in a detention camp.



- (2) No child shall be sentenced to death.
- (3) No child under the age of ten years shall be ordered by a Children’s Court to be sent to a rehabilitation school.”

13. Article 53 of the Constitution contains three important directives:

- a. The first one is, really, the "Prime? Directive when children come into contact with the law and the legal system. That is Article 53(2) of the Constitution: A child's best interests are of paramount importance in every matter concerning the child.
- b. The second one is in Article 53(1)(f): Every child has a right not to be detained, except as a measure of last resort, and when detained, to be held for the shortest appropriate period of time.
- c. The third one is also found in Article 53(1)(f): Every child has a right, when detained, to be held separate from adults and in conditions that take account of the child's sex and age.

14. Section 191 of the said Children Act provides the punishments available for a child offender as follows:

“ 191 (1) In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways-

- (a) By discharging the offender under section 35(1) of the Penal Code (Cap. 63);
- (b) by discharging the offender on his entering into a recognisance, with or without sureties;
- (c) by making a probation order against the offender under the provisions of the Probation of Offenders Act (Cap. 64);
- (d) by committing the offender to the care of a fit person, whether a relative or not, or a charitable children’s institution willing to undertake his care;
- (e) if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;
- (f) by ordering the offender to pay a fine, compensation or costs, or any or all of them;
- (g) in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions;
- (h) by placing the offender under the care of a qualified counsellor;
- (i) by ordering him to be placed in an educational institution or a vocational training programme;
- (j) by ordering him to be placed in a probation hostel under provisions of the Probation of Offenders Act (Cap. 64);
- (k) by making a community service order; or
- (l) in any other lawful manner.”



15. The *Children's Act* contains certain guarantees for children who are alleged to be in conflict with the law. They are found in section 186 of the *Act*. That section provides as follows:

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“186. Guarantees to a child accused of an offence
Every child accused of having infringed any law shall

- (a) be informed promptly and directly of the charges against him;
- (b) if he is unable to obtain legal assistance, be provided by the Government with assistance in the preparation and presentation of his defence;
- (c) have the matter determined without delay;
- (d) not be compelled to give testimony or to confess guilt;
- (e) have free assistance of an interpreter if the child cannot understand or speak the language used;
- (f) if found guilty, have the decisions and any measures imposed in consequence thereof reviewed by a higher Court;
- (g) have his privacy fully respected at all the proceedings;
- (h) if he is disabled, be given special care and be treated with the same dignity as a child with no disability.”

16. Under section 143 of the *Children's Act*. It states thus:

“Where a person, whether charged with an offence or not, is brought before any court otherwise than for the purpose of giving evidence, and it appears to the court that such person is under eighteen years of age, the Court shall make due inquiry as to the age of that person and for that purpose shall take such evidence, including medical evidence, as it may require, but an order or judgment of the court shall not be invalidated by any subsequent proof that the age of that person has not been correctly stated to the Court, and the age presumed or declared by the court to be the age of the person so brought before it shall, for the purposes of this *Act* and of all proceedings thereunder, be deemed to be the true age of the person.”

17. It is noted that the Petitioner is already past the age of majority, currently 28 years old. He was convicted and sentenced while he had become an adult at the age of 22 years old. Even though the petitioner had been a minor at the time of the trial, the fact that he became an adult during the time of conviction and sentence removes him from the benefit of being treated as an adult. Hence, he was properly dealt with by this court during his conviction and sentence. The only missing link is the fact that he was not given the opportunity to mitigate. He now has that right thanks to the *Supreme Court's decision in Muruatetu case (supra)*. The petitioner's claim that he should be treated as a minor even at this stage lacks any merit.
18. The social enquiry report dated 23.2.2024 indicates that the petitioner is a menacing person who threatened the safety of anyone who dared cross his path. The members of the community have registered their opposition to any attempts to have him back in their midst and that it is their view that his being in custody has brought a lot of peace and tranquillity as he used to terrorize them before he



was arrested. The report also indicates that majority of the members of the community believe that the petitioner was not a minor when he was arrested over the offence.

19. It is noted that the circumstances leading to the death of the deceased are rather tragic in that the petitioner waylaid the deceased who was then drunk and on his way home and butchered him to death and tried to conceal the blood by hiding the bloodstained clothes and the murder weapon but the bloodstain which led to his house gave him away. It transpired from the evidence that the petitioner had been compelled to compensate the deceased for injuries sustained in which the petitioner had earlier assaulted him. It seems the petitioner was not happy about the arrangement and thus planned to eliminate the deceased. This was unwarranted and that the deceased died a painful death. Had the petitioner used other channels of redress, the deceased could be alive today.
20. As regards the appropriate sentence, it is noted that the petitioner was sentenced to death which was later commuted to life imprisonment following a presidential decree. The Court of Appeal in *Charo Ngumbao Gugudu V. R* [2011] eKLR held as follows;

" Further, the law is that sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and that it is thus not proper for the court to fail to look at the facts and circumstances of the case in their entirety before settling for any given sentence. See *Ambani V. R* [1990] eKLR."
21. From the post mortem report prepared by Dr Raymond Damba (PW9), the cause of death was found to be cardiopulmonary arrest secondary to bleeding due to cut in the main blood vessels. The injuries sustained were really severe namely deep cut wound on the neck, cut on the right ear and ear lobe, brain matter oozing out, severed trachea and blood vessels. Again, the neck had been severed. It is clear that the petitioner butchered the deceased like a goat. The conduct of the petitioner was that of a beast yet there was no provocation even from the deceased. Courts usually consider the weapons used to gauge the sentence to be imposed and that the dangerous the weapons the severe the sentence imposed. It transpired that the petitioner had used a jembe (hoe) to hit the deceased on the head and then used a hacksaw to sever the head from the neck area. Under the circumstances, the petitioner deserved a severe sentence. However, due to the fact that he is a first offender, in view of the considered view that a sentence of forty (40) years' imprisonment is appropriate in the circumstance. This shall commence from the date of arrest namely 1.10.2010.
22. In the result, I find merit in the petitioner's application. The same is allowed. The death sentence is hereby reviewed and substituted with a sentence of forty (40) years' imprisonment which shall commence from the date of arrest namely 1.10.2010

DATED AND DELIVERED AT BUNGOMA THIS 17TH DAY OF MAY 2024

D.KEMEI

JUDGE

In the presence of:

Clement Wafula Kisaka Petitioner

Miss Kibet for Respondent

Kizito Court Assistant

